EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105993/2024

Held in Glasgow on 4, 5 & 7 February 2025; and by cloud video platform on (CVP) on 19 March 2025

Employment Judge S MacLean
Tribunal Member N Bakshi
Tribunal Member N Elliot

Mr J King	**Claimant** **Represented by:** **Mr M Dooley - Friend**
Rentokil Initial UK Limited	**Respondent** **Represented by:** **Mr M Ramsbottom - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the disability discrimination claims and unfair dismissal claim are dismissed.

REASONS

Introduction

1. The claimant sent the claim form to the Tribunal on 7 July 2004, in which he complains of:

    a. Disability discrimination. He relies on the condition of lower back pain. He claims :

        i. Failure to make reasonable adjustments to his role which would have allowed him to continue working (sections 20 and 21 of the Equality Act 2010 (EqA)).

ii Discrimination arising from his disability (section 15 of the EqA) asserting that his dismissal was because of his absences arising from his disability.

b. Unfair dismissal in terms of section 98 of the Employment Rights Act 1996 (ERA).

c. Unlawful deductions from wages/breach of contract in relation to a failure to pay holiday pay that the claimant would have accrued during his 12 weeks' notice which was not included in his pay in lieu of notice.

2. Following the provision of medical evidence and the claimant's disability impact statement, the respondent accepted that his lower back pain condition is likely to satisfy the definition of disability being a condition that has a long-term, substantial and adverse effect on the claimant's ability to carry out day to day activities. The respondent's position remained that it did not know and could not have reasonably been expected to know that the claimant had a disability before 1 August 2023. The respondent denies that it failed to make reasonable adjustments, and denies discrimination arising from disability. The respondent admits dismissing the claimant. The respondent asserts that the dismissal was potentially fair, and was by reason of his long-term sick absence. The respondent says that the claimant was paid all money to which he was entitled. The respondent makes an employer contract claim in respect of an overpayment made to the claimant in July 2024 which the claimant resists.

3. A final hearing was listed to deal with all issues including remedy. As the number of days allocated for the hearing was unexpectedly reduced, it was agreed that the hearing would be restricted to dealing only with liability. The Tribunal did not consider the employee contract claim as it was agreed that it would be considered at any remedy hearing, or separately, if insisted upon.

4. For the respondent, the Tribunal heard evidence from Steven Nicholl, branch manager, and Richard Law, service manager. The claimant gave evidence on his own account.

5. The list of issues prepared by the representatives was refined to take account of the evidence and submissions.

6. The Tribunal has set out facts as found that are essential to its reasons or to an understanding of the important parts of the evidence. The Tribunal considered the submissions during deliberations and has dealt with the points made in submissions and the remaining issues while setting out facts, law and application of the law to those facts.

Findings in fact

7. The respondent operates as a leading commercial pest control and hygiene service provider.

8. The respondent employed the claimant as a service technician from 30 April 2001 until 22 March 2004 when his employment was terminated. The claimant's role involved driving a work vehicle to client premises, carrying out lifting duties, conducting deep commercial cleaning at client premises, and using heavy plant equipment.

9. The claimant's contract of employment issued on 22 August 2001 provides:

   a. that after more than 15 years' continuous service, the claimant is entitled to 26 weeks' pay (less statutory sick pay or sickness benefit) for 26 weeks.

   b. If the claimant becomes incapacitated for any cause whatsoever from efficiently performing his duties for a continuous period of six months in any 12 month period or 130 business days in aggregate in any period of 12 months, the respondent can give notice to terminate their employment without prior notice.

   c. A maximum notice of termination by the respondent of 12 weeks, and also provides for a payment in lieu of notice.

   d. The holiday year starts in January. Holiday entitlement for the calendar year is statutory and bank holidays; 20 working days; and five working

Christmas holidays between 1 December and 31 January. Annual holidays may not be carried forward.

e. The respondent is authorised to deduct from any final payments made on termination "any cash advances, expenses, loans or other similar indebtedness" to the respondent (clause 2).

f. Employment ceases on the expiry of notice or "forthwith on payment by" the respondent of the pay in lieu of notice (clause 2(b)).

g. Any outstanding holiday entitlement shall be deemed included to the extent of any notice period for which salary may be paid in lieu (clause 3).

10. The respondent's colleague handbook refers to full time employees having 28 days holiday (including public holidays) in any twelve month period. Days cannot normally be carried over to the next holiday. Employees are referred to other policies including flexible working; grievance, disciplinary, capability (satisfactory performance targets); and sick absence.

11. The sick absence policy defines a long-term absence as any period of absence of more than 20 working days. The line manager will keep in touch. The respondent may require a report from the employee's GP or require (with consent) examination by an occupational health doctor. The respondent will monitor and manage sick absence. Where an employee is unable to return to work during an acceptable time period, termination of grounds of ill health may be considered after various steps including: a review of the absence record; discussion with the colleague regarding their individual situation; consideration of up to date medical advice; written notification to the colleague as soon as it is established that termination of employment has become a possibility; meeting the colleague to discuss the options and consider their views in continuing employment; considering whether any reasonable adjustments be made to the colleague's job or whether there are any other jobs that the colleagues could do; allowing a right of appeal against any decision to dismiss the colleague on the grounds of long-term ill health; and

holding a further meeting for the colleague to determine any appeal and following this meeting, informing the colleague of its final decision.

12. On 21 June 2022, the claimant commenced a period of sick absence. The fit note issued from 11 July 2022 stated that the claimant was not fit to work because of a "back injury at work".

13. Steven Nicholl, branch manager invited the claimant to a welfare meeting held remotely. The letter stated that the welfare meeting was not a formal meeting. Mr Nicholl was to be accompanied by a company representative who would take notes. A leaflet was enclosed containing information about the employee assistance programme providing 24 hour confidential support.

14. At a welfare meeting on 27 July 2022, the claimant advised Mr Nicholl, that some days he was fine and other days he could not walk. He had been prescribed strong painkillers. The claimant was scheduled to see a physiotherapist. Mr Nicholl asked the claimant to call him after the physiotherapist appointment to discuss the physiotherapist's view on the claimant returning to work.

15. On 29 July 2022, the claimant spoke to Mr Nicholl and sent a follow-up email advising that the physiotherapist considered that the muscles in the claimant's lower back were causing the pain, and that he had a follow up an appointment. The claimant's sick absence continued.

16. At a welfare meeting on 1 September 2022, the claimant confirmed to Mr Nicholl that he continued to suffer a lot of pain in his lower back although swimming was helping. The claimant was still on medication and had started driving. The claimant expressed a desire to return to work but could not give a date due to the ongoing pain. It was agreed that the claimant would keep in touch. The claimant continued to provide Mr Nicholl with updates of his physiotherapist appointments.

17. On 10 October 2022, with the claimant's agreement, the respondent obtained an occupational health report (the October 2022 report) which stated that the

claimant was currently unfit to resume work and he was to be re-referred when he was ready to do so. The October 2022 report stated:

a. the claimant was continuing to experience increasing pain which hindered him to bend, crouch or kneel. This had an impact to his functional capacity.

b. The claimant was taking painkillers. He was receiving supportive treatment. He did not drive at present due to lower back pain. The claimant was currently unable to return to work. His symptoms were impacting his ability to undertake his day to day tasks, and he was awaiting a review.

c. With supportive treatment the claimant was likely to return to work with some initial adjustments to support his return and continued attendance at work.

d. If the effect of the treatment was disregarded, the claimant's impairment would have a substantial effect on his normal day to day activities (like shopping and going to work) therefore the EqA is likely to apply.

e. The recommendation was to re-refer when the claimant was ready to resume work for a phased return to be discussed and further assessment within a six to eight week period.

18. The claimant and Mr Nicholl discussed the October 2022 report at a welfare meeting on 14 October 2022. The claimant confirmed he was still on medication. His back was still sore. He clarified that he was not driving long journeys. He was attending a physiotherapist every four to six weeks.

19. The respondent clarified the October 2022 report with the occupational health advisor who confirmed that the supportive treatment was physiotherapy. Specific adjustments would be discussed with the claimant at a review in six weeks (from 10 October 2022).

20. At a welfare meeting on 17 November 2022, the claimant confirmed to Mr Nicholl, that he had been to the physiotherapist and had muscle damage. The

claimant was to continue with exercises. He stopped taking the painkillers as they were causing stomach problems. The claimant did not know when he would be returning to work as his back was still sore. He had tried driving short distances. It was agreed that an up to date occupational health report would be obtained.

21. On 2 December 2022, the claimant provided a fit note for six weeks (13 January 2023) in which the GP stated, "I will not need to assess your fitness for work again at the end of this period". The claimant sent an email to Mr Nicholl on 5 December 2022 stating that the physiotherapist considered that there was "a big improvement" in his movement since the first session. The claimant still had problem with his lower back, he was frustrated but hoped he would get better soon.

22. On 12 December 2022, with the claimant's consent, the respondent obtained an occupational health report (the December 2022 report), to be read in conjunction with the October 2022 report, which stated that the claimant was temporarily unfit to return pending further improvement in his back. The December 2022 report noted that the claimant's job could involve solo working, driving short or long distances to customers undertaking various jobs including deep cleaning and repair work. This could involve manual handling. The December 2022 report stated:

    a. the claimant's back had limited improvement; he tended to be worse in the mornings with stiffness and difficulty moving although it could improve throughout the day.

    b. The claimant reported difficulty with sitting and driving for long periods of time and could only do short distances. He was not undertaking any heavy lifting. Given the claimant's role required undertaking long spells of driving and heavy lifting, he was not able to tolerate this at present. However, with ongoing medical support, it was hoped that there would be significant improvement in the coming weeks.

    c. The claimant's impairment had not lasted 12 months and did not have a substantial effect on his ability to perform day to day activities. The

EqA was unlikely to apply. However, this was legal and not a medical decision.

d. It was hoped that the condition would improve over the coming weeks to months and ensure that there was no reduced impact upon work. In the short-term, there may be some impact but the reasonable adjustments that were proposed should help to mitigate some impact. There was no indication that the claimant would not be fit to continue in his current role.

e. It was not possible to advise when the claimant would be fit to return to work. It was hoped that this was a singular back condition rather than something that would recur.

f. The recommendations were:

i. a phased return to work when the claimant was fit, consisting of 50 percent of normal working hours for week 1 and increasing it slowly over a four week period. This would minimise the risk of aggregating health conditions and allow for tolerance to be built up for manual tasks. The hours should be reviewed with a manager and employee on a weekly basis. During a phased return, additions to normal breaks are built in to allow the working day for adequate rest phases for the body.

ii. A manual handling risk assessment should also be carried out. Should concerns be raised from this adjustments should be made.

23. On 21 December 2022, the respondent advised the claimant that his statutory sick pay was due to expire and he would need to submit an application to DWP.

24. The claimant sent an email to Mr Nicholl on 6 January 2023 advising that his physiotherapist was happy with the progress. The claimant said that his intention was to start back to work soon, that he would telephone once he had been to a doctor's appointment.

25. On 9 January 2023, during a telephone call with Mr Nicholl, the claimant indicated that he wished to return to work. His physiotherapist was of the view that exercise would assist in his rehabilitation. The claimant's fit note ended on 13 January 2023. Mr Nicholl reminded the claimant about the possible phased return to work. It was agreed that the claimant would discuss this with his GP.

26. On 11 January 2023, Mr Nicholl emailed the health and safety advisor to ask about individual risk assessment. Mr Nicholl was advised that there was an ability to carry out an individual risk assessment but if the claimant was fully fit, then this did not need to be done as there would be no restrictions or limitations. However, the health and safety advisor was happy to support an individual risk assessment, if one was required.

27. The claimant emailed Mr Nicholl on 12 January 2023, advising that the physiotherapist had placed him "on hold" but that there was an open appointment to get in touch with him, or after three months if he does not hear from the claimant, the claimant will be discharged. The claimant had spoken to the GP's receptionist and been told that GP would not issue a letter stating that he was fit to return to work. The respondent would need to take the claimant's word for it.

28. The claimant returned to work on 16 January 2023. Mr Law, service manager, conducted a return to work interview at which a phased return to work was discussed. He described having a "wee twinge in the back from time to time" and taking medication. The claimant worked 20 hours across four days between 16 January 2023 and 29 January 2023. He was doing no lifting of ladders or chemicals. From 30 January to 6 February 2023 the claimant worked 30 hours across five days per week. He was assigned local (route) work during the four week phased return. During the weekly reviews the claimant said that he found getting up in the morning strange but to be expected. He confirmed that there were no work issues, the driving was fine.

29. The claimant started working full time from 6 February 2023. If there were any issues/problems he was to contact Mr Nicholl or Mr Law. The claimant did not raise any issues with the managers.

30. Mr Law and the claimant had a formal absence review meeting on 10 March 2023 following an unrelated absence. It was explained that as the claimant had hit an absence trigger for two separate absences he may not be entitled to company sick pay. The claimant indicated that work was fine. He was doing his routes. There were no issues.

31. The claimant continued to work full time. He undertook all work to which he was allocated. The claimant continued to experience back pain when carrying out some duties involving manual handling and driving long distances. He did not take medication for pain relief due to the side effects. The claimant raised no issues with his supervisor or managers about the allocation of work.

32. The claimant was absent from work from 1 August 2023 due to “low back pain”. He provided fit notes.

33. Mr Law invited the claimant to a welfare meeting on 16 August 2023. A notetaker was present. The claimant advised that he was on medication and his back pain was not getting any better. He did not know what had caused the injury. He mentioned that after doing a tough job with a colleague he was okay and went home. That night he felt his back “go”. He was absent the next day as he could not work. The claimant confirmed that he was doing exercises but had not been driving although he had brought the car that day, and there were no major issues. The claimant said that the pain was consistent but increased when he was bending over, getting into bed and standing too long.

34. The claimant confirmed his retirement which was due in August 2024. He was asked if any part of his job had affected him. The claimant indicated that “route work is fine, I have not issues with any of it”. While he did not “shy away” from any jobs, job work mainly included manual work which put his back at risk. The claimant did not know when he would be able to return to work. He wanted to be back before he retired.

35. The claimant remained absent. He attended a welfare meeting with Mr Law (at which a notetaker was present) on 1 December 2023 at which the claimant indicated that the pain level was not as bad. However, he was seeing two different GPs and he did not know when he would be in a position to return to work. There was discussion about whether there could be any adjustments to get the claimant back to work. Mr Law indicated that there was a possibility of looking at light duties. The claimant did not about know whether part time work would help his back. Neither the claimant nor Mr Law raised any other aids or adaptations. The claimant said that he had not had any x-rays on his back but that at his next GP appointment, he would ask about his return to work.

36. On 25 January 2024, with the claimant's consent, the respondent obtained an occupational health report (the January 2024 report), following a telephone consultation between the claimant and an occupational health doctor who had reviewed the case notes. The claimant reported that in August 2023, he suffered an exacerbation of his back pain which happened after a busy day at work and he had been signed off since August. He had attended a physiotherapist and been given a series of exercises to perform. He had been advised to avoid any lifting and although he had been sent for an x-ray, he had not received the results of this. He could walk and swim but had limited activity. He was to avoid any lifting or prolonged exertion. He was on medication, and on a back pain disability questionnaire, confirmed that the results were consistent with "severe disability".

37. The January 2024 report stated that the claimant was unfit to work. His back pain had become chronic. In this episode the claimant had a flattened trajectory of recovery. Given the claimant's active role, any future return to work would involve amended duties and restrictions. The January 2024 report stated:

    a. A return to work was not possible and no restrictions would currently allow the claimant a return to work.

b. The severity of the pain, impact on daily functioning and chronicity of symptoms would mean that disability legislation applies.

c. It was unlikely that reliable service and attendance would be possible in the future. The claimant's active role as a service technician would be severely limited.

d. Based on the trajectory over the last three/four months (which was considerably worse than the previous episode), the claimant was unfit to continue in his current post. There was limited information on the precise diagnosis for the cause of the pain. A face to face consultation and/or specialist input may provide a more accurate answer to that question.

38. The claimant attended a welfare meeting with Mr Law on 15 February 2024. Mr Nicholl was present to take notes. The claimant stated that he had seen some improvements to his lower back pain but was experiencing good days and bad days. The claimant's current fit note expired on 23 February 2024. Mr Law asked what advice the GP had given about how long the injury would last. The claimant was not sure as to how long his injury would last. He was no longer seeing a physiotherapist and was awaiting the x-ray results. They discussed the January 2024 report. The claimant said that he wanted to return to work but was not fit enough yet. He wanted to end his career properly. There was discussion about whether anything else could be done to support the claimant's returning to work. The claimant stated that on his return to work previously, he had been put on light duties. He mentioned "GT services" which were stressful and hard but he understood that the administrator who allocated work did not fully understand the service and the work behind it. He did not think there was anything else that the respondent could have done. Mr Law indicate that if the claimant wanted to come back, then there would need to be a risk assessment on his ability to do the role. The claimant was advised that he had not been replaced and that he was still within their numbers. The claimant indicated that previously, the programming was strange, but he appreciated that the administrator did not always know what was involved. Mr Law advised that given the claimant's

length of absence, there was a possibility of going into ill health capability if the claimant could not return to his role, reduce hours or if there was no return date for any other roles within the business there would be a possibility to terminate his contract. Mr Law said that the ideal scenario was for the claimant to return and see out until retirement. Mr Law asked the claimant to try to get x-ray results and speak to his GP about possible dates for return.

39. On or around 23 February 2024, the claimant provided a fit note to the respondent dated 23 February 2024 which stated that the claimant would not be fit to work for six months (23 August 2024) (the February 2024 fit note). It stated that the claimant would not benefit, from a phased return to work, altered hours, amended duties or workplace adaptations.

40. Mr Law wrote to the claimant on 1 March 2024. The letter was headed "Arrangement for stage 1 ill health capability meeting". It summarised the discussion at the welfare meeting on 15 February 2024, and referring to the claimant being signed off by his GP until 23 August 2024. The claimant was invited to a meeting on 5 March 2024 to discuss his capability of carrying out the service technician role. Mr Law was to be accompanied by a "company representative who will act as a company witness and notetaker". The claimant was advised that he had a right to be accompanied by a fellow colleague or trade union official He was further advised that at the meeting, there would be a discussion about the claimant's current health and wellbeing and also discussion about further adjustments that the respondent could offer such as temporary or permanent redeployment. The claimant was provided with a list of potential vacancies within the whole business.

41. The meeting was conducted remotely on 5 March 2024. O'Baid Chaudhry, junior HR advisor, participated as a note taker. The claimant was unaccompanied. Mr Law recapped the discussion at the welfare meeting on 15 February 2024. The claimant was asked if there was an update since the January 2024 report. The claimant said that there was none. The claimant was asked whether there were any adjustments that could be put in place. He was not sure what was available. The claimant had only briefly looked at the list of vacancies. The claimant was asked whether he foresaw a return to

work dated in the near future. The claimant did not think that it would be six months, but could not say. The claimant was advised that there would be a further meeting to review the discussions, the list of vacancies, potential adjustments, potential return to work date. A decision would be made which could be termination of employment.

42. A letter dated 8 March 2024 was sent to the claimant summarising the discussions at the welfare meeting on 15 February 2024 and the stage 1 il health capability meeting on 5 March 2024. The letter included an invitation to a further meeting on 13 March 2024. The claimant was advised of his right to be accompanied. He was to be provided with an updated list of vacancies. The letter stated that the claimant was at the final stage of the absence management procedure. If there was little likelihood of return within a reasonable timescale, no reasonable adjustments that can be made, or alternative employment available then the outcome may be termination on the grounds of ill health. The claimant was encouraged to bring any relevant information for consideration.

43. At the stage 2 ill health capability meeting on 13 March 2024, the claimant was unaccompanied. Mr Chaudhry took notes. There was a review of earlier discussions and the January 2024 report. The claimant said that there were no major changes. He had not seen his GP except to obtain repeat prescriptions. There was some discussion about other roles. The meeting was adjourned so that further information could be obtained on some roles.

44. A letter was sent to the claimant dated 20 March 2024 summarising the meetings and confirming that the stage 2 ill health capability meeting would reconvene on 22 March 2024. The letter reiterated the claimant's right to be accompanied, the potential consequences and the importance of providing any information that might be relevant.

45. The stage 2 capability meeting was reconvened on 22 March 2024. The claimant did not have any update on the x-ray results and had not asked for or received any further advice from his GP. He could not give a timeframe on his return to work in his existing or any other role. The claimant was advised

that the three alternative roles in which he had expressed interest, were no longer available. Two were apprenticeships and the other was already filled. The claimant said he was not interested in any of the other roles as they were too far away. The January 2024 report was discussed. The claimant still agreed with it. Mr Law asked about adjustments. The claimant said that there were none with the role of service technician. Mr Law asked about part-time as an adjustment. The claimant did not consider this would enable him to return to work. Following an adjournment Mr Law said that the decision was made to terminate the claimant's employment on the grounds of medical capability with immediate effect. The claimant was advised of his right to appeal.

46. On 26 March 2024, the respondent sent a letter to the claimant confirming that following investigations, his employment had been terminated on the grounds of ill health with effect from 22 March 2024. The letter summarised the stage 1 and 2 ill health capability meetings. The letter confirmed that the claimant's employment was terminated effective from 22 March 2024. The claimant was entitled to 12 weeks' pay in lieu of notice and annual leave accrued but not taken for 2022 (16 days), 2023 (22 days), and 2024 (7.5 days). The payments were to be made through payroll on 19 April 2024 and subject to normal deductions for tax and national insurance. The claimant was reminded of his right to appeal within five working days of receiving the letter.

47. The claimant sent an email confirming his intention to appeal on 26 March 2024. This was acknowledged by letter dated 4 April 2024. The claimant was invited to an appeal hearing on 8 April 2024 to be conducted by a named branch manager not previously involved in the process. The claimant was advised of his right to be accompanied. The claimant sent an email on 4 April 2024 advising that he no longer wished to appeal the decision. The claimant said he had discussed with his son whether he was entitled to full sick pay when he was absent as he was only receiving statutory sick pay. The appeal hearing was cancelled.

48. The claimant was paid his final salary on 19 April 2024. This payment included pay in lieu of notice of £5,152.61 and holiday pay of £3,907.40 (45.5 days). There were deductions of £708.83 (absence legacy deduction); £443.01 (salary) and £100 cash float. On 19 July 2024, the respondent paid the claimant was paid £2,048.08: £1,329.05 (salary) and £1,401.19 (company sick pay).

49. At the date of termination the claimant was 66 years of age. He had been continuously employed by the respondent for 22 years.

Observations on witnesses an conflict of evidence

50. The Tribunal considered that the respondent's witnesses gave their evidence based on their recollection of events and contemporaneous notes. Mr Nicholl and Mr Law highly regarded the claimant who they considered to be a valued and hardworking employee. They had no doubt about his desire or willingness to work.

51. The claimant gave his evidence honestly. The Tribunal felt that he had a compliant nature and was often led by Mr Dooley during examination-in-chief. This was not a criticism of Mr Dooley who represented the claimant well at the hearing. However the claimant readily made concessions in cross examination. Also some of the arguments made on the claimant's behalf were incongruous with the claimant's position at the time, and were not in the claim form, and list of issues before the Tribunal.

52. There was conflicting evidence about the duties assigned to the claimant from February 2023. The claimant said that that he was not always allocated light duties and raised this with the administrator allocating the duties who did not fully understand the service. The claimant said that he raised this with Mr Law who said that he would have a word with the administrator. Mr Law had no recollection of this other than the claimant making reference to administrator at the welfare meeting on 15 February 2024. It was not put to Mr Law that he was aware of this prior to the claimant's absence in August 2023. While the Tribunal did not doubt that the administrator allocated heavier duties to the claimant from time to time, the Tribunal was not convinced that

when this work was allocated that the claimant raised any issues with his managers. The Tribunal considered that the claimant's evidence was that he did not shy away from work; he did the work was allocated to him and did not raise issues.

53. There were issues about accuracy of the notes of welfare meetings and ill-health capability meetings. The respondent accepted that none was sent to the claimant at the time and welfare meetings were not "formal" meetings. The Tribunal considered that neither manager had any animosity towards the claimant; there was no reason for the notes not to reflect the discussion that took place. Also the notes were prepared by a "company representative" who was present and not involved in the discussion or decision making. The Tribunal noted that during the ill health capability process excerpts from the notes of meetings were reiterated in letters sent to the claimant. The claimant received these letters. In relation to the material findings, the Tribunal considered that while the notes may not have been word for word, they reflected the general discussion.

54. There were issues about the payments received by the claimant on termination of his employment. While email correspondence was produced none of the witnesses referred to it. The claimant was unable to explain in his evidence why he considered that there was an underpayment of holiday pay. He said that his wife had made the calculations. The claimant accepted in cross examination that he had received the payment of holidays to which he was entitled. The respondent's witnesses could not comment on the final payments made to the claimant as they were not involved.

Discussion and deliberations

55. The Tribunal considered the list of issues that has been discussed at the start of the hearing and started with the discrimination claims.

Disability status

56. The claims of failure to make reasonable adjustment and discrimination arising from disability require to the claimant to be a disabled person in terms of section 6 of the EqA at the relevant time (January 2023 until March 2024).

57. Mr Ramsbottom submitted that before June 2023, the claimant cannot be considered a disabled person as he had not had his back condition for more than twelve months. Mr Ramsbottom accepted that the January 2024 report confirmed that the claimant was likely to qualify as a disabled person. Mr Dooley's submission was that the claimant was a disabled person at the relevant time.

58. The October 2022 report indicates that the EqA is likely to apply; if the treatment is disregarded there would be a substantial effect on the claimant's day to day activities. The fit note issued on 2 December 2022 was for six weeks (13 January 2023) with no requirement for review by the GP at the end of that period. The December 2022 report states that the impairment has lasted less than twelve months, and that the claimant's impairment did not have a substantial effect on his day to day activities therefore the EqA was unlikely to apply. The comments about substantial effect on his day to day activities was in the Tribunal's view problematic as this contradicted the information in the relevant history/current situation especially when his medication and treatment was disregarded. The Tribunal accepted that at December 2022 the claimant's impairment had not lasted 12 months. However, he was a 64 year old manual worker who had been absent from work for seven months, and was still unfit for work. It was "hoped" that is was a singular back condition and not something that would recur.

59. The Tribunal considered that medical evidence did not confirm that it was a singular back condition. His recovery had been prolonged. Although the claimant returned to work on 16 January 2023, he was not "fully fit". A phased returned and amended duties were in place. His job was physical. He continued to experience back pain when carrying out duties involving manual handling and driving long distances. His back pain continued and was likely to worsen or recur. In the Tribunal's view the claimant was a disabled person from January 2023.

Failure to comply with reasonable adjustments

60. The Tribunal referred to section 20 and 21 of the EqA. The duty under section 20 comprises three requirements.

61. In the claim before the Tribunal the claimant relied on the application of two provision, criterion or practice (PCPs) which he said put him (a disabled person) at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled:

    a. requirement for the claimant to undertake certain workload (PCP 1); and

    b. the application of a capability process/sickness absence policy (PCP 2).

62. While in his submissions Mr Dooley referred to a failure to provide to an auxiliary aid this was not foreshadowed in the claim form or the list of issues.

63. The duty to make reasonable adjustments entails employers taking such steps as is reasonable to have to take to avoid the disadvantage (or to provide the auxiliary aid).

64. The Tribunal then considered each PCP in turn.

Did PCP 1 put the claimant at a disadvantage?

65. The respondent disputed that it operated a policy of requiring the claimant to undertake a certain workload. The Tribunal noted that PCP is not defined in the EqA. The EHRC Code of Practice in Employment states that the term should be construed widely as possible to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

66. The respondent provided hygiene services to clients. Technicians are allocated a schedule of daily duties which included route works and other heavier works. In the Tribunal's view this was a PCP.

67. The claimant's position was that PCP1 placed him at a substantial disadvantage because he could not undertake the work, he was in pain and it exacerbated his condition resulting in sick absence.

68. "Substantial disadvantage" is defined as something that is more than minor or trivial. It is important for the Tribunal to identify the nature and extent of any substantial disadvantage suffered by the claimant.

69. From its findings the Tribunal was not satisfied that the claimant could not undertake his work. To the contrary the claimant "did not shy away from work". While the Tribunal had no reason to doubt that the claimant continued to feel pain in his back, the Tribunal could not say what triggered the relapse in his condition in August 2023. The substantial disadvantage was that the claimant continued to have back pain while undertaking the workload allocated to him.

Did the respondent know or ought it to have known that the claimant was likely to be put at a substantial disadvantage by PCP 1?

70. The respondent was aware in January 2023 that the claimant was returning from a prolonged (seven months) absence. His job involved driving and heavy lifting. Occupational health reports flagged that the claimant may be a disabled person although at that stage his physical impairment had not lasted 12 months and it was hope that was a singular back condition. A phased return was recommended and was in place. The respondent knew that manual handling assessment had been recommended. Mr Dooley submitted that the respondent knew about the recommendation of the handling risk assessment in from the December 2022 report. Mr Nicholl made enquiries about this but it did not happen. The Tribunal focussed on what the respondent did do. The respondent spoke to the claimant during the phased returned. He raised no issues. The claimant returned to full time duties in early February 2023. He indicated at an absence review meeting in March 2023 that work was fine. He was doing his routes. There were no issues. He did not mention the ongoing back pain when undertaking certain duties. The claimant continued with his duties with no absences and did not raise any issues with his supervisor or managers. The Tribunal was not satisfied that the respondent knew or ought to have known that the claimant was or was likely to be put at a substantial disadvantage by PCP 1.

Did PCP2 put the claimant at a substantial disadvantage?

71. The respondent accepted that it did have a PCP of applying its policy in relation to sick absence. Both the claimant's absences were long term sick absences. The Tribunal considered that the respondent applied its sick absence policy to the claimant. There was no evidence of the respondent applying its capability policy to the claimant. It related to performance. There was no issue about the claimant's performance. To the contrary he performed well when he was at work.

Did PCP 2 put the claimant at a substantial disadvantage in comparison to persons who are not disabled?

72. The Tribunal asked what, if any, feature of the sick absence policy put the claimant at a disadvantage. The Tribunal considered that the substantial disadvantage was that the claimant required to maintain as certain level of attendance to avoid his employment being terminated.

73. In relation to the first absence, the claimant also referred to not having additional breaks during the phased return.

74. The Tribunal considered that the October 2022 report and December 2022 report confirmed the claimant's physical impairment and its effect on his day to day activities, which is more than minor. From the welfare meetings, the respondent knew that the claimant was being prescribed painkillers. While he had decided to discontinue their use, it was not because the pain had been alleviated but rather due to their side effects. The respondent knew that the claimant had returned to work in January 2023. The respondent put in place a phased return to work. The respondent understood this to have progressed well. The claimant returned to full time duties.

75. The respondent did not follow the recommendation to carry out a manual handling risk assessment although it was raised with the health and safety officer. The claimant gave reassurance that he was fit to return to work. There was no mention of a need for additional breaks being needed during the phased return. The claimant did not mention any ongoing back pain or have

any further absences other than for an unrelated illness in March 2023. At the welfare meeting in March 2023, the claimant did not mention to the respondent any issues about performing his role as a service technician or the work being allocated to him.

76. In these circumstances, the Tribunal did not consider that the respondent knew or could reasonably be expected to that the claimant would have a further absence due to his back condition in August 2023. There was no evidence, medical or otherwise, as to the cause of the claimant's condition or why in August 2023 there was a relapse.

77. The Tribunal considered that in relation to the second absence, the respondent knew that because of his absences the claimant's employment was likely to be terminated under the sick absence policy.

Did the respondent take such steps as were reasonable to avoid that disadvantage?

78. The respondent met with the claimant regularly and asked about adjustments to get him back to work. The medical evidence (the January 2024 and February 2024 fit note) did not indicate that the claimant was fit to return to work. No adjustments were recommended. The respondent met with the claimant at ill health capability meetings. The claimant's evidence was that when these meetings took place he was not fit to return part-time, or with a combination of light duties and part-time. While the claimant identified a number of adjustments at the hearing which he said would have avoided the substantial disadvantage. The Tribunal did not agree. Many were not raised during his employment by the claimant or the respondent and others were discussed and implemented or determined to be unhelpful during meetings.

79. The Tribunal concluded that the respondent did not fail in its duty to make reasonable adjustments.

Discrimination arising from disability

80. The Tribunal referred to section 15 of the EqA which provides protection from discrimination arising from disability. The first element of this claim is that the

claimant has to be treated unfavourably. The EHRC Employment Code states that this means that the disabled person must have been at a disadvantage. The threshold required to engage section 15 is relatively low.

81. The claimant says that he was treated unfavourably by being dismissed because of his sick absence which arose from his disability. The respondent accepted that the termination of the claimant's employment was unfavourable treatment and that the dismissal was because of the claimant's sick absence. The Tribunal was satisfied that the claimant was treated unfavourably because of something arising from his disability.

Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

82. The Tribunal asked whether the treatment was a proportionate and reasonably necessary way of achieving a legitimate aim. This entailed the Tribunal carrying out a balancing exercise between the reasonable needs of the employer and the effects of the treatment.

83. The respondent says that its legitimate aims were effective management of sick absence management, and service management due to the claimant's prolonged absence from the workplace which had an adverse impact on the respondent's service. The Tribunal did not understand the claimant to dispute that these were legitimate aims.

84. The Tribunal acknowledged that the claimant had two long term episodes of sick absence. In both episodes the claimant's absences were for over six months. The respondent had to reorganise the claimant's workload among colleagues. This was for periods of two to six weeks at a time (depending on the fit note) over a prolonged period. The claimant remained in the respondent's employee headcount.

85. Balanced against this was that the claimant was keen to return to work but was unable to do so until his condition improved. The claimant had undertaken supportive treatment. However despite an absence of six months

there was no indication from the claimant, or medical advisers that he was fit to do so.

86. The Tribunal was satisfied that the respondent attempted to engage with the claimant to explore other options. However the claimant was not able to return on reduced hours or lighter duties. Redeployment was considered but there was nothing suitable.

87. The Tribunal's impression was that the respondent considered that the claimant was an experienced, valued employee and was keen for him to return. There was no evidence the respondent had acted arbitrarily nor indeed was there any suggestion from the claimant that the respondent had acted differently or capriciously in his case as compared to anybody else's.

88. From the first absence in August 2023, the Tribunal considered that the respondent was expecting that the claimant would return to work and at the meeting the focus was on when that would be and how it could be facilitated. In the Tribunal's view the respondent's position changed on receipt of the February 2024 fit note as it covered until August 2024 and stated that the claimant would not benefit, from a phased return to work, altered hours, amended duties or workplace adaptations. The respondent met with the claimant and sought his views. The claimant did not indicate anything to the contrary.

89. By March 2024 the respondent's understanding was that the claimant wanted to return to work, but could not say when other than he hoped before August 2024. This would be an absence of a year. While the claimant was not being paid he remained part of the headcount and his work was being covered by colleagues. The Tribunal felt that the respondent's needs outweighed the impact on the claimant. The respondent's actions were proportionate.

90. The Tribunal felt that it was a proportionate means of achieving the legitimate aim as the claimant already had a significant absence and there was no return in the foreseeable future.

91. The Tribunal concluded that the application of the respondent's sick absence policy was proportionate and balanced the needs of the business with the claimant's personal situation. Accordingly the claim of discrimination arising from disability was dismissed.

Unfair dismissal

92. The Tribunal then turned to the unfair dismissal claim. The Tribunal referred to section 98 of the ERA. The onus is proof is on the respondent to show the reason for dismissal.

93. The respondent asserted that the reason for dismissal was the claimant's ill health capability. There was no alternative reason canvassed by the claimant. The decision to dismiss was taken by Mr Law. The Tribunal accepted that the reason to dismiss was potentially fair.

94. The Tribunal then went on to consider whether the respondent acted reasonably in dismissing the claimant for that reason. In terms of section 98 (4) of the ERA, this depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating ill health as sufficient reason for dismissing the employee and has to be determined in accordance with the equity and substantial merits of the case.

95. The relevant factors to be considered in ill health capability dismissals are:

a. the nature of the employee's illness;

b. the prospect of the employee returning to work and the likelihood of recurrence of the illness;

c. the need for the employer to have someone doing the work;

d. the effect on the absences on the rest of the workforce;

e. the extent to which the employee was made aware of the position; and

f. the employee's length of service.

96. There is no doubt that Mr Law had a genuine belief in the claimant being absent from work due to ill health. The claimant had pain in his lower back. Following a seven month absence the claimant had returned to work for six months and was absent again from August 2023 with no return to work in the foreseeable future.

97. The onus is on the respondent to take reasonable steps to ascertain the medical position. The respondent consulted with the claimant at welfare meetings (August 2023 and February 2024) and made an occupational health referral resulting in the January 2024 report. On receipt of the February 2024 fit note the claimant was invited to ill health capability meetings on 5 March 2024, 13 March 2024 and 22 March 2024. The claimant's views were sought on the medical evidence. Before the ill health capability meetings, the claimant was provided with invitations and the letters indicated that the outcome of any formal meetings may result in the termination of his employment. The respondent sought an up to date assessment of the claimant's health. There was no dispute that the claimant was not fit to return at that point. What was uncertain was the cause of the claimant's chronic back pain. The respondent concluded that the claimant was unfit to work in March 2024. The prognosis was an absence of a further six months.

98. The Tribunal considered that the test was whether the respondent's decision fell within the band of reasonable responses open to an employer on those particular circumstances in that business. While some employers may have asked the GP for a report, the Tribunal could not conclude that not doing so was out with the band of reasonable responses. While the claimant was unclear why the February 2024 fit note was for six months, this was the fit note that he gave to the respondent. It was understandable that the respondent accepted the February 2024 fit note to be the GP's assessment especially as the claimant did not say that this was an error or that was intending to return to work before then. The claimant was not fit to return to work before the termination of his employment or within the foreseeable future.

99. The procedure adopted by the respondent was fair. The Tribunal acknowledged that various notes of the meetings were not sent to the claimant for approval/agreement. Given that is the respondent's procedure in the Tribunal's view it was poor practice for them not to do so.

100. In relation to welfare meetings and return to work meetings, the notes were a contemporaneous record by management. The Tribunal considered that it was reasonable for a record to be kept of meetings albeit it they were informal and the claimant had no right to be accompanied. Even those meetings at which the claimant was entitled to be accompanied, he chose not to do so. The discussions at ill health capability meetings were narrated in the invitation letters. The letters also informed the claimant that there was a risk of his employment being terminated and the importance of providing any information that might be relevant.

101. The Tribunal felt that while some employers may decide that ill health capability meetings where dismissal is being considered should be undertaken by someone who has not been previously involved, the Tribunal could not say the respondent's decision for Mr Law to conduct the ill health capability meetings was not within the band of reasonable responses. In the Tribunal's view a line manager with the appropriate authority could be well placed to discuss the options, especially when there was a right of appeal to someone who was not previously involved in the process. This was the case here.

102. The Tribunal acknowledged that the claimant had a lengthy period of service. There was no doubt that Mr Law was aware of this. The claimant was given a payment in lieu of notice that reflected his length of service. The Tribunal considered that some employer's might have given the claimant 12 weeks' notice of termination rather than making a payment in lieu. Again the Tribunal could not say that the respondent did not act within the band of reasonable responses. The claimant remained in the headcount until his employment was terminated. The claimant was offered a right of appeal. Had the claimant updated or other relevant medical or other information he could have

presented this at the appeal hearing. While the claimant appealed he withdrew his appeal before the appeal hearing.

103. The Tribunal concluded that considering all the factors the claimant's dismissal was fair.

Unlawful deduction from wages

104. The claimant claims that he was not paid his accrued holiday entitlement on termination. The claimant's final pay slip refers to payment of 45 days annual leave. The Tribunal did not understand from the evidence the basis upon which this was calculated.

105. The Tribunal was unable to make findings about what if any holidays the clamant took when he returned to work in January 2023, or during his period of sick absence from August 2023 and if he took any annual leave while on long term sick absence.

106. From the claimant's contract of employment he was not entitled to carry forward holidays from one year to the next. In relation to statutory holiday entitlement accrued during sickness, the claimant's contract of employment may be superseded by legislation.

107. The contract of employment also states that the claimant was entitled to accrue holidays until he is paid his PILON. For the holiday year 2024, this did not happen until 19 April 2024. In his evidence the claimant said he was paid the holiday pay to which he was entitled.

108. Given that subsequent payments were made by the respondent in July 2024 about which there is an employee counter claim, the Tribunal decided not to dismiss the unlawful deduction from wages claim at the stage.

Date sent to parties **23 May 2025**