EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr S Crock**

Respondent: **UPS Limited**

Held at: **Cardiff and Video (CVP)**
On: **22 July 2024, 23 July 2024, 24 July 2024, 25 July 2024**

Before: **Employment Judge R Brace**
Non legal members: **Mrs R Hartwell**
Mrs C Peel (on CVP)

Representation

For the Claimant: **In person**
For the Respondent: **Mr D Green (Counsel)**

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal as follows:

Disability

1. At the relevant times the Claimant was not a disabled person as defined by section 6 Equality Act 2010 because of occipital neuralgia.

Direct discrimination (s.13 EqA 2010)

2. The complaint of direct disability discrimination is not well-founded and is dismissed

Failure to make reasonable adjustments for disability (s.20/21 EqA 2010)

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed

Unfavourable treatment because of something arising in consequence of disability (s.15 EqA 2010)

4. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

Unfair Dismissal (ERA 1996)

5. The complaint of unfair dismissal is **not** well-founded. The Claimant was **not** unfairly dismissed.

Written Reasons

Introduction

1. This final hearing was conducted as a hybrid hearing with Mrs C Peel, non-legal member, participating remotely by video (CVP).

2. Regular breaks were agreed for the Claimant as an adjustment and it was also agreed that if he became uncomfortable and needed to stand during the hearing, he would let the Tribunal know when he would be permitted to do so. No other adjustments were required for any other participant, whether representative or witness.

Claims and List of Issues

3. On 29 September 2023 the Claimant commenced early conciliation and on 10 November 2023, an Early Conciliation Certificate ("EC Certificate") had been issued by ACAS[1]. On 22 November 2023, the Claimant had issued an ET1 claiming unfair dismissal and disability discrimination [11].

4. At Box 8.2 of his ET1, the Claimant referred to an 'incident at work' on 10 August 2023 but that he had not realised what damage had been done to his person and that he had been able to carry on with his duties to the end of that week until he had started getting symptoms, what he states he now knows, related to a prolapsed disc. He claimed that his first day of absence was 15 August 2022 and that he was signed off pending investigation of leg pain.

5. He relied on a number of conversations with his manager where he asserted he 'went into detail' with the manager. He complained of the incident not being followed up and that he had been unable to go into work to fill in the accident book. He complained of lack of home visits, that his employee file had been doctored and lack of full pay due to an injury at work. He complained that he had been unfairly dismissed, discriminated against on grounds of disability and specifically raised that he had been paid 85% sick pay whereas others off due to incidents at work were paid 100% sick pay.

6. The Respondent filed its ET3 Response which was accepted [27] and disability directions were given [60].

7. Prior to this final hearing, there had been four previous case management preliminary hearings:

    a. The first took place before Employment Judge Leith on 28 February 2024, when the Claimant clarified some of his discrimination complaints and directions were given to prepare for a final hearing. A draft list of

issues was included, which was not disputed by the parties following that preliminary hearing [63]. At that hearing, the Claimant described his impairment as prolapsed discs plus sciatica, but Judge Leith noted that the Claimant was not bound by that when complying with the disability directions [73]. The Respondent was permitted to file an Amended Grounds of Resistance [82];

b. Prior to the second preliminary hearing, on 2 April 2024 the Claimant provided his Disability Impact Statement [107]. Within that statement, the Claimant referred to prolapsed disc with nerve impingement and also occipital neuralgia, a chronic pain condition, that he stated had been ongoing since August 2016 [107]. On 15 April 2024, the Respondent's wrote confirming that it did not consider that there was information at that time to conclude that the Claimant had a disability at the relevant dates and therefore was unable to concede disability [114]. The Claimant in turn responded, again referencing both his prolapsed disc/nerve impingement and occipital neuralgia [121].

c. The second preliminary hearing took place before Employment Judge Jenkins on 19 April 2022, when the claim of indirect discrimination that had been included in the list of issues drafted by Judge Leith, was withdrawn. Anonymisation orders were made in respect of the two comparators (X and Y) the Claimant had named for the purposes of his direct discrimination complaint [125];

d. The third preliminary hearing took place before me on 29 May 2024 [140]. At that hearing, the Claimant was permitted to amend his comparators and a discussion took place regarding whether the Claimant wished to rely on occipital neuralgia for the purposes of his discrimination complaint. It was recorded that the Claimant confirmed he did not, which reflected the content of his email of 8 May 2024 [132];

e. The fourth preliminary hearing also took place before me on 9 July 2024, as the Claimant had, immediately after the hearing on 29 May 2024, made an application to add occipital neuralgia to his claim. At that hearing the Claimant was permitted to add occipital neuralgia as an impairment relied on for the purposes of his s13 and s15 EqA 2010 complaints and a witness order was made for Comparator X to attend the final hearing [361].

8. On 14 June 2024, the Respondent conceded that the Claimant had a disability of prolapsed disc with nerve impingement at the time of the events the claim was about ("Relevant Dates"), but confirmed that the Respondent continued to dispute that the Claimant had a disability of occipital neuralgia at the Relevant Dates [151].

9. At the outset of the first day of the hearing when discussing case management, the Respondent confirmed that it also conceded both knowledge of the prolapsed disc with nerve impingement as a disability and, for the purposes of the reasonable adjustments claim, knowledge of the substantial disadvantage.

10. The Claimant also indicated that he considered that there was a further reasonable adjustment which he relied on, that of an alternative role in administration with regular breaks but with the removal of any obligation to undertake the specific duty of lifting and carrying parcels to and from customers. After considering submissions from both parties on whether to permit the Claimant to rely on an additional suggested adjustment, the Tribunal did give such permission and amended the list of issues. Oral reasons were given for that permission during the hearing.

11. A copy of the final amended List of Issues is attached as an Appendix to this judgment. The Claimant was encouraged to keep that List of Issues before him during the hearing particularly during cross-examination.

Evidence

12. The Claimant gave evidence, as did the following individuals on behalf of the Claimant:

    a. Mr David Davies, shop steward for Unite and the Claimant's representative at the internal meetings;

    b. Mr Philip Emery, an ex-employee of the Respondent; and

    c. Comparator X, the Claimant's first comparator and an existing employee of the Respondent.

13. All witnesses, save for Comparator X, relied on written witness statements which were taken as read. As Comparator X was subject to a witness order and no written statement was provided for them. Comparator X was asked questions by the Claimant which was taken as his evidence in chief.

14. The Claimant also relied on a witness statement from Comparator Y who did not attend to give live evidence and the Claimant was informed that little, to no weight, would be placed on the written evidence of any witness who did not attend to be cross-examined.

15. The following gave evidence on behalf of the Respondent:

    a. Mr Kevin Oliver, Business Manager and the Claimant's line manager at the relevant times;

b. Mr David Jarman, HR Supervisor; and

c. Mrs Caroline Connors, Division Manager for South-West.

16. All Respondent witnesses also relied on written witness statements which were taken as read.

17. All witnesses were subject to cross-examination and some questions from the Tribunal.

18. There was a Tribunal bundle of 372 pages (the "Bundle") and references to the hearing Bundle appear in square brackets [ ] below. An agreed cast list and chronology was also provided.

Findings of fact

19. The findings of fact given by the Tribunal are made on the basis of the evidence before us and based on the balance of probabilities.

20. The Respondent is an international express courier and package delivery company, operating its business from a variety of centres across the UK, including one at Cardiff. It employs around 6,000 employees on a UK wide basis and, at the relevant times, around 80 employees in its Cardiff centre.

21. The Claimant was, at the date of termination of employment, 45 years' old and had over 17 years' service with the Respondent having been employed by the Respondent since 2 February 2006 as a Package Car Driver on an annual salary of £32,676.80. He was based at the Respondent's Cardiff centre.

22. Within his disability impact statement [107] the Claimant indicated that he had lived with occipital neuralgia since August 215 but that he '*was able to manage this and it did not affect [his] work load or ethic'.* Whilst he spoke of having the condition since August 2015, and it being brought on my stress and anxiety over his situation, he gave no evidence of the impact, adverse or otherwise, on his normal day to day activities.

23. We found that the Claimant had not proven that his occipital neuralgia, despite accepting that it was a condition that he had lived with since 2015, had a substantial adverse long term impact on his day to day activities.

Terms and Conditions

24. On 20 January 2012, the Claimant signed his acceptance to new contractual terms (the 'Contract') and, at the date of termination of employment, the terms

set out in that Contract were the applicable terms governing the rights and entitlements of the Claimant as an employee [158].

25. Clause 5 of those Contract terms provided that he was entitled, at the discretion of the Respondent, to Company Sick Pay ('CSP'), normally paid at the rate of 80% of the basic contracted pay, inclusive of statutory sick pay [162]. CSP increased according to length of service and employees with 5 years and over were eligible for CSP of up to 52 weeks. It was agreed that it was standard for Package Car Drivers, such as the Claimant, for CSP to be paid at 85% following pay negotiations with the recognised trade union.

26. The Respondent had a written policy on sickness and absence which included the Respondent's Sickness and Industrial Benefit Scheme ("the Scheme") [183] which in turn contained further provisions on application and eligibility of the Respondent's CSP. The Scheme provided that CSP was paid at the discretion of the Company albeit it did not form part of the employees' contract of employment.

27. We also had evidence from Mr David Jarman[1], evidence which was not challenged, that if an individual was absent from work due to an industrial injury which was not their fault, they could be considered for 100% CSP but that in order to be eligible, the employee had to notify their manager as soon as possible and fill in the accident workbook when an investigation would then take place with a view to assessing whether this was a true non-fault workplace injury. Thereafter, the manager would put in a request with the health and safety team for the individual to receive 100% CSP and it would then be for the health and safety team to determine whether they would exercise their discretion on whether 100% was appropriate in the circumstances.

28. We also had evidence from Mr Kevin Oliver in relation to workplace accident procedures, which we accepted and found were the procedures that were agreed. Where an individual was involved in a workplace accident , they were required to report such an incident to their supervisor or line manager as soon as possible and log the incident in the accident workbook. Where this was not possible due to the individual being off sick for example, they would need to request their line manager fill in the accident workbook for them when an investigation would then be carried out.

29. It was also agreed between the parties that it was also a collectively agreed term that employees if 'hospitalised', would be entitled to CSP at 100%, although no written documentation supporting this collectively agreed right was included in the Bundle. The evidence of Mr Davies was that what amounted to being 'hospitalised' was not defined and that the interpretation of this term was left to local agreement. We accepted that evidence.

[1] DJarman WS§23-24

30. There was no written capability policy applicable to the Claimant's employment, but the Tribunal found that the Respondent had a two stage meeting process whereby managers would discuss options to facilitate a return to work and that this would include discussions of alternatives and reasonable adjustments and that ultimately, if there were none, then consideration of termination on the grounds of capability would be the last resort.

31. Further, it was part of the Respondent's unwritten ill health capability policy that on termination, the Respondent would make an ill health capability termination payment based on the employee's annual salary and the number of years worked ("Ill Health Capability Termination Payment")

32. In around 2015, the Claimant had suffered an injury at work to his shoulder that caused him to be off for around 21 months.

33. In the period 2019-2022, the Claimant had been a union safety officer with specific responsibility for health and safety during which times he had attended safety meetings and had been involved in the Respondent's health and safety systems. From 2022, he had been a shop steward of Unite.

34. Taking into account the Claimant's own previous workplace accident involving an injury to his shoulder, own involvement in health and safety and his role as a trade union shop steward, we found that the Claimant was an employee who was very familiar with the Respondent's policies and procedures and how they worked in practice.

35. We found that he was fully familiar with the process of reporting workplace incidents and that he was aware of the need to formally report an accident or incident at work, particularly where an injury resulted. The Claimant accepted this in live evidence. We further found that this extended to knowing that it was important to ensure that any incident was recorded in the accident workbook and that the Claimant would also have been aware of the consequences of failing to do so, both in terms of the lack of any consequent investigation and in turn impact on the level of CSP.

36. We also found that his knowledge of the Respondent's policies extended to knowing how the Respondent managed capability in work. He confirmed so in cross-examination. We also found that this extended to knowing that he would receive a substantial Ill Health Capability Termination Payment if his employment was terminated by reason of ill health capability.

Sickness Absence - August 2022

37. On 15 August 2022, the Claimant telephoned his line manager Kevin Oliver to report that he would be unable to attend work. There is a dispute between the parties as to what actually was said in that telephone conversation.

38. Mr Oliver made a brief record of this conversation in a document entitled 'Record of Supervisory Discussion'[200], which he accepted he did not make that day but around a week later on around 22 August 2022, as follows:

    'Stuart called in with an issue with his leg/hip. Getting pain. Not in'.

39. The following day, the Claimant called again. Again this conversation was only recorded in brief in the Record of Supervisory Discussion, again on 22 August 2022, that '*Stuart now as doctors fit note.'* Later that day, the Claimant provided that Fit Note that stated that the Claimant had been assessed by the GP that day and that because of '*leg pain',* he was not fit for work [211].

40. The Claimant and Kevin Oliver spoke again on 22 August 2022. Again, the note in Record of Supervisory Discussion is brief, recording that the Claimant had called and told him that he was *'…….still in pain. Not in going back to the Doctor.*'

41. On the same date the Claimant sent to Mr Oliver by way of Whatsapp message, an updated Fit Note that indicated that the Claimant would not be fit for work until 5 September 2022 because of '*neuropathic pain of [left] leg+'* [212, 213]. In the covering Whatsapp message, the Claimant expressed unhappiness and that he was stressed about being off work and that the focus was on controlling his pain. There is no reference to back pain or that it was suspected to be the result of an injury at work.

42. What Mr Oliver did not record in that Record of Supervisory Discussion, but what he now recalls, is that the Claimant was frustrated that his pain had been continuing and he did not know the cause and that:

    a. in the first call on 15 August, the Claimant told him that he was suffering from pain in his leg and was unable to get out of bed and that he did not know what had happened;
    b. in the call on the following day, the Claimant repeated that the pain was in his leg; and
    c. in the call on the Monday 22 August 2022, the Claimant again indicated that his pain was in his leg and he would need to remain off work.

43. The Claimant's written statement evidence is that he told Mr Oliver in that first call, on 15 August 2022, that he had injured himself at work the previous week on 10 August 2022 when he had twisted out of the vehicle seat to get in the back of the vehicle to get parcels, that he had no symptoms on the day save for an awkward inner sensation that came and went, that his pain 'came

and went' as he termed it throughout the following days in work and that on the following weekend, by the Sunday that is when he knew something was seriously wrong as the pain was unbearable.

44. This evidence was challenged on cross-examination and we were taken to the Claimant's GP records of that time [318] which record that:

    a. on 16 August 2022 the Claimant had a telephone appointment in which he complained of '*leg pain*'; and
    b. again on 22 August 2022, the Claimant was seen by a GP when he again complained of '*pain of left leg'.*

45. In live evidence, the Claimant insisted that he had told his GP that he had back pain but that this too has not been recorded. His live evidence was also that he told his GP on 16 August 2022 that he had sustained an injury at work. We did not accept this evidence. We found that it was more likely than not, that had the Claimant discussed with the GP back pain and/or a possible injury in work however described, which resulted in in symptoms in the days following, that too would have been recorded in the GP notes. They were not. This was despite subsequent GPs recording that the Claimant had told them that he was unhappy that the Respondent would not permit him to return to work on light duties (see entry of 25/11/22 and 9/12/22).

46. As a result of those contemporaneous documents, particularly the GP records and fit notes, despite Mr Oliver being challenged by the Claimant that there was a possibility that he might not be remembering what the Claimant had told him in those telephone as he had been busy and distracted with planning for the day, we preferred the evidence of Mr Oliver.

47. We found that the Claimant informed Mr Oliver of leg pain only and that the Claimant did not tell Mr Oliver that he was suffering from back pain in those early conversations.

48. We further found that the Claimant did not tell Mr Oliver that he considered that the pain had been caused by an incident in work. We considered that had he done so, there would have been no reason for the Claimant not to have recorded, or sought for it to have been recorded in the Respondent's accident workbook, or requested Mr Oliver complete the accident book on his behalf. This was particularly so taking into account the Claimant's previous role in health and safety and his role as shop steward.

49. We found that the first time that the Claimant spoke to the GP of back pain was on 31 August 2022 when he was then referred for an MRI [318]. Again, the GP records do not reflect the Claimant telling them of an incident in work which again led us to find that this was because the Claimant did not do so.

50. We also found that the first time that the Respondent was aware that there was any issue with the Claimant's back was on receipt of the Claimant's Fit note of 31 August 2022 [214] which recorded '*Chronic back Pain'* signing the Claimant off work for a further two weeks. It was Mr Oliver's recall that at that time the Claimant was stressed and frustrated as he wanted to return to work but could not due to his pain and no diagnosis or explanation of how this had arisen.

51. Mr Oliver was challenged by the Claimant that he had not recorded their subsequent conversations, on 30 and 31 August. We did not find that the lack of documented record of those calls was because the Claimant had informed Kevin Oliver in those calls that he had sustained an injury at work, but accepted Mr Oliver's evidence that it was that the Claimant had not provided any other relevant information. Again, we found that the Claimant did not discuss the possibility that the pain had been caused as a result of a workplace incident.

Ongoing sickness management

52. By the beginning of September 2022, as the Claimant had been absent for over 3 weeks, his sickness absence was considered to be long term and an HR Adviser was assigned to ensure regular 2-4 week contact with the Claimant. The HR log was provided in the Bundle [215] which recorded the HR Manager's conversations with the Claimant which we accepted as a contemporaneous record, albeit brief, of the matters that had been likely discussed over that time.

53. Kevin Oliver also stayed in contact with the Claimant over this period by Whatsapp and telephone. The Whatsapp exchanges between the two formed part of our consideration, particularly those over the period 18-21 September 2022 [204].

54. We noted that the Claimant told Mr Oliver that he was still in discomfort and that he was waiting for the MRI to confirm what was '*going on'* and that he was '*Genuinely at a loss'* (18 September 2022). This further supported our finding that the Claimant had not, by this stage, raised any possibility that his back condition had been or may have been caused by an injury at work.

55. The Claimant sent a series of Whatsapp messages to Kevin Oliver on 21 September 2022 from the hospital confirming his diagnosis and that he was being referred to a spine clinic. He expressed concern about his job and queried taking up a role as a driver trainer as he needed '*to be kept on the books'*. Kevin Oliver reassured him that he was not losing his job. He later that day indicated that he needed to be back in work as he could not afford to be off work any longer after the next two weeks and queried a phased return or support. He asked for suggestions.

56. The day later, on 22 September 2022 the Claimant also informed the HR Manager of his diagnosis of a prolapsed disc following his MRI and that he had also been referred to the spinal clinic for cortisone injections [326].

57. The Claimant's comments in those Whatsapp exchanges supported our finding that the Claimant had still not indicated to Kevin Oliver that his pain had been caused, or even that he had a concern that his pain had been caused, by an incident in his work. The Claimant had still not reported or sought to have reported by this stage an injury caused by an incident at work.

58. Whilst in live evidence, the Claimant denied that he had spoken to HR until November 2022, we did not accept that preferring the documentary record as evidencing that there had been conversations between the Claimant and HR from September 2022 and that at no time prior to the February 2023, had it been recorded by the HR manager within her notes that the Claimant had indicated an injury at work. We found that had the Claimant considered that the pain had been caused by an injury in work, it was likely that he would have been reporting as much to her too at this point and such comments would have been recorded. They were not and as a result, we found that this was because it was more likely than not that the Claimant did not report such an issue.

59. The Claimant spoke to Kevin Oliver on 27 September 2022 and the Record of Supervisory Discussion records that the Claimant told him that he intended to return to work when his current sick note expired on 5 October 2022 [200].

60. On 28 September 2022, Kevin Oliver forwarded to the Claimant an advertisement for an HR position in response to the Claimant having asked about alternative roles [217, 218]. He had no response from the Claimant at that time despite the closing date for the role being 30 September 2022.

Return to work – 5 October 2022

61. On 5 October 2022, the Claimant returned to work and had a meeting with Kevin Oliver's supervisor and they were later joined by Kevin Oliver.

62. At that meeting it was clear to all that the Claimant was not fit to return to work. The Claimant told them that the only reason that he wanted to return to work was that he had been receiving CSP at 85% of his basic pay and could not afford the reduction in his salary. The Claimant agreed that he was not fit to return to work and that he would need to remain off work until his condition improved.

63. We accepted the evidence of Mr Oliver that as the meeting was ending, the Claimant indicated that he 'must have' injured his back when he had been in

work in the week leading up to his injury and spoke of how he had bent down and felt his back 'go'. Whilst it is disputed by the Claimant that this was the first time that he had raised the possibility of an injury being sustained in work, we have made clear findings that the Claimant had not.

64. This was the first time that the Claimant had spoken of or mentioned such an incident. Kevin Oliver asked the Claimant for specifics of the incident, in terms of date and time of incident and what exactly he was doing when he was working. The Claimant was informed that without such information, Kevin Oliver would be unable to report or investigate. The Claimant indicated that he could not recall, only that '*it must have happened'* when he was working.

65. The Claimant was challenged that the reason that he raised a possible incident at work was because if he was unfit to return to work, this was the Claimant's route to 100% pay through the CSP.

66. Whilst the Claimant denied this, we found that this was likely to be the case. We had found that the Claimant had not, at any point prior to this conversation, raised an injury at work. The Claimant did not seek to record the incident in the accident workbook whilst he was in work that day or subsequently, and did not request Mr Oliver to do so as his line manager. Whilst the Claimant gave live evidence that it would '*not have entered [his] mind'* that Kevin Oliver would not have opened an investigation at this stage, we did not accept this as credible. Again, taking into account the Claimant's own roles, in health and safety and as a shop steward, he would have been aware of the reporting obligations and progress of an investigation and would know that the information provided would not have resulted in an investigation unless he formally reported it as such. He did not.

67. We did not find it inexplicable or unreasonable for Kevin Oliver in those circumstances to take no action at this stage in relation to that conversation. In particular, we found that it was reasonable for him not to record this as a work place injury.

Alternative HR Role

68. Throughout October 2022 the Claimant continued to provide fit notes confirming that he was unfit for work. The Claimant continued to receive CSP at 85% of salary.

69. On 24 October 2022, the Claimant contacted Kevin Oliver by Whatsapp asking about the HR role that he had been sent to the Claimant on 28 September. The closing date for that role had passed and the two then spoke about other similar HR roles. Whilst in live evidence the Claimant could not recall the totality of the conversation as described by Mr Oliver in his evidence, he did accept that it is likely that he did not consider the salary was

sufficient as he was the '*breadwinner',* as he termed it, and was accustomed to the money with his financial commitments and outgoings based on a Package Car Driver salary and that at that time, he could not commit to any role with a lower salary.

70. We found that the Claimant communicated that the salary for such roles was insufficient for the Claimant, being £5,000 less than his current salary. The Claimant confirmed that he would only be interested in alternative roles that paid the same as a package car driver. The Claimant subsequently sent a further Whatsapp asking if mileage would be paid at 40p per mile on top of the salary and if not, this would be a '*deal breaker'* [205].

71. The Claimant subsequently confirmed that he was not interested in applying for an HR role.

72. The Claimant continued to provide fit notes throughout 2023 that confirmed that he was unfit to return to work in any capacity due to chronic back pain [219-225] . The Claimant also reported that he was awaiting physiotherapy and a course of injections.

73. He continued to receive CSP at 85% and at no time followed up on the 5 October 2022 conversation regarding a potential injury at work. This supported our finding that the Claimant did not consider that he had reported an injury at work on 5 October 2022. Had he thought that, we found that it was more likely than not that he would have followed this up and sought to find out about the progress of any investigation. He did not.

Treatment and First Occupational Health Report 14 March 2023

74. In January 2023, the Claimant had his first facet joint injection [331] which unfortunately did not relieve the Claimant's symptoms and on 24 February 2024, a further fit note to 24 May 2024 due to chronic back pain was provided [228]. At that point, the Claimant was awaiting a neurosurgery appointment and possible nerve block.

75. Kevin Oliver and HR decided that they would need to refer the Claimant to the Respondent's occupational health providers ("OH") to obtain a report on his condition, prognosis and to assist identifying support for the Claimant.

76. On 7 March 2023, the Claimant contacted Kevin Oliver requesting 2 weeks' 100% CSP as a result of being 'hospitalised' following his January back injection. Kevin Oliver suggested that he contact HR for approval and suggested the Claimant call into work on his return from leave for a 'catch-up'. [206]. Such a visit did not happen as the Claimant became unwell with flu.

77. On 14 March 2023, the Claimant had a telephone appointment with the OH and a report was subsequently provided [231]. That OH report indicated that the Claimant had reported to them that he had injured his back in work in August 2022 and remained unfit for work but that the Claimant's health was likely to improve with treatment and that a further review would be useful in 6-8 weeks.

78. The OH adviser indicated that any opinion on workplace adjustments could only be formed at the stage when the Claimant was able to return to work and that he was most likely to require a phased return to work and implementation of any adjustments following a risk assessment. They considered that the Claimant's medical condition was likely to amount to a disability due to the impact of the condition on the Claimant's day to day activities and that this was likely to have persisted or would persist beyond 12 months.

79. On receipt of that OH report, due to the content, we found that the Respondent was aware or ought to have been aware that the Claimant was a disabled person pursuant to s.6 EqA 2010, by reason of his prolapsed disc at that point. They were aware that the Claimant had a pain related condition from August 2022 that impacted on his day to day activities of driving and being able to attend work. They were also aware that the impact on those day conditions were likely to meet the definition of long term.

80. By 20 April 2022, the number of back injections the Claimant had received had not improved the Claimant's condition and he attended a neurosurgery appointment that day. The written report from that consultation indicated that the Claimant had told the consultant of a sudden onset of lower back pain in the previous August when he was out doing a delivery and lifting heavy weights [333].

81. In any event, the neurology report stated that the Claimant had been informed that he had a degenerative spine disease which was also contributing to his back pain and that if he continued with the driver role he was going to continue to suffer from back pain and worsen the degenerative changes in his spine.

82. The Claimant was encouraged to consider a change in job routine that did not involve him lifting heavy weight and was placed on a waiting list for a discectomy.

Second OH Report 15 May 2023

83. On 15 May 2023, the Claimant again attended OH as arranged after the first OH appointment. Again, the report was shared with the Respondent [237].

84. The OH adviser noted that the Claimant had received facet joint injections, was due to undergo a nerve block injection the week following the OH assessment and was due to undergo some surgery on his prolapsed disc. At that appointment, the Claimant reported to the OH adviser that he rated his pain at 9/10 and that his condition had not improved since he commenced his absence from work in the previous August 2022.

85. It was the opinion of the OH adviser that any improvement prior to surgery was unlikely to be significant and whether the Claimant could return to work following his surgery would depend on the complexity and outcome of the surgery and post-operative recovery; that guidance should be obtained from the treating surgeon as to what level of activity could reasonable be undertaken post-operatively.

86. It was recommended that the Claimant be considered unfit to work until he had his surgery, either in his substantive capacity or in a modified or restricted capacity and the OH adviser was not of the opinion and that there were any modifications or adjustments that could be put in place that would facilitate him being able to return to work. They further recommended that the Claimant be reviewed post operatively with a view to giving an opinion regarding fitness for work at that point.

87. Again, during this period, the Respondent continued receiving the GP Fit Notes indicating that the Claimant was not fit for work for a further three months as a result of chronic back pain [240]. The Claimant continued to receive CSP at 85%.

88. That OH report was reviewed by Kevin Oliver together with a new HR adviser, a Bradley Penrith. Mr Penrith has not been called by the Respondent to give evidence on behalf of the Respondent, but the Tribunal draws no adverse inference from that.

Meeting: 28 June 2023

89. On 8 June 2023, the Claimant was sent an invite to a welfare meeting to be held on 28 June 2023 to discuss any update on the Claimant's health and options available following the Claimant's absence from work [241]. It was suggested that he bring any documents or matters he wished to review or discuss to the meeting and informed that he had the right to be accompanied and to co-operate to assist with the Respondent's understanding of his condition and any potential adjustments to allow him to return to work.

90. On 20 June 2023 the Claimant had a nerve root injection [335]. By this point his surgical procedure was planned for 18 July 2023 [337].

91. The Claimant attended the 28 June 2022 meeting accompanied by his trade union representative, Mr David Davies, shop steward for Unite. Kevin Oliver attended on behalf of the Respondent and was accompanied by HR, Brad Penrith.

92. There is a dispute as to what was said in that meeting. The Claimant's evidence was that at this meeting he specifically raised if he could return to work and cover a Team Leader role, cover that another Package Car Driver, Comparator X, had been providing. This is disputed by the Respondent.

93. Handwritten notes of the meeting were included in the Bundle [243]. The Tribunal accepted that these were not verbatim notes but did accurately summarise the main issues discussed. The notes were signed by the Claimant. Mr Davies confirmed in live evidence that it was the usual process for minutes to be handed over to the employee at the end of the meeting to look through and that the employee would then sign the bottom of each sheet so that matters could be added if missing.

94. We found that this would have happened in this meeting and accepted the notes as reasonably reflecting the main issues that had been discussed albeit they were not a verbatim record of what was discussed and matters such as introductions would not necessarily be recorded. We considered that such notes presented a more reliable account of matters discussed than the witnesses could recall a year later.

95. We further found that if there had been significant issues missing from the notes, the Claimant would have sought for these issues to be included and would have sought for them to be added as he did in subsequent meetings, He did not. We did not consider it critical that the Claimant had only signed the last page. Rather, we concluded that in signing that last page the Claimant was indicating agreement to the totality of the notes and that neither he nor Mr Davies considered that there was anything significant that had been omitted.

96. We found that at that meeting the Claimant raised concerns that his CSP was running out in August and this was causing financial stress. He spoke of his back condition, that he was waiting for surgery, that it had been recommended that he did not do any lifting or excess movement and that he had been advised not to continue with his current line of work.

97. The Claimant did raise the possibility of an alternative role at that meeting and indicated that if a role could not be found for him at the same pay that did not require lifting, he would not be able to continue in employment.

98. We found that this was the extent to which the possibility of alternative roles was discussed at that meeting. We did not find that the Claimant questioned

at that meeting specifically covering a Team Leader role that Comparator X had been covering. This was not referred to in the notes and whilst Mr Davies in live evidence recalled that the Claimant had enquired about 'possible amended duties' as the Respondent had helped others, he had been unable to recall or remember other matters that it was suggested to him had been discussed.

99. The Claimant queried if any severance package could be offered to end his contract on health grounds, putting forward two options:

    a. if the Respondent could consider backdating his CSP from 85% to 100%; or
    b. if the Respondent would consider going down the 'capabilities route'.

100. In live evidence, the Claimant indicated that what he meant by 'capabilities route' was whether adjustments could be made and whether he could have a couple of months additional pay. He gave evidence that he didn't know what going down a capabilities route meant and he did not accept that meant termination of employment and a severance payment within this Respondent organisation.

101. Additionally, whilst Mr Davies did not recall the Claimant asking about 'severance', he did recall that the Claimant had asked about 'capabilities' and options relating to capabilities. He further accepted that he had not understood the Claimant to be asking about reasonable adjustments to enable him to return, but to a possible termination of employment with a cash payment.

102. As a result, the Tribunal did not accept the Claimant's response as credible. For reasons already given, we found that the Claimant was fully aware of the Respondent's processes and that termination on ill health grounds would result in a significant Ill Health Termination Payment. The Claimant was not in a position to return to work in any capacity at that stage as he was awaiting surgery. He was concerned that his CSP was ending. As such, we found that when the Claimant raised the option of going down the 'capabilities route', he was asking the Respondent to terminate his employment on health grounds and to pay him an Ill health Termination Payment.

103. Kevin Oliver indicated that the next step would be to again refer the Claimant to occupational health and the Claimant expressed concern that there had been little contact with him during his sick leave, that he was running out of CSP.

104. He asked if he would receive 100% CSP following the nerve injection he had received on 20 June 2023 and Kevin Oliver confirmed that he would check

the position. He asked if the Respondent would continue to pay sick pay after the 12 months sick leave.

105. It was clear that at that meeting the Claimant was expressing concern about his financial situation and was seeking ways to optimise his financial position and that as a result, Kevin Oliver sought clarity as to whether the Claimant was seeking an Ill Health Termination Payment or was asking about the Respondent's position if he was not able to return to work. The Claimant indicated that he did not believe that the Respondent would be able to find him an alternative role and that he did not know when he would be able to return to work.

106. Kevin Oliver repeated that the next step would be to refer again to OH, to discuss those findings and whether the Respondent would progress down the capability process. The Claimant confirmed that he would find out if his surgery was going ahead on 19 July, on 3 July 2022.

107. It appears that at that stage, David Davies, the Claimant's representative, checked with the Claimant if he was making a decision about requesting 'capabilities' and whether he was changing his mind on that issue.

108. In light of our earlier findings, the Tribunal found that that this meant that the representative was checking with the Claimant if he genuinely wanted the Respondent to terminate his employment so that he could receive the Ill Health Termination Payment. The Claimant confirmed that money and his health were of concerns and that he had been recommended not to continue his role as a driver. In our view, this indicated to the Respondent that the Claimant as clearly an indicating a desire to leave with a termination payment as a preferred option to continuing on sick leave with impending nil CSP.

109. It appears that at that point David Davies raised an alternative role of feeder and Kevin Oliver assured the Claimant that alternative roles would be offered to the Claimant if the capability process was followed.

110. It appeared to the Tribunal that no decisions were made at the end of that meeting but that the Claimant was verbally indicating that money concerns were a focus of worry for him.

111. After the meeting, Kevin Oliver reviewed the May OH Report and concluded, reasonably so in the Tribunal's opinion, that there was not necessary as the report was clear that the Claimant was not fit to return to work in any capacity and was unlikely to make any improvement prior to his surgery and that the position would not change until that surgery

Second Meeting : 11 July 2023

112. A further welfare meeting was arranged for 11 July 2023, by way of letter sent to the Claimant on 6 July 2023 to discuss any update regarding the Claimant's health and options. [248]. Prior to that meeting, Brad Penrith reported to the Claimant that a further OH report was not required at that stage.

113. The Claimant again attended accompanied by Mr Davies and Kevin Oliver was accompanied by HR, Bradley Penrith who again took notes of that meeting were included in the Bundle and signed by the Claimant [249]. Again, the Tribunal accepted that the notes presented a fair reflection of the main issues that had been discussed as the Claimant had been represented by his trade union officer and had signed the meeting notes at the end of the meeting. Had there been a glaring omission, we concluded that this would have been raised.

114. The Claimant has given statement evidence that the Respondent did not know his surgery had been cancelled until the 24 July 2023. At that meeting the Claimant did confirm that he had his pre-op meeting that morning and had been told that he would need another MRI before the operation; that there was a risk that his operation would be postponed as a result.

115. Kevin Oliver informed him that CSP was unlikely to be extended and that it was going to run out in the middle of August, some three-four weeks later. The Claimant was informed that there were no alternative roles available that paid the same rate of pay as a Package Car Driver.

116. Kevin Oliver had given detailed witness statement evidence[2] that he informed the Claimant that the only roles that were available were in pre-load and local sort positions that these were paid less than a Package Car Driver and were too physically demanding and that the Claimant agreed. He also gave evidence that the Claimant had indicated that he may be interested in clerical or administrative positions but that he confirmed to the Claimant that there were no vacancies that could be offered at that time.

117. Whilst the Claimant is a litigant in person, the Claimant had taken some time to question and challenge Mr Oliver in relation to many other aspects of his witness statement. He did not challenge this evidence. Despite this not being within the note of the meeting, we accepted Mr Oliver's evidence as a result. We also found that at that time, there were no alternative roles suitable for the Claimant as evidenced by the vacancies spreadsheet [254].

118. In respect of the 'capabilities route' i.e. termination of employment, payroll had by this meeting worked out the Claimant's Ill Health Employment Termination Payment and that this would be around £24,000. This was confirmed to the Claimant and there was a discussion as to whether such a

[2] Kevin Oliver WS §70

payment would be tax-free and it was confirmed that it was subject to tax and NI. The Claimant asked how they put that option 'into play' and it was confirmed that there would be another meeting. The Claimant indicated that he did not want to go against the doctor's advice and again asked if the Respondent would reimburse him for the fact that the injury had arisen in work. Kevin Oliver confirmed that he would take that forward to health and safety. A further meeting was arranged.

119. In cross-examination, Kevin Oliver conceded that on reflection he should have been clearer to the Claimant at that time, that given the way that the Claimant had not reported the incident, that it was unlikely he would receive the 100%.

120. The Claimant suggested in his cross-examination that Kevin Oliver, that he had not reported a potential accident at work on the Claimant's behalf as it might impact on Kevin Oliver's personal targets and in turn incentivisation package. Whilst, we were not persuaded by the Claimant's suggestions that this was the reason why the Claimant did not receive 100% CSP, we also noted that if that had been the reason for Mr Oliver's failure to report a potential accident in work, this would have been wholly unrelated to the Claimant's disability.

Third Meeting: 24 July 2023

121. On 17 July 2023, the Claimant was sent an invite to an ill health capability welfare meeting to take place on 24 July 2023. The letter did not indicate that it was at a particular stage of any process but it did indicate that the purpose of the meeting was to get an update on the Claimant's health, review redeployment opportunities and the consideration of the termination of the Claimant's employment on grounds of ill health capability. The Claimant was warned that the outcome of the meeting could lead to his dismissal and he was informed of his right to be accompanied.

122. Again, the Claimant attended with David Davies, his trade union representative, and Kevin Oliver attended with Brad Penrith. Again notes were provided in the Bundle which for the same reasons already provided, the Tribunal accepted as an accurate summary of the main issues discussed albeit not a verbatim note [255].

123. The Claimant confirmed that his nerve block injection had caused numbness and his operation had been postponed. This procedure was not in fact carried out until January 2024.

124. Kevin Oliver confirmed that it was a Stage 2 meeting. Whilst there had been no clear reference to the previous meetings being anything other than welfare meetings, the notes to the meeting of 11 July 2023 had referred to that being

a Stage 1 meeting and no issue appears to have been raised by the Claimant or Mr Davies as to the status of such meetings at the time. We found that both Mr Davies and the Claimant understood that this meeting was a meeting to determine if the Claimant's employment would be ended.

125. Kevin Oliver also confirmed that the Respondent was looking at potential return dates or alternative employment The notes reflect that the Claimant stated *'No to both of those'*. The Tribunal found that despite the notes not being verbatim, it is likely that the Claimant responded with those words or words to that effect.

126. It was confirmed that as a result, the Respondent would be looking to end his employment for capability reasons with a payment to the Claimant of £24,061.60 which was taxable and there followed a discussion as to the taxable nature of the payment.

127. The Claimant again asked about the 15% difference in CSP and was informed that they were waiting to hear how the Claimant would report the injury, confirming that accepting the payment would not prevent him from putting a claim in. It was confirmed that the termination of employment would be effective immediately. The Claimant asked if it was worth him putting in a grievance in. It was confirmed that he could as an ex-employee.

128. The Claimant raised that there were drivers sat in the building and that he had lost a lot of money and taken on debt. From simply reading the notes, this does not appear to have been addressed at that meeting but it is not in dispute that it was.

129. The Tribunal accepted Kevin Oliver's evidence that in raising this issue, the Claimant was referring to the excess of Package Car Drivers that could sometime arise on any one shift, who would be surplus to the requirements of that particular shift and would be sitting around in the centre awaiting delivery work to come in. We further accepted Mr Oliver's evidence that such drivers would be required to deliver packages when work came and that in effect the Claimant was suggesting that he could be retained and return to work to do nothing i.e. be paid to come into the centre and be surplus to the Respondent's requirements and furthermore, not be required to go on deliveries even if needed.

130. The Claimant confirmed on cross-examination that this was right, that he could see drivers sat around and not as busy as anticipated and rather than take the severance payment, he wanted to know why he couldn't 'sit around like everyone else'. He accepted that he would have been unable to undertake any manual handling and would have been unfit to undertake any driving role.

131. Kevin Oliver concluded that it was not a reasonable or feasible option to employ an individual as a Package Car Driver to stay in the building permanently but not be obligated to undertake any duties.

132. Again, whilst not in the notes, we accepted that at this meeting the Claimant also referred to Comparator X and complained that Comparator X was employed as a Package Car Driver, yet undertook that driving role rarely.

133. This was the first meeting that the Claimant took the opportunity to challenge the notes despite signing them, as the following day the Claimant emailed and sought to add into the notes (in addition to other amendments) that he had mentioned Comparator X in the meeting, and that he had requested to undertake that role whilst Comparator X returned to driving [264]. We further found that this was the first time that the Claimant specifically raised carrying out the Team Leader role instead of Comparator X.

134. Kevin Oliver told the Claimant that a Team Leader role, had one been available, carried a lower salary than a Package Car driver and was physically demanding requiring the post-holder to be on their feet throughout the shift and assisting with lifting and lowering packages.

135. At that meeting, the Claimant confirmed that a Team Leader role would not be suitable for him as a result of his restricted mobility due to the physical demands of the role and that he needed to maintain his salary. This was also accepted in live evidence when the Claimant was questioned.

136. At the meeting, the Claimant was informed that as could not foresee a return to work in the foreseeable future, his employment would be terminated on ill health grounds.

137. The Claimant requested a short adjournment and on return asked when the Ill Health Termination Payment would be made. The meeting ended with the Claimant thanking Kevin Oliver.

138. Later that day the Claimant emailed indicating that there appeared to be an office vacancy, indicating that he had previous office experience and there was no reason why he could not have undertaken that have as he had helped out in the office multiple times [266]. Brad Penrith responded the following day, confirming that it was not a role in the Cardiff centre and that the Claimant would not be able to work in a such a clerical role and remain on the same salary as a Package Car Driver [267].

Termination of employment, grievance and appeal

139. Later that day, the Claimant sent in an email with attached grievance letter [258, 259]. In that grievance letter, the Claimant complained that:

a. He had not been treated the same as other employees absent from work through incidents or sickness regarding CSP;
b. That he had not been invited in sooner to discuss his well-being;
c. That he had to chase for the 100% 2 weeks' CSP following his surgery, referring to his cortisone injection;
d. There had been no follow-up or investigation into his injury; and
e. That he had been treated differently to others who had been unfit where work positions had been made up for them.

140. The Claimant also wrote the same day indicating that he wished to appeal his dismissal [261] on the grounds that:

a. There had been no follow-up OH appointment and that he had been dismissed despite not having upcoming surgery;
b. That no medical information had been requested from his GP;
c. There had been no offer of current vacancies;
d. There had been no offer of reasonable adjustments. He considered that an offer of an alternative role and remaining on same wage would be reasonable;
e. The Respondent had not completed the accident book; and
f. He was not advised of his right to appeal the decision to dismiss.

141. On 31 July 2023, a letter was provided to the Claimant confirming that his employment ended on 24 July 2023 and gave a brief summary of the alternative employment options that had been discussed including the preload and sort roles and the clerical role. [268]. Payment of the £24,061.60 Ill Health Termination Payment was confirmed and the Claimant was informed of his right of appeal. Calculation of the Ill Health Termination Payment was attached [270].

142. On 7 August 2023, David Jarman (HR Supervisor) wrote to the Claimant confirming that the grievance process was not open to current employees. Notwithstanding that, he provided a response to some of the Claimant's concerns [273].

143. An appeal hearing in relation to the dismissal was scheduled before Caroline Connors, Division Manager for the South-West. A letter confirming the date of 17 August 2023 for such a hearing was sent to the Claimant on 14 August 2023 [274]. He was informed of his right to be accompanied.

144. Prior to that appeal, Ms Connors read the relevant correspondence including the letter of termination and the notes taken during the meetings held on 28 June, 11 and 24 July 2023.

145. The Claimant attended with a different trade union representative, Richard Jackson. Caroline Connors attended with a notetaker. The notes of this meeting were typed and again were in the Bundle [275]. Again the Claimant signed the notes indicating that they were an accurate reflection of the discussion and the Tribunal accepted that, whilst not verbatim notes, they were likely to reflect the matters discussed.

146. At the outset of the meeting, the Claimant's representative indicated that they wished to have an 'off the record' discussion, the Claimant's operation had been postponed and that he did not know when it would be undertaken or the recovery period following it, that the medical advice was that following surgery he still would be unable to return

147. He requested that the appeal hearing be used to discuss and negotiate the amount of the payment that the Claimant had received.

148. Following some discussion on Caroline Connor's ability to increase that amount, the Claimant asked if it was possible to backdate his sick pay, increasing it from 85% to 100%. There followed a discussion regarding the discretionary nature of such an award and the process that had to be followed for reporting workplace accidents.

149. Despite the direction of the discussion heading towards an increased termination payment, it was clear that the Claimant was still raising that he had not been offered alternatives. He raised a possible administration role as a result of an impending departure of a member of staff, claiming that the only aspect of the office role that he could not undertake was supporting customers, but that this had not been considered.

150. In live evidence, we heard that those in clerical roles had a customer facing role of going down to the reception area to deal with customers coming in to collect parcels and that this would involve going down to the warehouse and lifting up the parcels multiple times a day. Whilst the Claimant did not raise this at the time, in live evidence he confirmed that this interaction with customers could have been removed from any such role as a further adjustment, but he agreed that to remove such a regular duty was not practicable or reasonable.

151. The Claimant confirmed that he had requested termination and severance as his sick pay had been expiring in August. He asked if he could ''*quash the appeal and claim the 15%'* differential in CSP. His representative confirmed that the Claimant wished to withdraw his appeal but was requesting additional severance payment as a gesture of goodwill, in particular the back payment of the 15% differential in CSP and a further 3 weeks CSP to take the Claimant to 12 months full pay.

152. Following the meeting, the Claimant was sent a letter on 31 August 2023 confirming the Claimant's withdrawal of his appeal [277]. In that letter it was confirmed that the Claimant had agreed that he was not fit to return as a Package Car Driver, that preload and sort roles that were available were unsuitable. It was also confirmed that there were no administrative roles and no drivers had been seconded to such roles. The Claimant was also informed that fluctuating volumes of work could lead to spare drivers and on occasion this would result in alternative work.

153. In that letter, Caroline Connors dealt with the Respondent's position on CSP and that there were no recorded conversations or an injury form being completed and that she saw no evidence of a specific isolated incident in work as being the primary cause of the Claimant's absence.

154. On 9 September 2023 the Claimant commenced early conciliation and on 10 November 2023, an Early Conciliation Certificate ("EC Certificate") had been issued by ACAS[1]. On 22 November 2023, the Claimant had issued an ET1 claiming unfair dismissal and disability discrimination.

Comparators

155. To complete our findings, we deal with the Claimant's comparators. In addition to Comparator X, the Claimant relies on two further comparators.

156. Comparator X was called by the Claimant to give evidence on his behalf pursuant to a witness summons requested by the Claimant.

157. We found that in 2011, Comparator X had been employed as a Package Car Driver when he had a seizure and that he had been absent from work for around 4-6 months as a result [280]. Comparator X returned to work on reduced hours until around the March of the following year. The Claimant suggested to him that he had been paid his full salary in that pashed return despite working only 20 hours. Comparator X could not recall but he indicated that he did not believe that this had been the case. We were not persuaded that this had been the case and found that when Comparator X worked for 20 hours, he would only have been paid 20 hours.

158. Over the years subsequent to that, Comparator X had appeared to have worked in a variety of roles, when he was paid the contracted rate for the specific role, and had as a result built up experience of covering other roles, including the Team Leader role. He confirmed that when covering the Team Leader role, he received his Package Car Driver salary.

159. We found that Comparator X helped out in covering the Team Leader role when required due to the permanent Team Leader being on an undefined period of sickness absence himself. It was not a vacant role at any time up to

the termination of the Claimant's employment. In doing so he was from time to time required to carry out manual handling, specifically lift and carry parcels and on the return to work of the substantive Team Leader, Comparator X would continue in his Package Car Driver role.

160. We found that Comparator X was employed as a Package Car Driver but had from time to time covered the role of Team Leader on a temporary basis, when the Team Leader was off sick. In covering that Team Leader role, Comparator X remained as a Package Car Driver role and was still required his contractual duties as a Package Car Driver.

161. We also found that the Team Leader role did not become a vacant role until October 2023, when the role was offered to Comparator X who declined to accept the role as the role was paid at a lower rate than Package Car Driver.

162. Comparator Y, was a Package Car Driver and had been involved in a non-fault workplace incident, where ball bearings had been shot at the windscreen of the car they had been driving, injuring Comparator Y and causing a glass splinter to enter his eye, triggering pre-existing PTSD. Comparator Y reported the incident and completed the accident workbook. Kevin Oliver made a request to the H&S department for Comparator Y to receive 100% CSP and that department made a decision to pay out 100% CSP.

163. Comparator Z was also a Package Car Driver who, following a hip operation, had returned to work following a year sickness absence. OH reported that they were fit to return on a phased return with no adjustments.

Submissions

164. Respondent's counsel relied on written submissions which are incorporated by reference into this reserved judgment.

165. In supplementary oral submissions that where there was a dispute, he invited us to prefer the evidence of the Respondent's witnesses. In relation to disability, he reminded the Tribunal that despite the Respondent denying that occipital neuralgia was a disability, the claim of disability discrimination had proceeded entirely on the basis of the Claimant's back condition.

166. The Claimant reminded that his witnesses, save for Comparator X, had attended of their own free will and thanked them for attending. He considered that Comparator X that been unable to recall matters and had been less helpful for him. In relation to Occipital Neuralgia, he indicated that the condition was brought on and exacerbated by stress. The Claimant maintained that he had reported an injury in August 2022.

167. In relation to potential administration roles, he accepted that he couldn't assist customers but believed that any administration role could have been further adjusted for him to remove that duty.

168. The Claimant indicated that the notes were not fully reflective of what had been discussed and in particular the OH reports had not. He complained that the possibility of his CSP being uplifted to 100% had never been dismissed and that he had been convinced that this was being looked into.

169. He did not consider that he had been dismissed fairly or in accordance with ACAS guidelines; that there had been little to no contact for 10 months, there had been errors in only having one Stage 1 meeting and that the Respondent had rushed. The Claimant informed us that he had brought this case, as he had been treated differently to Comparator X, adjustments had been made for him, and that adjustments had also been made for Comparator Z for 18 months. He considered that the Respondent had not considered reasonable adjustments and that he had done everything in his power to stay in the Respondent's employment; that Comparator X staying in his role was more important to the Respondent than making adjustments for him and saving his job.

Law

Disability

170. The Equality Act 201 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:

    a. Does the person have a physical or mental impairment?
    b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
    c. Is that effect substantial?
    d. Is that effect long term?

171. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin** *v* **Patent Office** [1999] IRLR (EAT)). In **Goodwin** Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability (see paragraph 22).

172. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

173. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).

174. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).

175. The question of whether the effect is long term is defined in Sch. 1 Part 2 as lasting 12 months, likely to last 12 months, likely to last the rest of the person's life. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood

176. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank** v **VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect.

Direct discrimination – s.13 EqA 2010

177. Section 13(1) EqA 2010 provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

178. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120 and in **Nagarajan v London Regional Transport and others [**1999] IRLR 527 HL, the House of Lords held that the Tribunal must consider the reason why the

less favourable treatment has occurred or, why the Claimant received less favourable treatment. The concept of treating someone "less favourably" inherently requires some form of comparison.

179. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case*."

180. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. This is often referred to as the hypothetical comparator. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed** [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl v Law Society 2004 IRLR 799.**

<u>S.20 Duty to make reasonable adjustments</u>

181. Section 20 EqA states that: …

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

182. Section 21 EqA states that:

(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

183. In relation to knowledge of disability the correct questions are, in relation to the relevant time:

a. Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially

b. Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

184. The required knowledge is of the facts of the disability, not that they meet the legal definition. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

S.15 EqA 2010 - Discrimination arising from disability

185. Discrimination arising from disability is defined in s15 EA 2010:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

186. As for the correct approach when determining section 15 claims we refer to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31.

187. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

188. Section 136 provides that:

(2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provisions.

189. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen** v **Wong** 2005 IRLR 258 as refined in **Madarassy** v **Nomura International Plc** [2007] ICR 867. The Court of Appeal emphasised that

there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

Unfair Dismissal – s.94/98 Employment Rights Act 1996

190. Section 94 of the Employment Rights Act 1996 ("ERA 1996") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the Respondent under section 95 ERA 1996.

191. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

192. In this case the Respondent asserts that it dismissed the Claimant because of capability. Capability is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).

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

Conclusions

Disability

194. As indicated, it is conceded by the Respondent that the Claimant was disabled by reason of his back condition at the relevant dates. The Tribunal has to determine whether the Claimant was also disabled by reason of occipital neuralgia. We concluded that he has not proven that he was disabled by this condition.

195. It is accepted that the Claimant had at some point an impairment of occipital neuralgia, a pain disorder which causes shooting pains along the scalp. The Claimant's two disability impact statements [107][121] simply state that the Claimant had the condition.

196. As we state in our findings, whilst the Claimant has spoken of having the condition since August 2015, and it being brought on my stress and anxiety over his situation, he gave no evidence of the impact, adverse or otherwise, on his normal day to day activities. We found that the Claimant had not proven that his occipital neuralgia, despite accepting that it was a condition that he had lived with since 2015, had a substantial adverse long term impact on his day to day activities. We therefore did not find that the Claimant had proven that he was disabled at the Relevant Time by his occipital neuralgia.

197. In any event, despite persuading the Tribunal at the last preliminary hearing to permit an amendment to his claim to enable the Claimant to rely on this condition in support of his disability discrimination complaints, the Claimant did not rely on such a condition in presenting his complaint at the final hearing and we concluded that such a condition was wholly irrelevant.

198. We proceeded to deal with the discrimination complaints on the basis of the Claimant's back condition and on the basis of our finding that the Respondent had knowledge that such a condition rendered the Claimant a disabled person on receipt of the 14 March 2023 occupational health report.

Direct disability discrimination (s13 EqA2010)

199. The Claimant relies on the following treatment:

    a. Failing to put him into the role of Team Leader Supervisor (mentioned in the meetings of 29 June 2023 and 11 July 2023); and

    b. Paying him CSP at 85% throughout his sickness absence.

200. It is accepted by the Respondent that the Claimant was subjected to both acts. However, the Tribunal concluded that in neither case was the reason for the treatment because of disability.

201. In relation to the Team leader role, the Tribunal accepted that there was no permanent vacant role and that Comparator X had been filling in for an absent member of staff on a temporary basis.

202. The Claimant also used Comparator X, an individual who was covering the role, as a comparator. We concluded that Comparator X were in materially

different circumstances and did not assist in our consideration of whether the reason for the treatment was the Claimant's disability:

a. Comparator X had relevant, previous experience to cover the Team Leader role as a result of historical roles, whereas the Claimant did not;
b. As had been accepted by the Claimant at the outset of this hearing and again in live evidence, this would not have been a role which the Claimant could have undertaken until at least 3 months after his operative procedure whereas Comparator X was able to cover the role immediately;
c. Furthermore, we had found that it was a physically demanding role that required the post-holder to lift and carry parcels and could not have been undertaken without significant adjustments, adjustments that the Claimant required and Comparator X did not.

203. We did not consider Comparator Z to be an appropriate comparator. Comparator Z was absent due to a hip replacement, and was subsequently certified as fully fit for work without adjustments.

204. The Claimant did raise Comparator X at the meeting on 24 July 2023 and that he was covering for the Team Leader and undertook driving rarely. However we did not consider this in itself sufficient to find or infer discrimination such that the burden shifted to the Respondent. Notwithstanding that we were persuaded by the Respondent that any failure to offer the Claimant the opportunity to cover for the absent Team Leader, was not because of the Claimant's disability but because of the same reasons that Comparator X was not a relevant comparator –the role was not a suitable one for the Claimant.

205. The role involved manual handling of lifting and carrying and also required the post-holder (whether temporary or otherwise) to be on their feet for extended periods. The role also required the cover to revert to their own substantive role when the Team Leader returned to work.

206. The reason for the Respondent not offering the Claimant the Team Leader rolw was because the Claimant was incapable of undertaking the Team Leader role and was seeking a termination payment at the time. We concluded that this was unrelated to his disability and that claim therefore failed.

207. In relation to being paid 85% CSP, the Tribunal had found that this was the standard rate of CSP for package car drivers. We concluded that this was the reason that the Claimant was paid 85% CSP and not the Claimant's disability.

208. We had further found that 100% CSP was awarded at the discretion of the Respondent following a reported injury at work. We did not consider that the

failure by Kevin Oliver to be definitive with the Claimant that as he had not reported any incident he would not get 100% CSP was sufficient to infer discrimination. In any event we were persuaded that the reason the Claimant did not receive 100% CSP was because he had not formally reported a workplace injury in accordance with the Respondent's accident reporting procedures. This was a reason wholly unrelated to the Claimant's disability.

209. We concluded that Comparator Y was a comparator that was in materially different circumstances to the Claimant. Comparator Y had an established no-fault workplace injury. At the relevant time the Claimant had not reported the injury as resulting from a workplace incident and had not followed reporting processes and had not been sufficiently particular to allow the matter to be investigated properly.

210. The Tribunal concluded that the Claimant's complaints of direct disability discrimination were not well-founded and were dismissed.

Failure to comply with the duty to make reasonable adjustments

211. We repeat our conclusions on knowledge of disability and that at the Relevant Time the Respondent had the requisite knowledge of the Claimant's disability.

212. It is accepted by the Respondent that the Respondent had the provision, criterion or practice ('PCP') relied on of a requirement to lift and lower parcels and that this PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was unable to lift and lower parcels (and unable to return to work if he would be required to do so).

213. It is also conceded by the Respondent that the Respondent knew or could reasonable have been expected to know that the Claimant that the Claimant was likely to be placed at this disadvantage.

214. In this case, the focus has been on what steps could have been taken to avoid the disadvantage and whether it was reasonable for the Respondent to have to take those steps and when.

215. The Claimant suggests putting him into:

    a. covering the role of Team Leader Supervisor and
    b. giving him administration duties with the ability to have regular breaks if the pain was too difficult and to remove any duty to lift and carry customer parcels.

216. Again, the Respondent accepts that they have not taken such steps but their position is that it would not have been reasonable to have taken them.

217. In general terms, the Tribunal concluded that neither adjustment would have been reasonable at that time in the context of this claimant. This was not an employer that was pushing an employee down a capabilities procedure in the summer of 2023, with a view to getting the employee back in work in July 2022 or dismissing him if that was not possible. This was an employee who was not fit to return to work, who was about to have surgery in July 2022 and until sometime after such surgery was unlikely to be able to return. This was also an employee who was facing the exhaustion of his CSP in the following month and who, if he was unable to receive 100% CSP, was looking for a termination payment. The tribunal considered that this context was relevant in terms of the steps that this employer did take.

218. For the avoidance of doubt, we concluded that to have appointed the Claimant as Team Leader Supervisor on a permanent basis would not have been a reasonable adjustment as there was no vacant role and to do so would have meant dismissing the substantive postholder as Comparator X was covering on a temporary basis only. This was not considered a reasonable adjustment.

219. In relation to whether the Claimant should have been considered for the role of covering for the absent substantive Team Leader Supervisor, we concluded that this too would not have been a reasonable adjustment.

220. This was a role that had the requirement to lift and carry parcels. This was not a duty that could have been undertaken by the Claimant and would have required a further adjustment of removal of such a duty. This had not been claimed prior to this hearing but in any event we were not persuaded that this would have been reasonable step for the Respondent to take. It was a temporary tole only and would have ended when the substantive postholder returned to work; the role would have required the person covering to revert to their substantive role when required i.e. in this case a Package Car Driver. This was not something that the Claimant could undertake. The Claimant did not have the skills to carry out the Team Leader supervisor role.

221. In relation to the clerical role, we were not persuaded that the adjustments that were required to any clerical role, of removing the responsibility of attending to customers and collecting delivered parcels from the warehouse, was a reasonable step for the Respondent to take. The Respondent persuaded us that such manual handling was required on a daily basis and it was not a reasonable step to have removed such a duty from the substantive role, a duty that the Claimant was unable to undertake.

222. The Tribunal therefore concluded that whilst the duty to consider reasonable adjustments had been triggered, the Respondent had not failed to comply with its duty to make reasonable adjustments. The claims of failure to comply

with the duty to make a reasonable adjustment do not succeed and are dismissed.

Discrimination arising from disability (s15 EqA2010)

223. We repeat our findings and concluded that by the date of the receipt of the Claimant's first occupational health report on 14 March 2023, it could be said that the Respondent could reasonably have been expected to know that the Claimant was a disabled person by reason of his prolapsed disc with nerve impingement. In any event, it is conceded by the Respondent that they had knowledge of disability at all relevant times.

224. It is further accepted by the Respondent, that the Respondent treated the Claimant unfavourably by dismissing him and that the Claimant's sickness absence arose in consequence of the Claimant's disability. It is not accepted by the Respondent however that the Respondent dismissed the Claimant because of that sickness absence. Rather, the Respondent says, the Claimant was dismissed because:

    a. he was incapable of performing his contracted role even with adjustments;

    b. there was a poor prospect of this situation being alleviated even by surgery; and

    c. because the Claimant agreed with this assessment and preferred dismissal to the alternatives.

225. The Respondent says the Claimant could have been maintained on unpaid sick leave without dismissal, and the Respondent would have done this had the Claimant indicated willingness this indicates that absence per se was not the cause of dismissal.

226. We agree. There was nothing in the evidence before us that suggested that the Respondent was considering moving to a position of terminating the Claimant's employment as a result of his sickness absence, quite the contrary. The Tribunal concluded that it was the employee that was proactively seeking ill health termination to obtain the benefit of the Ill Health Termination Payment. We concluded that this was an employer that was content for the Claimant to remain on sick leave and undergo his operative procedure before considering managing him on a capability basis.

227. We would repeat our conclusions in relation to the reasonable adjustments claims.

228. The claim of discrimination arising from disability was also not well founded and was dismissed.

Jurisdiction/Time limits

229. Finally, in relation to the time limits for bringing the discrimination complaints, the Respondent accepted that its management of the Claimant's sickness absence; the application of its capability procedure which resulted in his dismissal and the treatment of the Claimant's CSP were courses of connected conduct ending within the primary time limit. The Tribunal agreed and concluded that all of the claims are in time.

Unfair dismissal

230. It is not in dispute that the Claimant was dismissed on 8 June 2023. The Tribunal concluded that the Respondent had proven that the reason or principal reason for dismissal was capability; that the Claimant was incapable of performing his role because of his back condition. This was supported by the OH report of 15 May 2023 [238] and the Claimant not only agreed with this assessment contemporaneously but has also accepted during the course of this hearing that at the point of dismissal he was incapable of performing his role as Package Car Driver. Dismissal for a reason related to capability is potentially a fair reason for dismissal under s98(2)(a) ERA1996.

231. When considering a dismissal for capability and considering whether the Respondent acted reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant, the Tribunal will usually decide, in particular, whether:

a. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;
b. The Respondent adequately consulted the Claimant;
c. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position
d. Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant
e. Dismissal was within the range of reasonable responses.

232. We accepted and concluded that the Respondent had received an Occupational Health Report (second OH report) confirming that the Claimant was no longer capable of performing his duties as a Package Car Driver.

233. Whilst the Claimant has contended that the Respondent had indicated that they would get a further OH report, we had found that Brad Penrith had confirmed to the Claimant subsequently that the Respondent would not and

further concluded that an additional OH Report, before the Claimant's pending surgical procedure would have not changed the prognosis and likely return for the Claimant at that point in any event. We concluded that the Respondent genuinely believed and had grounds for believing that the Claimant was no longer capable of performing their duties.

234. In terms of consultation, whilst we did find that the letters inviting the Claimant to the meetings on 28 June 2022 and 11 July 2022 did refer to 'welfare' meetings as opposed to 'capability' meetings, we did view this in the context of the discussions that had actually been held, that there was not written policy and that throughout the Claimant had been represented by his trade union as well as being a shop steward himself.

235. In terms of both the consultation and whether the Respondent could reasonably be expected to wait any longer, these issues must also be viewed in the context that the Claimant had proactively sought out and proposed termination on ill-health capability grounds, when he indicated that he wanted to go down the 'capabilities' route or words to that effect in order to obtain the considerable Ill Health Termination Payment, of over £24,000 some two months short of the expiry of his 85% CSP in June 2023.

236. We concluded that was a considerable feature of the discussions between the parties and the manner of the welfare meetings leading to the termination of his employment on 24 July 2023. We did not consider that the labelling of the meetings caused any procedural unfairness and concluded that the Claimant was fully cognisant of the status and purpose of the meetings.

237. We were satisfied that the Claimant had been adequately consulted at such meetings and that this included options of returning to work, and what adjustments could be made, including consideration of the options put forward by the Claimant including a surplus driver role, when effectively the Claimant raised the possibility of being paid for doing nothing, cover for the Team Leader role and clerical roles, all of which were considered and dismissed by the Respondent.

238. Whilst the Claimant did immediately lodge a grievance and appeal following the dismissal meeting, the content of which was at odds with what he had been saying at the dismissal meeting earlier that day, again we view this in the context of the Claimant's repeated requests for more CSP and to effectively be on full pay until he was fit to return. This was a position that despite his appeal, the Claimant did not resile from at the appeal hearing. Indeed, his representative turned the discussions away from appeal to focus on financial consideration and efforts to increase the severance amount.

239. The timeline for surgery was long and at the point of termination of employment, indeterminate. The Claimant was looking for a termination with a

payment. Whilst the Claimant may very well have been in a difficult financial situation, we concluded that this was the reason for the Claimant's behaviour and by 24 July 2023, unless the Respondent was prepared to pay the Claimant 100% CSP, he made clear that he did wish for termination and an Ill Health Termination Payment. Whilst there is little doubt that the Claimant did raise possible alternatives, this was always with the underlying principle that he needed to immediately receive 100% CSP.

240. Being satisfied that there were no adjustments that could reasonably have been made at that point to allow the Claimant to return and with the Claimant proactively seeking an Ill Health Termination Payment, the Tribunal concluded that dismissal fell within the range of reasonable responses.

241. We concluded that the claim for unfair dismissal was not well-founded and was dismissed.

Employment Judge Brace

12 August 2024

RESERVED JUDGMENT SENT TO THE PARTIES ON

13 August 2024

FOR THE TRIBUNAL OFFICE

Adam Holborn

APPENDIX

EMPLOYMENT TRIBUNALS

Claimant: Mr S Crock

Respondent: UPS Limited

Amended List of Issues

1. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 June 2023 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 It is common ground that the Claimant was dismissed/

2.2 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (long term absence).

2.3 Was it a potentially fair reason?

2.4 If the reason was capability, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The Tribunal will usually decide, in particular, whether:

2.4.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.4.2 The Respondent adequately consulted the Claimant;

2.4.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.4.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.4.5 Dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 Does the Claimant wish to be reinstated to their previous employment?

3.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the Claimant?

3.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the Claimant be compensated?

3.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the Claimant's compensation be reduced? By how much?

3.6.6 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

3.6.7 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

3.6.8 Does the statutory cap of fifty-two weeks' pay or £105,404 apply?

3.7 What basic award is payable to the Claimant, if any?

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

The Respondent's position is that the claimant requested his employment be terminated on capability grounds. The Claimant does not accept this.

4. Disability

4.1 It is now conceded that the Claimant had a disability of prolapsed disc with nerve impingement at the at the time of the events the claim is about ("Relevant Dates") (Respondent email 14 June 2024). The Respondent does not concede that the Claimant had a disability of occipital neuralgia at the Relevant Dates.

4.2 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the Relevant Dates? The Tribunal will decide:

4.2.1 Did they have a physical or mental impairment: occipital neuralgia?

4.2.2 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?

4.2.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.2.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

4.2.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.2.5.2 if not, were they likely to recur?

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

5.1 Did the Respondent do the following things:

5.1.1 Fail to put the Claimant into the role of Team Leader Supervisor (mentioned in the meetings on 29 June 2023 and 11 July 2023);

5.1.2 Pay the Claimant Company Sick Pay of 85% throughout his absence.

5.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

In respect of the first allegation, the Claimant says he was treated worse than Lee Saunders (X), another driver who lost his licence due o a different condition, but allowed to carry out a non-driving role.

In respect of the second allegation, the Claimant says he was treated less favourably than Nick Humpage (Y), a driver who was absent due to an injury sustained at work who was paid full pay whilst off sick

The Claimant says they were also treated worse than Gerald Rogers (Z).

5.3 If so, was it because of disability?

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

6.1 Did the Respondent treat the Claimant unfavourably by:

6.1.1 Dismissing the Claimant?

6.2 Did the following things arise in consequence of the Claimant's disability:

6.2.1 The Claimant's sickness absence?

6.3 Was the unfavourable treatment because of any of those things? That is, did the Respondent dismiss the Claimant because of that sickness absence?

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

6.4.1 To overcome the operational impact of having a driver vacancy for a prolonged period of time and to effectively and

proactively manage cases of long term sickness absence (§85 Amended Grounds of Resistance).

6.5 The Tribunal will decide in particular:

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

6.5.2 could something less discriminatory have been done instead;

6.5.3 how should the needs of the Claimant and the Respondent be balanced?

6.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

7.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2 A “PCP” is a provision, criterion or practice. Did the Respondent have the following PCPs:

7.2.1 A requirement to lift and lower parcels

7.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant’s disability, in that he was unable to lift and lower parcels (and unable to return to work if he would be required to do so?

7.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

7.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

7.5.1 Putting the Claimant into the role of Team Leader Supervisor;

7.5.2 Putting the Claimant into an administration role with regular permitted breaks for pain and the removal of the requirement to lift and carry parcels for customers.

7.6 Was it reasonable for the Respondent to have to take those steps and when?

7.7 Did the Respondent fail to take those steps?

8. Remedy for discrimination or victimisation

8.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the Claimant?

8.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the Claimant be compensated?

8.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.8 Should interest be awarded? How much?