EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104464/2023

Held in Glasgow on 4 – 7 March 2024
Deliberations on 12, 13 14 March and 2 April 2024

Employment Judge D Hoey
Members Mr I Ashraf and Mr J Gallacher

Mr J Reid	**Claimant** **Represented by:** **Mr P Deans -** **Solicitor**
Network Rail Infrastructure Ltd	**Respondent** **Represented by:** **Mr D James -** **Counsel** **[Instructed by:** **Messrs Dentons]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed pursuant to section 98 of the Employment Right Act 1996. He is awarded a basic award of £16,845 (**sixteen thousand eight hundred and forty five pounds**). No compensatory award is made to avoid double recovery, compensation being awarded in respect of the unlawful discrimination complaint. Recoupment does not accordingly apply.

2. The claimant's dismissal was a breach of section 15 of the Equality Act 2010, the claimant having been treated unfavourably because of something arising in consequence of a disability and the treatment not having been shown to be a proportionate means of achieving a legitimate aim.

3. He is awarded compensation in the sum of £31,829.76 (**thirty one thousand eight hundred and twenty nine pounds and seventy six pence**) (including injury to feelings: £7,500, Interest on injury to feelings: £601.64, net wage loss: £10,540.62, interest on net wage loss: £703.32, pension loss: £11,975 and interest: £509.18).

4. The claim in respect of unlawful deduction of wages is dismissed, the sum sought not being wages in terms of section 13 of the Employment Rights Act 1996.

REASONS

1. The claimant raised complaints for unlawful disability discrimination, unfair dismissal and unlawful deduction of wages. The respondent disputed the claims. Matters had been focussed at an earlier preliminary hearing.

2. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality. It was also explained that the Tribunal makes a decision in respect of the issues before it and only from the evidence led, whether by agreement or that led.

Case management

3. The parties had worked together to focus the issues in this case and that continued until the submissions stage for which the Tribunal was grateful. It has helped the Tribunal to ensure the issues it required to determine in light of the complaints before it were carefully and precisely focussed. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time.

Issues to be determined

4. The issues to be determined were discussed in detail and became clearer as the Hearing progressed. The claim, as pled, included one claim pursuant to

section 15 of the Equality Act 2010. At the submissions stage the claimant sought to amend a further claim but this was withdrawn and the focus was in respect of the claims pled.

5. The parties had also agreed a significant amount of evidence, including sums in respect of wage loss and pension loss, which assisted the Tribunal.

6. The issues to be determined were agreed to be as follows.

Discrimination arising from disability

a. The claimant alleges the respondent treated him unfavourably by dismissing him. Was the dismissal unfavourable treatment?

b. It is agreed that the claimant's inability to carry out his substantive role, and concomitant sickness absence, arose in consequence of his disability. Those factors operated to a significant extent on the mind of the respondent when making the decision to dismiss.

c. Was the claimant's dismissal a means of achieving a legitimate aim, namely ensuring that the respondent is not required to pay staff full pay for long periods of time when there are little prospects of them returning to their role, adjustments made to their role do not allow the employee to return to their role, there are no suitable alternative roles, and/or employees, such as the claimant, do not accept suitable alternative role offers as this is not sustainable for the respondent?

d. If so, was the respondent's treatment of the claimant a proportionate means of achieving that legitimate aim? The claimant alleges not, based on the following arguments (the factual foundations of which are materially disputed by the respondent):

i. The respondent failed to follow its Stood Off policy.

ii. The respondent failed to redeploy the claimant to the Stores position.

Unfair dismissal

e. It is agreed that the reason or principal reason for the claimant's dismissal was capability within the meaning of section 98(2)(a) of the Employment Rights Act 1996.

f. Did the respondent act reasonably in treating that reason as sufficient for dismissing the claimant?

g. Was the claimant's dismissal fair within the meaning of section 98(4)? The claimant alleges not, relying on the following arguments (the factual foundations of which are materially disputed by the respondent):

   i. Suitable alternative employment had been identified for the claimant which the respondent unreasonably failed to consider him for.

   ii. The respondent unreasonably failed to permit the claimant a trial period in the Stores role.

   iii. The respondent failed to follow its contractual Stood Off policy which would have entitled the claimant to be Stood Off with pay for a period of up to two years before being dismissed.

   iv. The respondent unreasonably failed to consider the claimant for any other alternative employment.

   v. The respondent failed to properly consider the claimant's long service with the respondent.

   vi. The respondent failed to allow the claimant to exercise his right to appeal within a reasonable timeframe.

Unlawful deductions from wages

h. Were the respondent's 'Stood Off' provisions wages which were properly payable to the claimant?

i. Did the respondent make unauthorised deductions from the claimant's wages by failing to stand him off under its 'Stood Off' provisions? If so, how much was unlawfully deducted?

j. If there was a series of deductions, was the series broken by the Claimant receiving the correct wages? If so, when?

Remedy

Discrimination

k. What financial loss, if any, has the claimant suffered as a result of any alleged unlawful discrimination, if found?

l. What award, if any, should be made for injury to feelings?

m. Did the claimant and the respondent comply with the ACAS Code of Practice on discipline and grievance?

n. If not, was such failure to follow the Code reasonable in all the circumstances?

o. If not, would it be just and equitable for the Tribunal to increase or decrease any award?

Evidence

7. The parties had produced a joint bundle of 265 pages.

8. The Tribunal heard from the claimant, his trade union representative, one of the dismissing officers (Ms O'Donnell), Mr O'Connor (who was responsible for stores) and Mr McConnell (the appeal officer). The witnesses each gave oral evidence and were cross examined and asked further relevant questions.

Facts

9. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence

led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time.

Background

10. The respondent owns, repairs and develops the railway infrastructure in Scotland, England and Wales. It is a large employer with a substantial HR support function. A large part of the workforce is represented by a trade union which had entered into agreements with the respondent.

11. The claimant was employed from August 1984 until his dismissal effective 14 March 2023.

12. The claimant's original role was team leader for track inspection which involved him walking on uneven surfaces and inspecting track. As part of that role the claimant used an ipad and iphone and apps to deal with work requests.

The team

13. The claimant worked in a team with a line manager who was supported by Ms O'Donnell, an HR Business Partner who commenced employment with the respondent in 2019. Ms O'Donnell's line manager was Ms Robinson, senior HR Business Partner whose line manager was Ms Tenant, Head of HR.

The contractual matrix

14. The claimant was subject to the respondent's standard terms of employment. The contract was supplemented by policy documents and collective agreements, there being a recognised trade union in respect of the constituency of which the claimant's role formed part.

15. One of the relevant policy documents was the **ill health severance policy** which can result in a payment (ill health severance) where an employee is not fit for their role and there is no suitable alternative work. The policy sets out the process that should be followed where ill health severance is being

considered. HR approval is required and once obtained an initial discussion should take place with the employee. A second meeting should then be convened to confirm the position.

16. Another key entitlement that exists in the respondent's employment are the "**Stood Off Provisions**". The parties agreed that the relevant position in terms of Stood Off Provisions (which are contractual in nature) is discerned from the letter of 12 June 2019 from the respondent to the trade union entitled 'Interpretation of Stood Off Provisions'. The following was agreed to be the contractual position.

    a. Employees with permanent medical conditions that prevent them from performing their current role should be accommodated with reasonable adjustments.

    b. Permanent adjustments should be made where possible and the occupational health report should be given precedence to a GP report.

    c. Following receipt of an occupational health report a welfare meeting should be arranged in which suitable alternative roles are identified based on employee restrictions, obligations under Equality Act 2010, the underlying principle that every possible endeavour will be made to accommodate the employee in suitable alternative work, taking account of skills, knowledge, experience and training.

    d. If there is a disagreement at the welfare meeting as to whether any suitable alternatives exist or not, this will be escalated to a meeting with a more senior manager and more senior union representative for resolution. That could include referring proposed roles to occupational health for assessment as to whether the roles are within the physical restriction of the individual (if not already detailed in a previous report).

    e. Where every possible endeavour has been made by the company and employee to identify suitable alternative roles but no such roles are identified, the employee will leave with contractual notice and ill health severance.

f. If a suitable alternative role is identified that is vacant the employee shall be placed into the role.

g. If the suitable alternative role is not vacant, the employee will be Stood Off for up to 2 years with basic pay.

h. If an employee is not accommodated during the 2 year, period notice will be serviced to coincide with the end of the period. Ill health severance will be paid at the end of the notice period.

i. If any employee declines the offer of a suitable alternative role or expresses a desire to leave, they shall leave the company will ill health severance.

Claimant's absence from work

17. The respondent had made adjustments to the claimant's role to help alleviate the effect of his condition on his ability to carry out his role but the claimant was absent from work from February 2022 until his dismissal by reason of his capability. He was incapable of carrying out his substantive role.

Occupational health report in August 2018

18. The claimant attended Occupational Health on 19 August 2018 which was conducted by a occupational health adviser over the telephone. The claimant had "issues affecting his left knee" and there had been wear and tear of the joint. He experienced pain when walking up stairs and when sitting for long periods. A gradual return to work was thought feasible.

Application for voluntary severance

19. In the Summer/Autumn of 2022 the respondent asked for those employees who wished to leave the business in terms of the voluntary severance scheme to apply. The claimant applied for voluntary severance in the course of Summer/Autumn 2022. Had he been successful in his application, he would have left the respondent's employment (aged 60) and received a payment that would be significantly greater than the sum that would be paid if he left by way of ill health severance.

Occupational health report of 12 May 2022

20. A report was prepared by an occupational health advisor following a discussion on the telephone with the claimant. The claimant had issues with his foot, ankle, knees, hips and hands. Pain in his ankle, knees and hips had worsened. He had osteoarthritis but the pain had lessened and he was hoping for a return to work. It was not clear if the claimant would be able to return to his current duties. He was unable to work or sit for lengthy periods of time. A planned phased return to work was recommended. There was a risk of further absence if the pain and discomfort worsened.

Occupational health report of 9 August 2022

21. On 9 August 2022 the claimant had a face to face consultation with an occupational health specialist. The report noted that the claimant had been absent from work since February 2022 with musculoskeletal problems. The pain and stiffness had worsened and he could not carry out his role, which involved patrolling tracks and walking on ballast for prolonged periods. The claimant had wear and tear and osteoarthritis in his joints which meant he was unable to squat, bend or walk on uneven ground and struggled to use stairs. He also had issues with his hands and fingers.

22. The occupational health report stated that the claimant was unfit for his role and was unlikely to be able to work for any length of time on ballast or uneven ground. He may be able to undertake lighter and more sedentary duties. His joint condition is chronic and a gradual deterioration was expected. While medication may manage the condition, he was unlikely to be able to resume fitness for physically demanding roles.

23. The claimant was deemed no longer fit to carry out his substantive role and the claimant was a disabled person in terms of the Equality Act 2010.

Ms O'Donnell begins to manage the claimant and his absence

24. From around August/September 2022 Ms O'Donnell, HR Business Partner began to work with the claimant and his line manager in relation to securing a return to work in some capacity for the claimant.

25. Ms O'Donnell met with the claimant around late August/September 2022. Ms O'Donnell had reviewed the occupational health reports and current position. She wished to explore alternative roles with the claimant. Ms O'Donnell had identified other vacancies at the time, namely technical clerk and section admin roles. The claimant said he wanted to explore a stores role which he believed he could do.

26. While it was Ms O'Donnell's view that there were 2 alternative roles which were suitable for the claimant, technical clerk and section admin which would be office based and available for an immediate start. it was agreed that an occupational health referral be made in respect of the stores role.

27. The claimant had was interested in the stores role and believed that he could do it. Ms O'Donnell said she would consider the role and it was agreed to seek an occupational health report in relation to the stores role.

Occupational health report of 12 September 2022

28. Following a telephone assessment by occupational health, a further report was issued on 12 September 2022. The occupational health assessor considered a previous doctor's assessment and a job description that had been provided. The arthritis was unlikely to improve although it may not inexorably progress. There were no restrictions on activity that would arise medically as a result of the condition and the view was taken that the claimant was free to engage in any task he finds to be within his capabilities. The only way to find out was with "cautious trial".

29. The claimant had noted that his substantive role was "beyond him". There was no harm in trying the Stores role notwithstanding the activity and manual handling involved. The worst that could happen would be that the claimant would not be able to carry out the role. It may well be uncomfortable for the claimant to carry out but that may not differ from being at home. A fair degree of dynamic activity was preferable to being completely sedentary.

30. There was no guarantee of success or failure and a trial in the role would identify any issues as manual handling required to be within the comfortable

capabilities of the operator. No issues arose operating fork lift trucks and prolonged walking at various times would be helpful (in contrast to being totally sedentary).

September 2022 welfare meeting

31. In September 2022, a meeting took place at which Ms O'Donnell, the claimant, and Mr Malone were present. Ms O'Donnell had reviewed the occupational health reports and current position. She wished to progress the discussion given the information in her possession and the previous discussion.

32. It remained Ms O'Donnell's view that there were 2 alternative roles which were suitable for the claimant, namely technical clerk and section admin. Ms O'Donnell wanted to explore these roles with the claimant.

33. Ms O'Donnell had information about these roles and wished to explore them with the claimant as they appeared to her to involve tasks the claimant could undertake which she believed contrasted with the stores role which she believed involved manual handling beyond the capabilities of the claimant.

34. The claimant's focus, however, was in relation to the "stores role". He believed the occupational health report supported his position that he could do the role.

35. At that time there were no stores roles that were vacant or likely to be vacant within 2 years (which was not relevant for the purposes of the Stood Off Provisions). Ms O'Donnell said she would consider the role although she believed the claimant would not be fit to carry out the stores roles given the manual work she believed the stores role required.

December 2022 welfare meeting

36. By letter dated 17 November 2022 the claimant was invited to a welfare meeting to discuss his ongoing absence and medical condition and the occupational health provider's report. The meeting was to ensure the

respondent considered “ways to support the claimant which are reasonably balanced against the needs of the business”.

37. The claimant attended the meeting on 8 December 2022. Ms O’Donnell was of the view that the technical clerk and section admin roles were available for the claimant. The claimant explained that he was not “tech savvy” and “not great” with computers. It was his preference to work in stores. Ms O’Donnell explained that the respondent was able to offer college training to support staff in IT skills to equip the claimant with the skills necessary. The claimant explained that he wanted to work in stores.

38. The claimant did not want to undertake the roles Ms O’Donnell had identified as he wanted to focus on the stores roles. His position had not changed. Ms O’Donnell understood that the claimant had rejected the other roles she had identified. The claimant’s sole focus was in relation to the stores role which he believed he could do (and the claimant did not believe he had rejected any other roles as at that stage he was only pursuing the stores role).

39. Ms O'Donnell explained that in the absence of alternatives, the next step would be consider ill health severance and she had obtained figures which she gave to the claimant to take away.

Claimant raises concerns and an explanation is given

40. On 9 December 2022 the claimant’s union representative sent an email to Ms O’Donnell, copied to Mr Smith, a more senior union representative. Concern was expressed that a decision had been made the claimant could not take up the “post that was identified” in (and supported by) the occupational health report. The representative was asking for the documents supporting how that decision was made which was believed to be “outside the correct process”.

41. The more senior trade union representative to whom the email was copied sent an email the following day to Ms O’Donnell and the claimant’s union representative expressing surprise. He asked for confirmation that there was an occupational health report with recommendations but someone had made a decision to seek another opinion that recommends another course of action.

42. On 12 December 2022 Ms O'Donnell replied to the claimant's representative and more senior union representative explaining the position noting there were 2 occupational health reports which suggested the claimant's health was such he could not squat, bend or walk and struggled to use stairs with deteriorating pain and stiffness such that he could not walk for significant periods of time nor stand or sit. That, according to Ms O'Donnell, precluded the claimant from carrying out a stores role which she said involved manual handling, lifting, bending, operating machinery and heavy lifting which would not be a suitable alternative role since it placed the claimant at risk of pain.

43. Ms O'Donnell noted the most recent report said the claimant would be at risk of pain and she had sought clarification of the position. She concluded by saying "we offered to explore admin roles and this was rejected due to not being tech savvy so even outwith the physical aspects of the stores role there is also a lot of computer work with the role that has been deemed by the employee and rep as unsuitable".

44. Ms O'Donnell's line manager had seen the email. The Head of HR stated on 13 December 2022 that she stood by Ms O'Donnell's decision and would speak with the more senior trade union official about the matter. A discussion was said to have taken between Ms Robinson and the senior trade union official. It is not known what was discussed.

Ill health severance approval

45. On 26 January 2023 Ms O'Donnell had a discussion with the Head of HR about the claimant's position noting adjustments had been made to his substantive role but the claimant could no longer carry out that role. The claimant had osteoarthritis and was unable to walk for significant periods nor stand or sit for long periods as his joints stiffened. Ms O'Donnell noted the claimant was unfit for his current role and she had met him to discuss other posts as there was a vacant Technical Clerk role. She said the claimant had "refused this as a suitable alternative".

46. Ms O'Donnell stated that the stores role would be unsuitable because the role involved manual handling, lifting, bending and working machinery and lifting

heavy infrastructure. The most recent occupational health report had said there would be pain and she had sought clarification. She said she "offered to explore admin roles and this was rejected due to not being tech savvy so even out with the physical aspects of the stores role there is a lot of computer work with the role and that has been deemed by the employee and rep as unsuitable". There had been 2 further meetings with the claimant and no alternatives were identified and so she had advised that ill health severance would be considered. Ms O'Donnell asked the Head of HR to approve that.

47. On 27 February 2023, the Head of HR approved ill health severance stating "given the restrictions due to his health conditions and his refusal to consider/work in administrative roles, this is the only alternative. There are no other reasonable adjustments that have been identified".

Stores role

48. On 7 February 2023 Ms O'Donnell asked Mr O'Connor (Logistics Co-ordinator) to provide detail on the stores coordinator and stores controller roles (which were the stores roles she understood the claimant had been interested in). He replied advising that the stores controller role involved little ladder work, "quite a bit" of manual labour as the main duties are putting materials away, some work could be done while seated, the work needed IT system work and if the post holder did not want to learn IT work the role could not be done.

49. With regard to the stores coordinator role, the work involved little ladder work, manual labour could be delegated to another, a considerable amount could be done while seated, and a large part of the role required use of IT systems without which the work could not be done.

Ms O'Donnell seeks clarification

50. Ms O'Donnell found the December 2022 occupational health report in relation to the stores role to be confusing as it appeared to suggest the claimant might be capable of doing a role that she considered involved manual handling which she believed conflicted with previous occupational health reports and

her knowledge of the role. She had asked that the clinical operation lead of the occupational health provider (Ms McGowan) to re-consider the position given her view as to the conflict.

51. A response was received on 7 February 2023. Ms O'Donnell had noted that previous reports appeared to suggest the claimant would be unable to carry out the stores role which would involve manual handling, bending, working with machinery and lifting heavy infrastructure material. Ms McGowan stated that it is rare to declare that someone could not do a task just from symptoms alone. It was considered a "described limitation" not a medically imposed restriction.

52. The issue for Ms O'Donnell had been that the report had noted the claimant would be in pain at home or at work so he may as well try the role. Ms McGowan noted that it is impossible to predict what someone cannot do and often it is only by trying something that the restrictions are identified. It was noted that clinical examinations are not good at predicting functions and the employee's opinion is not a clinical opinion. Ultimately it was a decision for a management.

Salary paid until end of employment

53. Up until the end of the claimant's employment he was being paid his full pay.

March 2023 welfare meeting

54. The claimant attended a further welfare meeting on 2 March 2023 with his trade union representative at which the claimant's line manager and Ms O'Donnell were present.

55. The purpose of the meeting was to follow up from the last meeting. Ms O'Donnell explained that there had been no other vacancies arising and that ill health severance appeared to be the only option. The claimant had been given details about the payments he would receive and had been told at the last meeting severance would be considered unless alternatives had been identified.

56. The claimant and his trade union representative were unhappy that the decision had been taken. They often interrupted Ms O'Donnell when she was explaining the position. Ms O'Donnell answered the claimant's question if he was being paid off due to ill health affirmatively. She said that the claimant had been offered an admin role but he had not been interested in that type of work.

57. The claimant's trade union representative said the claimant did not agree with the decision and Ms O'Donnell explained the previous occupational health reports and vacancies that existed. She also noted that the stores role involved heavy lifting and manual labour. She said that a discussion had taken place with head of stores and a work place assessment had been carried out and the respondent was not willing to put the claimant into a role that could cause further pain or exacerbate his condition. She explained that the risk was too great and there were no options remaining.

58. The claimant's trade union representative emphasised that the last report suggested the stores role could be considered, to which Ms O'Donnell said there was still a risk of pain and the claimant had not been interested in IT and admin roles. Ms O'Donnell reiterated the risk of the claimant finding the stores role too difficult given his health condition was too high for the respondent.

59. The claimant was advised of his dismissal which was by reason of capability and that he could appeal.

60. The claimant's inability to carry out his substantive role, and concomitant sickness absence, arose in consequence of his disability. Those factors operated to a significant extent on the mind of the respondent when making the decision to dismiss.

Appeal against dismissal

61. By email of 9 March 2023, the claimant appealed against the decision to dismiss him saying he did not agree with the decision that was made, feeling

it was unfair, not correct and that his terms and conditions were ignored and that elements of the process were discriminatory towards him.

Formal letter of dismissal

62. By letter of 10 March 2023 the respondent formally notified the claimant of his dismissal, together with his right to appeal. The letter confirmed that after careful consideration regarding the claimant's absence due to ill health, his employment was being terminated due to capability. That decision had been taken following receipt of the occupational health reports and given there had been no suitable alternative work.

63. The claimant was paid a lump sum "ill health severance payment" of £30,111.18 together with pay in lieu of notice and accrued holidays. He was advised of his right to appeal.

Further communications as to stores role

64. On 21 March 2023 Ms O'Donnell made further enquiries into the stores role asking those in the role how much manual handling is involved and how the work could be undertaken in light of the IT position. She was advised that "the role is predominately based on receiving and handling supplies and picking and packing". The role is carried out by a small team and it was not possible to delegate the work. Only a small part of the work could be done seated and IT competence was essential.

65. On 4 April 2023 Ms O'Donnell asked how much manual handling was needed and how much could be done seated. She was advised that not much of the work was done seated, usually the IT work. Ms O'Donnell explained that she was preparing for the claimant's appeal. The claimant had identified the role as a suitable alternative but it had been declined due to her belief that the role involved a lot of heavy lifting and manual handling. She explained that the information would be reviewed by the senior occupational health manager.

Internal case review

66. On 11 April 2023 Ms O'Donnell provided Ms McKinlay (Senior Occupational Health and Wellbeing Specialist) with a document entitled 'Case review'. This was a document that was intended to set out the position to assist with consideration of the claimant's appeal. Ms O'Donnell explained that as the claimant was unable to carry out a physically demanding role and said he was unwilling to work with any IT or admin related roles, she did not agree the stores role was a suitable alternative. She set out the background as above.

67. Ms O'Donnell noted that having reviewed all the background material she did not consider the stores role to be a suitable alternative as it was physically demanding which occupational health had said should be avoided. The only parts of the role that were not physically demanding were the IT and admin work which the claimant had confirmed he was unwilling to do.

68. Ms O'Donnell noted that at the December 2022 meeting, the claimant had wanted only to engage once the voluntary severance process had been completed which had delayed the fixing of the welfare meetings. She said that at the March welfare meeting she had gone through all the information and reports. The claimant had confirmed he would not carry out admin or IT work and the claimant was not willing to look at other roles.

69. On 28 April 2023 Ms McKinlay replied to Ms O'Donnell. She stated that the most recent occupational health report had to be respected. She understood the claimant was unfit for his substantive role and said that more information was needed to reach a concluded view. She asked whether the absence of IT skills could be dealt with and what the manual handling actually involved.

70. Ms McKinley had brought the information together in a document entitled "RAG status for roles". That was a table of red, amber and green assessment of the stores coordinator and stores controller roles.

Claimant seeks copies of minutes

71. On 29 May 2023 the claimant sent an email to the respondent noting that he had no reply to his appeal and asked that the minutes of the welfare meetings be sent to him.

72. On 6 June 2023, the claimant emailed the respondent asking again about the appeal and the minutes.

Minutes provided with confirmation the claimant did not wish admin work

73. On 6 June 2023, the respondent provided minutes of the meetings and provided an update regarding the appeal stating that an appeal manager would be appointed and the claimant should set out his grounds of appeal.

74. In the email of 6 June 2023 Ms Robinson advised the claimant that it was her understanding that the claimant was unable to do track work. He did not want to do admin work and the stores role was ruled out as it involved manual handling.

Clarifying the position as to appeal

75. On 6 June 2023 the claimant resent his email of March as to his appeal. The claimant's appeal was that his terms and conditions had been ignored, which included the Stood Off Provisions.

76. On 4 July 2023 the respondent confirmed that the claimant's appeal would be heard and on 10 July 2023 Ms O'Donnell emailed Ms Colville as appeal hearing manager regarding the claimant's appeal. Ms Colville was then replaced by Mr McConnell due to capacity issues. Mr McConnell was given the background information to consider.

77. One of the contributing factors for the delay was the claimant's appeal against the respondent's decision not to give him voluntary severance but the Tribunal had no information as to when this appeal was dealt with. The claimant's appeal against the decision not to award him voluntary severance was unsuccessful. There was no communication by the respondent explaining why the appeal was delayed.

Further consideration of stores role

78. On 21 September 2023 Ms O'Donnell contacted the stores manager to ask further details about the stores roles. She wanted to know about manual handling and IT work and more information about the role and wanted to

arrange a walk around with her and the senior occupational health adviser. She was told that the stores controller has limited computer work while the stores coordinator work is mostly done at the computer. The stores controller work is spent mostly on the floor moving around with the other role more sedentary.

79. Ms O'Donnell noted that it would be good to see the role and acquire a better understanding. She needed to ensure she understood the role as she was dealing with HR issues in relation to it. She asked if the coordinator role was primarily admin based and not walking around which was said to be correct. The stores controller role was not light duties and mostly done on foot.

80. Ms O'Donnell attended the store on 5 October 2023 and had a walk around and spoke with those undertaking the role. Her walk around supported her view as to the level of manual handling involved in the role.

Appeal hearing

81. The claimant attended an appeal hearing on 17 October 2023, together with his union representative, Mr Malone, chaired by Mr McConnell (Project Manager) supported by another HR business partner.

82. Prior to the meeting Mr McConnell had telephoned the claimant to make sure he had all the papers and the claimant confirmed he had all the necessary papers.

83. The meeting began by noting the purpose of the appeal was to consider the 2 grounds of appeal.

84. With regard to the **first ground of appeal** the claimant said he had not been given a trial for the stores role. The claimant's union representative said the stores role had been identified by the claimant and he felt he could do the role. An occupational health report had been obtained in relation to the stores role but the claimant felt ignored as they had focused on other occupational health reports. He felt there was nowhere that said he could not do a stores role.

85. It was noted that the role had involved heavy lifting and manual handling and HR had spoken with the head of stores and a risk assessment had been carried out. The respondent had not been willing to put the claimant into a role that could cause further pain. The claimant said it appeared the last occupational health report was being overruled. The lack of a trial was the issue.

86. The claimant was asked if his preference was the stores role not an admin role as he did not think it was suitable as it was sitting and IT based. The claimant agreed saying he would need training on IT.

87. The claimant was unhappy that matters had not been progressed. It was explained that the claimant was unfit to do his substantive role and no alternative had been identified that the claimant wished to undertake that was considered suitable. As the claimant had identified the stores role, the occupational health report had been obtained. It was considered a physically demanding role. The appeal officer said an admin role had been offered but the claimant did not want this and did not have or want to learn the IT skills which the stores role required.

88. The claimant's union representative stated that the claimant did not say he would not want the admin role. The appeal officer did not ask the claimant whether or not he would undertake any of the admin roles.

89. The claimant argued the matter ought to have been escalated and there should have been a meeting with Ms Robinson and a more senior union representative.

90. The claimant's union representative stated that the claimant 'should have been stood off', as he met the conditions and Stand Off "was in the process and was not used". The Appeal Manager stated that there were suitable alternative roles available based on his skills and experience which he had declined. The claimant disagreed. It was also noted by the claimant that "the process was not completed properly, which could be discriminatory". It was asserted that the claimant should have been stood off and the appeal officer was challenged for a second time that the provisions of Stand Off applied

even in the absence of a vacancy. The union representative pointed out that the claimant was the only one to have been dismissed in these circumstances and this had never happened before.

91. With regard to the **second ground of appeal**, when asked what parts of the process the claimant considered to be discriminatory, he said someone else in a similar position to him had secured voluntary severance but he had not. It was said that the process was not being escalated and that was discrimination.

Post appeal consideration

92. On 17 October 2023 Mr McConnell considered matters and sought information from his colleagues in relation to issues arising during the appeal. He considered each of the issues the claimant had raised and assessed each of the issues in reaching his decision.

Appeal outcome

93. By letter of 14 November 2023 the claimant was informed of the reasons that his appeal was not upheld. The outcome letter noted that prior to making the decision a detailed amount of evidence had been considered which included the points made at the appeal hearing, the dismissal letter, occupational health reports, welfare meeting notes, issues as to the stores role and related policies and procedures. He also noted that he had asked Ms Robinson to consider whether or not the stood off process map had been followed. He also explained he had spoken to Ms O'Donnell who had visited the stores.

94. He had reviewed the evidence and decided not to uphold the appeal. He concluded the original decision was supported by occupational health that the claimant was not fit for his substantive role and there were limitations on what the claimant could do, such as bending, lifting and carrying materials.

95. Mr McConnell was satisfied alternative roles were considered and due to the claimant's limited capabilities including IT proficiency and risk to his health, neither stores roles would be suitable and would cause further detriment to his health.

96. He was satisfied the stood off process was followed, including considering alternative roles and the matter being escalated due to non agreement. He believed the claimant did not satisfy the conditions for being stood off.

97. He did not believe the claimant met the conditions for stood off because the stores role was not suitable due to the physical requirements and the claimant's health, the claimant had rejected the offer to explore administrative roles and he had rejected suitable alternative employment offered – the technical clerk role.

98. He concluded that for claimant was dismissed in accordance with the ill health severance policy.

99. Finally it was noted that the claimant said he had been discriminated against because he was not stood off and another employee in the same position got voluntary redundancy. No evidence of discrimination was found.

100. In reaching the decision, Mr McConnell considered each of the points the claimant raised. He did not consider the claimant's length of service as material to any of the grounds of appeal, which had not been raised by the claimant.

101. The appeal was accordingly dismissed.

Facts relevant to remedy

102. As a result of the dismissal the claimant was upset and his confidence was dented. He had not been out of work for 38 years. This had an impact upon his sleep. The Tribunal process had also an impact upon him.

103. Had the respondent followed the terms of the Stood Off Provisions, the claimant would have been offered the admin roles. He would have accepted those roles and remained in employment (at his current pay level).

104. The Tribunal considered it virtually certain the claimant will secure comparable employment (with the same rate of pay and comparable benefits) within 18 months of the date of his dismissal.

105. The claimant's gross weekly pay was £604.15. His net weekly pay was £482.31. A 9% pay increase was applied by the respondent from 22 March 2023. Had the claimant not been dismissed, his net weekly pay would have increased to £525.

106. The claimant has been in receipt of fortnightly payments of £169.60 in respect of Employment Support Allowance. He began receiving those payments from around the time of his dismissal.

107. The claimant has been in receipt of monthly pension payments of £633 since September 2023 (which arise from the claimant's pension which he drew down). These payments will continue.

108. The claimant received £30,111.18 in respect of ill health severance. He was also paid in lieu of his notice (a sum amounting to £7,226.68) and the sum of £4,938.23 in respect of accrued annual leave.

109. If the claimant had worked for 1 further year, his pension loss would be £7,040. Had he worked for 2 further years his pension loss would be £13,620.

110. The parties agreed a basic award would amount to £16,845.

Observations on the evidence

111. The Tribunal found each of the witnesses generally to be credible. They did their best to recollect the position.

112. **Ms O'Donnell** was able to assist the Tribunal with her oral evidence but on occasion the absence of written correspondence of material matters had a significant impact upon her evidence. The Tribunal found it surprising that some matters had not been properly set out in writing, such as the offer of alternative roles to the claimant or proper minutes of meetings. As these had not been set out or provided to the claimant at the time, there were a number of difficulties in assessing the position.

113. Ms O'Donnell was clear in her approach as to alternative roles and her evidence was consistent with the contemporaneous documents. This included Ms O'Donnell's belief that she discussed the admin roles for the

claimant which she believed the claimant refused. Unfortunately while that was her firm belief, as the matter had not been fully set out in writing, there had been dissensus. Ms O'Donnell genuinely believed the claimant had refused the admin role but the Tribunal considered that on the balance of probability the claimant had simply not applied his mind to those vacancies as he was singularly focused on the stores role. It was more likely than not that his only concern at that stage was in relation to the stores role which he believed was a role for which he was suitable (and in fact he had not refused those roles). Given Ms O'Donnell had agreed to obtain a medical report in relation to the stores role (which the claimant was adamant was suitable for him) and given that medical report had suggested a trial period be undertaken, the claimant was only concerned with that role and had not in fact ruled out other roles (since for him the other roles would only be relevant once the stores role had been exhausted).

114. Had the offer of the other roles been properly set out in writing, with the full details as to each role (including details of tasks, location etc) with the claimant having been formally offered the role (or the belief that the roles had been formally declined) the position may well have been different. Such an approach was important given the context of such an offer, in light of the Stood Off provisions. While there is no requirement for written confirmation, such confirmation would have put the matter beyond doubt and given the importance of such offers (as they could potentially result in the claimant not being entitled to the Stood Off provisions) it was essential the matter was clear and the position set out beyond doubt.

115. Similarly Ms O'Donnell explained that the reason for the delayed appeal hearing was because the claimant had wanted to exhaust his application for voluntary severance. This was denied by the claimant. There was no evidence at all of the timing of the determination of the appeal and while Ms O'Donnell believed the lengthy delay in hearing the claimant's appeal was due to the appeal process, the Tribunal considered that it was more likely than not that the respondent had not expedited his appeal against his dismissal and the voluntary severance process had played a factor in the delay but that the

respondent had not heard the appeal within a reasonable period. The Tribunal would have expected an employer of the size of the respondent to have set out the position in writing and to have explained why there was a delay. No such correspondence had been issued.

116. **Mr O'Connor** set out the position in relation to the stores which the Tribunal accepted. This was the information Ms O'Donnell had obtained prior to the confirmation of the dismissal and was the information the respondent had in reaching its decision. Mr O'Connor had indicated that there were examples of workers being trained on the IT systems. The role was not solely manual work. There was also evidence that work could be done with assistance of mechanical devices.

117. **Mr McConnell** was unable to recall precisely what had occurred during the appeal meeting which was in some part due to the time that had passed. Mr McConnell found no merit in the appeal points, having assessed the points the claimant raised. He did not, however, consider the Stood Off Provisions afresh. That was surprising given the claimant and his union representative had made it clear that they believed the Stood Off Provisions applied and had not been followed properly. A key consideration as to the applicability of the Stood Off Provisions was whether or not the claimant was refusing an offer of suitable alternative employment. The claimant's position at the appeal hearing was not clarified in relation to those roles and Mr McConnell assumed the position was as Ms O'Donnell had set out. However, the claimant had made it clear that the minute of the dismissal meeting was disputed. Consequently in fact the position was unclear. Regrettably it was assumed that the claimant had refused the admin roles when, as set out above, that was not likely to have been the case and the matter was not properly explored. The Stood Off Provisions were not being properly considered.

118. That was a significant point since if the claimant had confirmed that he rejected the offer in respect of the admin roles, he would not be entitled to the Stood Off Provisions. However, if he had not rejected such offers, the Stood Off Provisions were engaged (and the stores role could have been relevant,

even if not an actual vacancy). The failure to properly assess the position given the Stood Off Provisions was a material failing.

119. **The claimant** did his best to assist the Tribunal. In some respects he had agreed with his agent as to certain matters in examination in chief which were incorrect and he subsequently changed his position when asked about certain matters during cross examination. For example, he initially said the admin role had not been discussed and then conceded it had. The claimant genuinely believed the stores role was a role he could do and as a result became singularly focused on that role to the extent he had not been in a position to properly consider other roles. Given Ms O'Donnell had agreed to obtain an occupational health report in relation to the stores role, and given the report had said a trial role was not likely to cause any real difficulty, it was not surprising the claimant maintained his focus on that role.

120. The **claimant's trade union representative** wished to assist the claimant and as noted by the respondent's agent was not prepared to accept things that clearly happened which (in the trade union representative's mind did not support the claimant). Thus it was denied that there was a meeting prior to the September occupational health report but it was clear that such a meeting took place since a meeting was necessary in order to discuss why such a report was needed (and the claimant ultimately accepted in cross examination such a meeting had taken place).

121. An important issue in this case was the assertion by Ms O'Donnell that she had offered the admin and clerk roles. This was initially denied by the claimant and his trade union representative. However, eventually the claimant conceded in cross examination that the admin role had been discussed. He did not accept and did not believe that he had refused such a role. He conceded that such a role would have been suitable and said he would have considered the other roles if the stores role had not worked out.

122. It was more likely than not that Ms O'Donnell believed the admin roles had been refused but in fact the claimant was only interested in the stores role and wanted to exhaust that before considering other roles.

123. The Tribunal noted that on 2 occasions the respondent's understanding, that the claimant had said he did not want to carry out the admin roles, was set out in writing which the claimant saw. Neither the claimant nor his trade union representative challenged that. The Tribunal considered this was because the claimant's focus was only in relation to the stores role. As the other roles had not been formally offered to him (and the respondent's belief that the claimant had formally rejected them) the claimant was of the view such roles could be considered at a later date and only once the stores role had been exhaustively considered.

124. The claimant made it clear at the appeal hearing, stating that the claimant had not rejected the admin role. Regrettably at no stage had the appeal officer clarified whether in fact the claimant was willing to undertake those roles. Given the roles were vacant and the claimant could have commenced employment or even a trial immediately, and given the appeal officer knew the minutes were not accepted as accurate, the appeal officer ought reasonably to have clarified the position, given the significance of that issue in the context of the Stood Off Provisions. By not asking what the claimant's position was in relation to those roles, the position was entirely unclear.

125. This was important since, if the claimant had refused an offer of a reasonable alternative, he would not be entitled to benefit from the Stood Off Provisions. Given the importance of those provisions, and given the minute of the dismissal meeting was being challenged, the position as to alternative roles should have ben clarified and the Stood Off Provisions properly analysed.

126. The Tribunal also did not have any evidence as to what was escalated as maintained by the respondent when it asserted there had been a discussion between a senior HR officer and a senior trade union official. It was also unclear what the position the respondent adopted had been in relation to the Stood Off Provisions since the respondent appeared to be arguing the admin roles were suitable alternatives which the claimant had refused (in which case the Stood Off Provisions would not be engaged) and yet the position in respect of the stores role had been progressed and potentially escalated (which suggested that the respondent considered the Stood Off Provisions

were considered at the time to have been engaged). The issue in this respect again arose as a result of the matter not being clarified in writing to put the position beyond doubt. It would have been far clearer, given the importance of the Stood Off Provisions and the consequences of the contractual position, for the position adopted by the respondent at the time to be clearly set out in writing, thereby ensuring both the claimant and respondent understood the position the respondent was taking in relation to the Stood Off Provisions. That did not happen in this case and the claimant and his union representative were unsurprisingly unsure what the respondent was doing in relation to the Stood Off Provisions.

Law

Burden of proof

127. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened 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 provision."*

128. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

129. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

130. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen**

Limited v Wong 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

131. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

132. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

133. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

Discrimination arising from disability

134. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him. Section 15 of the Act reads as follows:

> *"(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".*

135. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

136. In order for the claimant to succeed in his claims under section 15, the following must be made out:

    a. there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

    b. there must be something that arises in consequence of the claimant's disability;

    c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

    d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

137. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

    "A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment

need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

Unfavourable treatment

138. The Supreme Court considered this issue in **Williams v Trustees of Swansea** 2018 IRLR 306 and confirmed that this claim raises two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?' 'Unfavourably' must be given its normal meaning; it does not require comparison, it is not the same as 'detriment'. A claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.

139. In **Williams** the claimant was able to access his pension early due to ill health and because of the pension rules. The claimant argued that he ought to be able to access an enhanced element (which was calculated on his final salary level). He said the reduced figure arose because it was calculated by reference to his part time and not full-time salary was unfavourable treatment (because it stemmed from his only being able to work part time, due to his disability). While he succeeded at the Employment Tribunal, this was over-turned by the Employment Appeal Tribunal and Court of Appeal.

140. The Supreme Court said that in dealing with a section 15 claim, the first requirement was to identify the treatment relied upon. In that case it was the award of a pension. There was nothing intrinsically unfavourable or disadvantageous about the pension on the facts of this case. On the facts the pension was only available to disabled employees (since the entitlement only arise upon permanent incapacity). While that could be less favourable than someone with a different disability, who may have worked more hours upon cessation of employment, no comparison was needed for the purposes of

section 15. The claim failed. The Court emphasised that unfavourable treatment meant what it says and was not a high hurdle to surmount.

141. This issue was considered by the Employment Appeal Tribunal in **Chief Constable Gwent v Parsons** UKEAT/143/18 where HHJ Shanks stated, at paragraph 20: "The Chief Constable relies on the decision in the **Williams** case and says that this case is indistinguishable from it. In **Williams** it was decided that the claimant had not suffered unfavourable treatment because the "relevant treatment" was the award of a pension which he would not have received at all if he had not been disabled and that the award of a pension could not be construed as unfavourable. In this case the "relevant treatment" was identified as the application of a cap to a payment that would otherwise have been substantially larger. It seems to me plain that the two cases are quite different and that the ET was entitled to distinguish **Williams**."

142. It is therefore necessary firstly to identify the relevant treatment that is said to be unfavourable and a broad view is to be taken when determining what is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

143. In order to achieve the stated purpose, the concept of 'unfavourable treatment' will need to be construed widely, similar to how the concept of 'detriment' has been construed for the purposes of other anti-discrimination provisions. The Code (at paragraph 5.7) indicates that unfavourable treatment should be construed synonymously with 'disadvantage: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'.

144. It is also clear from the examples given in the Code that unfavourable treatment need not be directed specifically at the disabled person and it may arise in consequence of a policy that applies to everyone. It therefore covers treatment that, although not directed specifically at a disabled person, nonetheless has specific adverse effects on the disabled person.

145. In **Cowie v Scottish Fire** [2022] EAT 121 a new policy was introduced permitting employees who needed to stay away from work during the COVID pandemic for childcare or shielding reasons to take paid special leave, but a condition was imposed that any accrued annual leave and accrued time off in lieu should be used up first. Certain disabled employees alleged that they needed to shield because they were disabled and that this policy constituted unfavourable treatment arising out of their disabilities. The Employment Appeal Tribunal held the policy was the provision of a benefit with conditions attached to it rather than the imposition of unfavourable treatment and was not therefore unfavourable treatment.

146. A similar approach was taken in **McAllister v Commissioners** [2022] EAT 87 where the claimant, following his dismissal for capability reasons stemming from his disability, was entitled to a payment under the Civil Service Compensation Scheme but was awarded only 80 per cent of the maximum payment. Since the payment would only have been made to a disabled former employee it was held not to amount to 'unfavourable treatment'.

Justification

147. As to justification, in paragraph 4.27 the Code considers the phrase “a proportionate means of achieving a legitimate aim” (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:- is the aim legal and non-discriminatory, and one that represents a real, objective consideration and if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

148. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory

effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31: "although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). European law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

149. The Code at paragraph 4.26 states that "it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."

150. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

151. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

152. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

153. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

154. Chapter 5 of the Code contains useful guidance in applying the law in this area and the Tribunal has had regard to that guidance.

Unfair Dismissal

155. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason. The potentially fair reasons in section 98(2) include a reason which: "relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".

156. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

157. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) 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 it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

158. It has been clear ever since the decision of the Employment Appeal Tribunal in **Iceland Frozen Foods Limited -v- Jones** 1982 IRLR 439 that the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley** 2000 IRLR 827.

159. The application of this test in cases of dismissal due to ill health and absence was considered in **Spencer –v- Paragon Wallpapers Limited** 1976 IRLR 373 and in **East Lindsey District Council –v- Daubney** 1977 IRLR 181. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

160. The Employment Appeal Tribunal considered this area of law in **DB Shenker Rail (UK) Limited –v- Doolan** UKEATS/0053/09/BI). In that case the Employment Appeal Tribunal (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell** 1978 IRLR 379) is applicable in these cases. In **BS v Dundee City Council** 2014 IRLR 131 in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a fit note for a further four weeks, the Court reviewed the earlier authorities and said this at paragraph 27: *"Three important themes emerge from the decisions in* **Spencer** *and* **Daubney***. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."*

Unlawful deduction from wages

161. Section 13 of the Employment Rights Act 1996 provides workers with the right not to suffer unauthorised deductions from their wages. Section 13(3) defines a deduction as *"where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion".*

162. Accordingly, there cannot be a deduction unless the sum claimed is "wages" (see **Delaney v Staples** 1992 ICR 483) and the wages must be "properly payable".

Remedy

163. If a claimant has been unfairly dismissed the claimant is entitled to a basic award (calculated in a similar way to a redundancy payment) and a compensatory award. It is important not to award sums twice and to avoid double recovery – See **D'Souza v Lambet** [1997] IRLR 677 and section 126 of the Employment Rights Act 1996.

164. Section 124 of the Equality Act 2010 deals with compensation as a remedy for unlawful discrimination and states:

> *(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
>
> *(2) The tribunal may—*
>
> (*a*) *make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation.*
>
> *(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119…….*

165. Section 119 states:

> *(3) The sheriff has the power to make any order which could be made by the Court of Session –*
>
> *(a) in proceedings for reparation*
>
> *(b) on a petition for judicial review.*

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)..."

166. In considering remedy the Tribunal should consider pecuniary and nonpecuniary loss. This amounts to past and future loss (of money) and an award for injury to feelings.

Pecuniary loss

167. In assessing compensation, the loss must be attributable to the specific act that has been held to constitute discrimination, and not to other acts (whether potentially discriminatory or not). In **Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2) C-271/91** [1993] IRLR 445 it was stated that the effect that compensation must enable the loss actually sustained to be made good in full. The ordinary principles of causation and qualification of damages in reparation in delict apply.

168. Harvey on Industrial Relations and Employment Law at paragraph 852 of Volume L provide a summary of the guiding principles which underpin the approach to compensation for all forms of unlawful discrimination. These include the following:

1. The measure of damages is the same as it would be before an ordinary court;

2. There is no upper limit on the amount of compensation that can be awarded;

3. Whether there are multiple claims or simply different heads of loss in one claim of unlawful discrimination, there should be no double recovery in the compensation awarded for loss suffered;

4. The Tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so; but, having decided to make such an order, it must adopt the usual measure of damages: there is no jurisdiction to award only such as the Tribunal

considers just and equitable in the circumstances (**Hurley v Mustoe (No 2)** [1983] ICR 422).

5. In effect, the claimant is to be put into the financial position they would have been but for the unlawful conduct of the employer (**Ministry of Defence v Cannock** [1994] IRLR 509).

6. Unlike the approach in reparation, however, there is no requirement that the loss suffered be 'reasonably foreseeable'; compensation can be awarded in respect of all harm that arises naturally and directly from the act of discrimination, at least in cases where the discrimination was deliberate and overt (**Essa v Laing** [2004] IRLR 313 and **Abbey National plc and Hopkins v Chagger** [2009] IRLR 86.

7. In calculating compensation according to ordinary delictual principles the Tribunal must take into account the chance that the respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. (**Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25).

169. The issue to be decided is not which is just and equitable to award but what figure compensates the claimant for the losses suffered that flow from the unlawful act, assessing the sum in the same way as damages for a delict (**Hurley v Mustoe (No 2)** [1983] ICR 422).

170. Compensation should be awarded on the basis that 'as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]' (**Ministry of Defence v Cannock** [1994] IRLR 509).

171. In assessing the chances of matters happening in the future the Tribunal must base its decision on a realistic view of the future with reasons being given. Thus in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 the Tribunal was entitled to calculate loss of earnings on the basis that the claimant would have enjoyed a period of service of 21 years, retiring

at age 55. The Tribunal was entitled to reach such a conclusion notwithstanding statistical evidence which showed that only 9% of women who had left the Force had served for more than 18 years. The situation of the claimant was different from most – she could not have any more children, and the reason why most women left the force was to have children. Also, the statistics related to past practice, and 'family friendly' employment policies indicated that these would make it more likely women would stay on. The award could not be attacked as perverse.

172. The 'eggshell skull' principle of the law of delict applies in cases of unlawful discrimination: a discriminator must take their victim as they are. That means that the wrong-doer takes the risk that the wronged may be very much affected by an act of sexual harassment, say, by reason of their own character and psychological temperament. Provided the losses claimed can be shown to be causally linked with the unlawful act, the respondent must meet them.

173. It is enough to show a causal link between the unlawful act and injury on the part of the victim and the test of reasonable foreseeability is not applicable to limit the wrongdoer's liability: **Essa v Laing Ltd** [2004] IRLR 313.

174. In assessing the financial loss sustained as a result of the unlawful act, the Tribunal should consider losses sustained to date (past loss) and assess the position in the future.

175. As the aim is to place the claimant in the position they would have been had there been no act of discrimination, sums received by the claimant as a result of social security benefits will fall to be deducted from an award of compensation in a discrimination complaint: **Gaca v Pirelli** [2004] 1 WLR 2683 and **Colt Technology v Brown** UKEAT/233/17 as will other sums the claimant received that would not have been received had there been no discrimination.

Past loss

176. Past loss is that suffered by the claimant from the date of the discriminatory act to the date of assessment and may include full or partial loss of earnings

(including any overtime), to be assessed net of tax, and also other benefits associated with the employment. Credit must be given for sums received by the claimant by way of mitigation of their losses Compensation may be decreased here not only by such sums as the claimant has actually received but also by such amount as that the claimant could reasonably have expected to receive had they taken all reasonable steps to mitigate their loss.

177. In assessing loss, consideration should be given to the possibility that the discriminatory act might not have been the only causative factor. As confirmed in **Abbey National plc and Hopkins v Chagger** [2009] IRLR 86 the general rule in assessing compensation is that damages are to place the claimant into the position they would have been in if the wrong had not been sustained.

178. In **Wardle v Credit Agricole Corporate and Investment Bank** [2011] IRLR 604 the Court of Appeal stated that if it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the Tribunal is sure that the claimant would find an equivalent job is the wrong approach

Future loss

179. In assessing future loss, the Tribunal has to make decisions about the chances that employment would have continued had the discrimination not taken place. It is important that this is done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities. That approach was endorsed by the CA in **Vento v Chief Constable of West Yorkshire Police (No 2)** Ibid (see per Mummery LJ at [32] – [33]).

180. In **Newsome v Sunderland City Council** EAT/36/02 the claimant was held to have suffered unlawful discrimination when her employers failed to make reasonable adjustments and she was forced to take ill-health retirement at the age of 48. Compensation was based on the Tribunal's finding that she would (on the balance of probabilities) have remained in the employment until 65.

The Employment Appeal Tribunal held that approach was fundamentally wrong as the Tribunal should have made an assessment of the chance she had of remaining in service until 65.

181. In **Taylor v Dumfries and Galloway Citizens Advice Services** (2004 Scot (D) 10/4) the Court of Session held in principle in discrimination cases it could be appropriate to assessed find there was a 10% chance that, but for the unlawful act, the employee would have retained his employment provided reasons are given for adopting such a figure.

182. The Employment Appeal Tribunal confirmed in **Ministry of Defence v Cannock** [1994] IRLR 509 that it was wrong to assess loss in a situation where there had been a dismissal on grounds of pregnancy on the basis of what would have happened (judged on a balance of probabilities) had she not suffered unlawful discrimination. Instead, the calculation of loss should be dealt with as the evaluation of the loss of a chance.

Interest on financial sums

183. Interest is awarded on financial losses as per the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. Regulation 2(1) requires Tribunals to consider whether to award interest on compensation in discrimination cases. The interest is to be calculated as simple interest, which accrues daily at the rate fixed by section 9 of the Sheriff Courts (Scotland) Extracts Act 1892 (regulation 3(2)) which is currently 8 per cent.

184. Interest on pecuniary sums is awarded from the half way point between the date of the discriminatory act and the date of calculation.

185. The Tribunal retains a discretion, however, to award interest or not to do so and to calculate interest as it considers appropriate, having regard to whether, in any particular case, a 'serious injustice' would be caused if interest were to be awarded (regulation 6(3)).

Injury to feelings

186. In considering remedy the Tribunal should consider an award for injury to feelings. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of Appeal gave guidance on the level of award that may be made noting that the award is compensating subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief and humiliation. The three bands were referred to as being lower, middle and upper, with the following explanation:

"i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

187. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2023, the Vento bands include a lower band of £1,100 to £11,200, a middle band of £11,200 to £33,700 and a higher band of £33,500 to £56,200.

188. The higher band applies to “the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment”, the middle band “for serous cases which do not merit an award in the highest band” and the lower band “for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence”.

189. General principles that apply to assessing injury to feelings awards were given in **Prison Service v Johnson** 1997 IRLR 162 where it was noted that such awards are compensatory and should be just to both parties. They should compensate fully but not punish any party. Awards should not be too low to diminish the policy of the legislation. Awards should have some broad general similarity to the range of personal injury awards and Tribunal should d take into account the value in everyday life of the sums in question and the need for public respect for such awards.

190. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (made pursuant to section 139(1) of the Equality Act 2010) interest is simple and accrues from day to day. The judicial rate (fixed per the Sheriff Courts (Scotland) Extracts Act 1892) is presently 8%. Interest on an award for injury to feelings is awarded from the date of the act of discrimination until the date of calculation (Regulation 6(1)(a)).

Taxation

191. The rules to be applied are those imported from the law of delict. The claimant is to be awarded the sum of money that will put them in the same position as they would have been in had the unlawful act not occurred which means that income tax should be taken into account in assessing damages for either actual or prospective loss of earnings.

192. Compensation for loss of income will need to be calculated on a net basis. For awards exceeding £30,000 the award is likely to be taxed in terms of the Income Tax (Earnings and Pensions) Act 2003 (see sections 401 and 403) and so the award should be 'grossed up' so that the claimant is not in a worse position (by effectively having paid tax twice on the same sum) after receiving the award. That is often called the Gourley principle.

193. The issue of how tax affects compensation for discrimination was expressly considered by the Employment Appeal Tribunal in **Yorkshire Housing v Cuerden** [2010] All ER (D) 52 (Sep), where the following guidance was given for the assessment of compensation for discrimination in which the Gourley principle would apply: 'injury to feelings and personal injury awards that related to an employer's discriminatory conduct pre-dating the termination of employment (in that case, a failure to make reasonable adjustments), are not termination payments and are therefore not taxable and, hence, not subject to grossing up; an award of compensation for loss of pension rights on termination of employment is not a payment to a beneficiary out of a pension scheme falling under section 407 ITEPA 2003 and therefore should not be grossed up.'

194. Compensation for injury to feelings counts towards the £30,000 and will be taxable to the extent that it exceeds this sum unless the compensation is for injury to feelings perpetrated during employment in which case it does not fall to be taxed either as an emolument of employment or as a termination payment under section 403.

Submissions

195. Both parties produced written submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties' submissions as relevant below, but does not repeat them in detail. The parties' full submissions were taken into account in reaching a unanimous decision.

Decision and reasons

196. The Tribunal spent a substantial amount of time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision on each of the issues. The Tribunal deals with issues arising in turn.

Discrimination arising from disability

The claimant alleges the respondent treated him unfavourably by dismissing him. Was the dismissal unfavourable treatment?

197. The first issue is to determine whether the claimant's dismissal was unfavourable treatment. One might think this is axiomatic but the respondent's agent submits that on the facts of this case dismissal was advantageous to the claimant in the sense he received a large ill health severance payment (and he wanted a larger payment, having sought voluntary severance). Thus the respondent argues the complaint is that the terms of leaving are not as favourable as he would like them to have been, the dismissal is "insufficiently advantageous" and as such the dismissal cannot amount to unfavourable treatment.

198. The claimant's agent argues that, considered objectively, the dismissal is unfavourable treatment in the objective sense that the treatment is adverse as compared to that which is beneficial.

199. The authorities in this area note that it is necessary to identify the relevant treatment that is said to be unfavourable and take a broad view as to whether it is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

200. At the appeal hearing the claimant's issue with regard to discrimination was that he had not secured voluntary severance whereas someone in a similar situation to him had. The claimant wished to leave the respondent's employment, which is the purpose of his application for voluntary severance, an agreed termination of employment in return for a significant sum of money (which was greater than the ill health severance payment the claimant received).

201. This is not an easy issue to determine. The Tribunal must look at the context, taking a broad view. The dismissal brings the claimant's employment to an end, and to that extent it is clearly unfavourable. But in this case the claimant

received a substantial payment. The treatment was not therefore the ending of the employment in isolation but the ending of the employment with the payment.

Decision on whether dismissal was unfavourable treatment

202. In considering this matter the Tribunal considered the President of the Employment Appeal Tribunal's decision in **Cowie** very carefully.

203. In **Cowie** it was noted that in **Parsons** the claimants were complaining of unfavourable treatment in the application of the voluntary exit scheme whereby the compensatory lump sum was reduced (the unfavourable treatment) because of something (the claimants' entitlement to an immediate deferred pension) arising in consequence of their disabilities. Although the unfavourable treatment arose in the context of a benefit being received by the claimants (the pension), that was not a necessary precondition or consequence of the voluntary exit scheme for which the claimants had applied: the claimants had not accepted that precondition in order to obtain the benefit of the voluntary exit scheme and the unfavourable treatment was not intrinsically entwined with the advantage the claimants would otherwise receive in respect of their pensions. Referring to the separate purposes and histories of the two schemes in issue, the Employment Appeal Tribunal thus concluded that the Tribunal had been entitled to find as a fact that they were not to be considered together (one as a condition or consequence of the other).

204. In **Cowie**, the loss of flexibility and choice in terms of when to take accrued TOIL and annual leave could constitute unfavourable treatment in general terms, but the difficulty that arose was that there was no general requirement on the claimants to use TOIL and/or leave at a time of the respondent's choosing. It only arose when, and to the extent that, the claimants sought to access paid special leave. The Employment Appeal Tribunal held it would be artificial to consider the requirement to use accrued TOIL and/or annual leave separately from the entitlement to paid special leave because they were inextricably linked.

205. The Tribunal in **Cowie** erred by defining the unfavourable treatment by reference to the claimants' complaint. The claimants may have complained of the preconditions that had been imposed, but it was wrong to focus solely on the acts thus identified rather than having regard to the factual matrix, which included that the acts complained of by the claimants were "preconditions to obtaining or consequences of paid special leave", which were "clearly favourable".

206. Although the policy was subject to conditions for entitlement, that could not detract from the favourable nature of that treatment. The claimants were granted an entitlement to paid special leave during the periods of time they were unable to work due to their disabilities; that was an advantage they would otherwise not have enjoyed during those periods of absence. The claimants complained of the conditions of entitlement to that paid special leave but those conditions could not be viewed in isolation from the benefit thus provided: the conditions in question were only applied because the claimants were being granted an entitlement to paid special leave and it would be wholly artificial to separate out the two elements, the benefit and the conditions of accessing that benefit.

207. **Cowie** was a case falling within the analysis provided in **Williams**: the claimants were complaining of the conditions of entitlement to the favourable treatment extended to them under the paid special leave policy. Viewed in that context, there was no unfavourable treatment for the purpose of section 15. The error was to allow the claimants' complaint to define its assessment of "treatment" and thus to artificially separate out the conditions of entitlement to a benefit from the benefit itself.

208. The Tribunal analysed the dismissal of the claimant with the analysis provided both in **Williams, Parsons and Cowie.** The claimant's dismissal should not be viewed in isolation where the dismissal was pursuant to the application of the ill health severance policy. In **Cowie** the claimants complained of the preconditions that were imposed on the benefit and it was wrong to focus solely on the acts thus identified rather than having regard to the factual matrix, which included favourable treatment.

209. In this case the question is whether the claimant is complaining about the sum of money he secured (namely that it ought to have been greater – which was what he was alleging at the appeal stage when asked what his discrimination complaint was) or in reality, as alleged before this Tribunal, the issue was not keeping the claimant employed, ie dismissing him. The issue is whether the ill health severance payment, which is clearly favourable treatment, renders the otherwise unfavourable treatment (the dismissal) favourable treatment.

210. This is not an easy issue to determine given the authorities above. The nub of the complaint in this case is that the claimant was not kept on, ie that he was dismissed. The claimant's dismissal was pursuant to the ill health severance policy, but the complaint is not that the claimant should be paid more money for losing his job but rather that he was not retained and the failure to retrain him was the unfavourable treatment relied upon.

211. The Tribunal considered the fact the claimant received a substantial sum for his dismissal, which is favourable treatment. Unlike **Cowie**, however, the claimant did not seek to exercise a right given to him which gave rise to the unfavourable treatment. In fact the claimant was seeking the opposite of what the respondent wanted to do. While the respondent in essence softened the blow by paying a sum, the claimant had no control over whether or not the respondent decided to dismiss him and with what benefits. Those were matters entirely within the respondent's control.

212. The Tribunal takes account of the context - the fact the claimant had previously argued the complaint was that he did not get more money (by being given voluntary severance) and that the claimant had applied for voluntary severance but the pleaded case in relation to this complaint is expressly about the claimant's dismissal. But the Tribunal needs to consider the complaint before it and that is that the dismissal, the decision not to retain the claimant, was unfavourable treatment (in circumstances the claimant says he should not have been dismissed because of the surrounding circumstances).

213. Dismissal is ordinarily not advantageous to the extent employment is lost, as are the benefits employment brings (which are more than just financial). The

benefits of paid employment are often hidden, including the benefits of being part of a larger group, meeting colleagues, feeling of self worth, contributing something that benefits others etc.

214. In this case, however, the parties agreed the claimant was unfit to do the role he was employed to do. That was not in dispute. Dismissing the claimant must be viewed in context, namely that on the facts of this case, alternative employment had been offered to the claimant which he had declined (which the Tribunal found was not a breach of contract). Dismissal occurred because the claimant did not want to do the roles he was offered and the respondent was not prepared to retain the claimant to try a role the respondent considered unsuitable for him.

215. Nevertheless dismissal of the claimant prevented him from being considered for any alternative roles that arose (which given the terms of the Stood Off policy could result in him remaining in employment).

216. It cannot be the case that in deciding whether or not dismissal is unfavourable, the fairness or otherwise of the dismissal is relevant., since that would result in all fair dismissals not being unfavourable treatment and render nugatory the section 15 claim. Whether or not the treatment is unfavourable should be determined objectively, viewed in context, carefully applying the authorities.

217. The respondent decided to dismiss the claimant because they considered no alternatives to exist and that they were entitled, in terms of the ill health severance policy, to dismiss the claimant, subject to their paying the claimant the substantial ill health severance payment. The dismissal in this case is advantageous to the extent that the claimant received a substantial benefit as a consequence of his dismissal (which was a sum to which the claimant became entitled by virtue of the respondent's policy in this area).

218. It could therefore be said that the treatment, the dismissal, was unfavourable (to the extent that the claimant lost his job or at least the opportunity to try another role, if one arose) but simultaneously favourable (to the extent he received significant compensation).

219. The Tribunal considered the connection between the ill health severance payment and the dismissal and considered the case to be closer to **Parsons** than **Williams** and **Cowie.**

220. In **Parsons** the claimant was entitled to a lump sum and a deferred pension. The claimant argued the cap on the lump sum was unfavourable but the respondent pointed to the deferred pension which was a benefit that would otherwise not have been due. It was found that capping the compensation lump sum was clearly "unfavourable treatment". There was no reason to bring into account the "deferred pension" which the claimant also received on leaving. Thus where a claimant receives some benefit alongside the unfavourable treatment, the fact the other benefit is favourable does not make the otherwise unfavourable treatment favourable, at least where the 2 acts are not inextricably linked or connected (even if they fall due or become payable at the same time). The deferred pension was not linked to the compensation sum that was due. Thus the claimant could argue a restriction on the compensation sum is unfavourable treatment, even if the claimant also received a (more) favourable pension, which was separate benefit. They were not to be considered together (one as a condition or consequence of the other).

221. The Employment Appeal Tribunal in **Cowie** held that the context must be considered carefully and the claim not viewed in isolation and not purely as set out by the claimant. In **Cowie** the claimants were complaining of the conditions of entitlement to the favourable treatment extended to them under the paid special leave policy. Viewed in that context, there was no unfavourable treatment for the purpose of section 15. The error was to allow the claimants' complaint to define its assessment of "treatment" and thus to artificially separate out the conditions of entitlement to a benefit from the benefit itself.

222. In **Williams** the relevant treatment was "the award of a pension" which could not be said to be unfavourable.

223. The issue in this case is whether the significant ill health severance payment can be separated out from the dismissal, where the claimant was incapable of doing the job he was employed to do, and there being no alternatives for him.

224. In this case the relevant treatment is the decision to dismiss the claimant that is said to be unfavourable when viewed in context. The benefit the claimant secured alongside the dismissal is not challenged (and is a matter to be considered in assessing any compensation found due, if applicable). The claimant is not arguing the benefit he received was unfavourable or that he should have received a different benefit. It is the fact the respondent chose to dismiss the claimant that is being challenged as unfavourable treatment.

225. Both benefits in **Parsons** arose as a consequence of the dismissal. The fact therefore that the ill health severance payment arose because of the dismissal does not by itself result in the treatment being unfavourable. The unfavourable cap on the compensation sum in **Parsons** did not become favourable because a favourable and beneficial pension was also due. Those were separable even if they arose and became due at the same time. Applying the logic of **Parsons,** there is no reason to take into account the severance payment when considering whether the dismissal itself is unfavourable given they are separate acts or treatment.

226. Had the claimant been arguing that the severance payment was unfavourable, that would be a different matter since the payment is itself beneficial. The claimant is arguing the decision to end his employment and thereby prevent him the opportunity of returning to work in some other capacity was unfavourable treatment. The fact he also received a sizeable sum was a consequence of his dismissal but a separate component of it and did not of itself change the unfavourable status of the dismissal, if the logic of **Parsons** is applied. The claimant was not exercising a benefit in the same way as the claimants in **Cowie** (and challenging the operation of that benefit) and was not challenging a favourable pension entitlement (as in **Williams**). The challenge was the decision to end the claimant's employment (which separately gave rise to another benefit)

227. The Tribunal therefore concluded that the dismissal was unfavourable treatment on the facts of this case. While the dismissal was pursuant to the ill health severance policy with the claimant receiving the ill health severance payment as a consequence of his dismissal in circumstances where the claimant was incapable of doing the role he was employed to do and he had refused suitable alternative roles that were offered to him, in terms of **Parsons**, the severance payment was a separate and favourable benefit and the claimant had lost the opportunity to return to work in some other capacity.

Legitimate aim

228. As it was agreed that the claimant's inability to carry out his substantive role, and concomitant sickness absence, arose in consequence of his disability, the next issue was whether the claimant's dismissal was a means of achieving a legitimate aim, namely ensuring that the respondent is not required to pay staff full pay for long periods of time when there are little prospects of them returning to their role, adjustments made to their role do not allow the employee to return to their role, there are no suitable alternative roles, and/or employees, such as the claimant, do not accept suitable alternative role offers as this is not sustainable for the respondent.

229. The respondent's agent argued that properly managing the workforce cannot seriously be disputed to be a legitimate aim since that would mean dismissing an unfit employee could never be legitimate. The claimant's agent argued that the avoidance of incurring costs cannot be a legitimate aim where the aim breaches the claimant's contractual right to be Stood off.

230. The Tribunal found the aim relied upon was legitimate. Where an employee is unfit to carry out their substantive role and there are no reasonable alternatives to retaining, the aim is to properly manage the workforce. The claimant's agent's argument that it cannot be a legitimate aim where there is a contractual right to be Stood Off would be applicable if the contractual right in question was engaged. In principle the aim relied upon is a legitimate aim since the management of absent staff and maintaining the costs thereof is a

prima facie legitimate aim. The impact of the engagement of the contractual position is a matter pertaining to proportionality.

Proportionality

231. The onus of establishing justification is on the respondent who must establish the defence by evidence. The Tribunal must therefore consider the evidence that was led in assessing whether or not the legitimate aim was proportionately applied on the facts. The Tribunal has been careful to apply the authorities in this area and carefully consider the evidence led.

232. The aim the respondent says it was achieving in dismissing the claimant was "ensuring that the respondent is not required to pay staff full pay for long periods of time when there are little prospects of them returning to their role, adjustments made to their role do not allow the employee to return to their role, there are no suitable alternative roles, and/or employees, such as the claimant, do not accept suitable alternative role offers as this is not sustainable for the respondent".

233. The Tribunal considered whether dismissal of the claimant was a proportionate means of achieving that aim from the evidence. Its assessment of the proportionality of the dismissal is based upon that aim.

234. The claimant's agent argued that dismissal was not proportionate since the respondent could have retained the claimant, followed its Stood Off policy and/or redeployed the claimant to the stores position. This was important given the Stood Off Provision entitles an employee to remain in paid employment for 2 years (if the role is not vacant).

235. The claimant's agent submitted that redeployment would have avoided incurring costs when the claimant was not working. In this case there was no alternative vacancy that existed that the claimant wished to undertake. The stores role he wished to carry out was not vacant and was not likely to be vacant for 2 years. The contractual matrix was such that the respondent was under an obligation to follow certain steps. Given the position in relation to the admin roles had not been fully exhausted (in other words given the claimant

had not properly been given the chance to consider the offers as such) and given the claimant was focused on the stores role, in respect of which an occupational health report had been obtained which recommended a trial (which may or may not be successful), the failure to properly set out the position in relation to the admin roles and the failure to offer the claimant a trial was significant since either of those actions could have achieved the legitimate aim in a less adverse way. Dismissal could have been avoided and the contractual position respected. The failure to do so was significant.

236. The claimant's agent noted the absence of a trial period was an important factor in **DWP v Boyers** 2022 IRLR 741. That is taken into account in this case given the Stood Off Provisions and the impact upon the claimant.

237. The evidence before the Tribunal was clear that the respondent would pay for an employee who is unfit to do their substantive role (at the salary pertaining to the substantive role) for up to 2 years, provided another role existed that the claimant could do (whether or not that role was vacant or not). Thus the respondent was prepared to pay sums as wages where an individual was not working and there was no actual role for them to do. That is a relevant consideration placed in the balance. The proportionality of the aim should be considered within the factual context.

238. The Tribunal considered the legitimate aim could have been sufficiently important to justify the treatment. It was legitimate to avoid paying sums of money in circumstances it had no obligation so to do, where the claimant had refused to undertake other available roles where there was no available vacancy in respect of the stores role. But in this case there was a contractual obligation to maintain the claimant's contract or at least to have properly considered the matter and applied the Stood Off Provisions. The failure to properly consider the claimant's position in relation to the admin roles and the failure to offer a trial period for a role the respondent had not excluded (since an occupational health report was obtained) were important factors in the balance (given such an approach would have avoided dismissal). The respondent's agent conceded that the respondent's position on proportionality

was predicated upon the Stood Off Provisions having been properly applied and an offer made (and rejected) in respect of the admin roles.

239. The respondent argued that the means chosen to implement the aim, dismissal, were no more than necessary to achieve the aim within the context. Alternatives were considered and the respondent sought to retain the claimant as best it could making an assessment of the circumstances as they saw it. In fact, however, at the point of dismissal the claimant had not rejected the admin roles. The Tribunal found the Stood Off Provisions had not been properly applied and dismissal could have been avoided. Dismissal was not a proportionate means of achieving the aim relied upon in this case.

240. The final issue is whether dismissal struck a fair balance between the needs of the respondent and the effect of the treatment. The Tribunal considered this point carefully. The respondent had agreed in principle to paying staff the wage due for their substantive role where the employee was unable to do that role provided another role existed that the employee could do (even if that role was not vacant).

241. There was no evidence that suggested there were any financial restrictions such that the cost of retaining the claimant in this particular case would cause any issues for the respondent. In other words there was no evidence that continuing to pay the claimant was “unsustainable”, the key aspect of the legitimate aim relied upon. The Tribunal considered the evidence that had been led. The Tribunal considered the claimant’s agent’s submission that there was no evidence as to how the dismissal achieved the aim to have merit.

242. There was no evidence that showed the added costs of not dismissing the claimant (such as by waiting longer before dismissing) would have any impact upon the respondent, other than the continued cost of employing him since at the time of the dismissal the claimant was still being paid his full pay.

243. The Tribunal considered whether it was so obvious that dismissing the claimant saved cost for the respondent which meant the dismissal was proportionate. It was self evident that not paying salary saved cost and that was placed in the balance by the Tribunal. The matter to be considered is

assessing the impact such costs had upon the respondent balanced with the impact upon the respondent. There was no basis to support that general assertion that continuing to pay salary must have a negative impact upon the respondent (necessarily meaning the treatment was justified) given the very favourable Stood Off Provisions.

244. There was no evidence that suggested the added cost of maintaining the claimant's employment would have any other negative impact (aside from continued salary) upon the respondent, which is a very large organisation. It was not so obvious that judicial notice could be taken of the fact given the size of the respondent and the context, particularly in light of the Stood Off Provisions which, had they been applied, would have resulted in the respondent paying the claimant even where a vacancy did not exist. There was no evidence as to the impact the cost of not dismissing the claimant had upon the respondent particularly when assessed against the impact dismissal had upon the claimant. There was no evidence as to sustainability of the status quo. That was not something about which judicial notice could be taken aside from the obvious cost implication of ongoing salary payments.

245. The respondent's agent argued that given the claimant was already looking to leave the respondent's employment via voluntary severance the impact upon the claimant of his dismissal with the payment in question was not significant. The impact upon the claimant should be balanced against the reasonable needs of the business. The respondent offered alternative roles and it was said to be wrong to require an employer to retain employees who are unfit for their role having refused alternatives. While it was said to be wrong to require the respondent to pay the claimant for 2 years when there was no role available for him that was suitable on the facts, the Tribunal found there clearly were other roles the claimant could have undertaken had the position been properly followed through which fundamentally altered the balance and intense analysis carried out in assessing this issue.

246. The respondent's agent submitted that Ms O'Donnell's evidence covered the elements of the legitimate aim relied upon and the fact the claimant was on full pay was not in dispute. It was said dismissal would naturally reduce cost.

Decision on proportionality

247. The Tribunal carefully analysed the evidence led before the Tribunal and concluded that dismissal could have been reasonably necessary to achieve the aim. **Homer** confirmed that there requires to be some form of basis for justification but that does not require concrete evidence in every case and provided subjective impressions or stereotypical assumptions and generalisations are avoided reasoned and rational judgment can suffice.

248. The reason for the claimant's dismissal was said to be to reduce cost in context. The claimant's dismissal was with a significant ill health severance payment. The claimant had applied to leave the business (subject to receiving a greater sum) but that had been refused. Nonetheless the claimant had not refused the alternative roles the respondent had available and he had not been given a trial role in a role that he believed he could carry out. Dismissal was a disproportionate way to achieve the aim relied upon.

249. The impact of added cost of continuing to employ the claimant, (the sustainability of the position with regard to the respondent's business) was something in respect of which no evidence was led. This is important given the Tribunal can only determine the justification defence on the basis of evidence before it. There was no basis to find that the continued costs and delay in avoiding the claimant's dismissal would be detrimental to the respondent, particularly when balanced with the impact upon the claimant of losing the ability to find an alternative role that could arise.

250. The Tribunal balanced the impact of the dismissal upon the claimant and the effect upon the respondent. There was no evidence as to how the decision not to dismiss the claimant would impact upon the respondent. It was entirely possible that not dismissing the claimant and allowing the claimant further time to consider alternatives could have had no material impact upon the respondent (other than paying his salary, if that was what the respondent chose to do). The key point in assessing justification, in carrying out the critical analysis, is for the Tribunal to assess what the impact upon the respondent was and balance that against the impact upon the claimant.

251. Absent any evidence showing that the dismissal of the claimant had any material impact upon the respondent, whether in terms of work to be done, the team of which he formed part or the financial impact, the Tribunal considered the impact of dismissal upon the claimant to far outweigh the impact upon the respondent from the evidence before the Tribunal. In reaching that decision the Tribunal took account of the decisions the claimant had made and the context and ultimately decided that the respondent had not discharged the onus in relation to proportionality.

252. Even if the impact of cost had been set out in evidence, there were clear alternatives to dismissal which would have ensured the respondent achieved its aim (in a less burdensome manner). The claimant's agent's submissions with regard to proportionality had considerable merit. The alternative roles that existed should have been properly explored with the claimant and dismissal avoided. From the facts found (which resulted in the dismissal being unfair as set out below) dismissal was not a proportionate means of achieving the respondent's aim.

253. The Tribunal was not satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim. The respondent had not discharged the burden of showing dismissal was a proportionate means of achieving its aim.

254. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the measure the Tribunal is satisfied that the treatment was not objectively justified from the evidence presented to the Tribunal.

255. The respondent therefore breached section 15 of the Equality Act 2010.

Unfair dismissal

Sufficiency of reason

256. It was agreed that principal reason for the claimant's dismissal was capability, a potentially fair reason. The respondent genuinely believed that the claimant was incapable of that role.

257. The respondent was of the view that the claimant could have carried out the admin roles but believed the claimant did not want those roles. That belief was in fact misplaced and at the appeal stage the position was not clarified.

258. Given the claimant had not therefore, objectively viewed, refused an offer of a suitable alternative, the Stood Off Provisions were engaged. The respondent ought either to have made the position in relation to the admin roles clear or progressed the stores Role (which the respondent had not rejected and instead remitted the matter to occupational health). The most recent occupational health report had made it clear that there was no reason not to try the stores role. The respondent chose not to offer a trial role despite the occupational health report suggesting a trial was appropriate.

259. On the facts of this case, the respondent did not act reasonably in treating capability as sufficient for dismissing the claimant. The claimant was incapable of carrying out his substantive role but there were other roles that could and ought reasonably to have been explored which the claimant was likely to have been capable of undertaking.

Fairness of the dismissal

260. The Tribunal considered each of the grounds upon which is was said the dismissal was unfair in light of the evidence and context.

261. **Firstly** it was said that suitable alternative employment had been identified for the claimant for which the respondent unreasonably failed to consider him.

262. This was a fair criticism of the respondent. The Stood Off Provisions were in operation given the lack of clarity as to the admin roles and the existence of the Stores role. In this case the respondent had identified 2 specific vacancies that existed at the material times. They were roles the respondent believed the claimant could do. A trial could have been commenced. The respondent believed the claimant had rejected these but at the appeal hearing the position

was unclear and no steps were taken by the respondent to clarify the position. Given the terms of the Stood Off Provisions, dismissal is a last resort and the respondent should look at all alternatives. That was not undertaken.

263. A reasonable employer given the contractual context would not have dismissed. A reasonable employer would have clarified the position in relation to the alternative roles.

264. The respondent did not reasonably conclude the claimant had rejected the roles given the position set out at the appeal. It was clear the claimant's focus was in relation to the stores role. He had experience of working with IT and training was being offered as needed. Ms O'Donnell had concluded that the claimant was not able to undertake the stores role vacancies despite the terms of the occupational health report recommending a trial. Given the uncertainty there was no reason not to follow the recommendation. The whole purpose in seeking an occupational health report was to seek guidance. That guidance was to give the role a try. That guidance was not followed.

265. Previous occupational health reports had focused on the claimant's substantive role and had not focused on the tasks needed of the stores role. The only way to determine that matter would be to try it and the respondent acted unreasonable in refusing a trial, particularly given the occupational health report and information before the respondent. The evidence before the respondent was not that the role was solely manual but involved manual handling. A reasonable employer could not have concluded from the information before them that the role was unsuitable. No attempt was made to secure a more up to date or relevant occupational health report by the appeal stage and the information before the appeal was the same information before the dismissing officer.

266. The respondent's agent argued earlier occupational health reports made it clear the claimant had difficulty with various physical tasks. This was, however, obtained in relation to the previous role which was a physically demanding and different role to the stores and admin roles. The obvious difference was that the claimant would be walking on a flat surface rather than

ballast and could take breaks (and work in an office or under cover). It was possible the stores role could use mechanical assistance for labour intensive roles or other adjustments could be made. This was not explored at all. The admin roles were self evidently different. The claimant already operated IT equipment and apps and training would have been offered.

267. The respondent's submissions were predicated upon the respondent having offered the claimant the admin roles (and had the respondent done so, the outcome in this judgment would have been different) but from a detailed and careful analysis of the evidence, the Tribunal did not find that the admin roles had in fact been offered to the claimant (in the sense required by the Stood Off provisions). Ms O'Donnell believed she had done so but in reality the claimant's focus was elsewhere and Ms O'Donnell had allowed the focus to turn to the stores role. She believed the admin roles had ben declined but the claimant had not in fact refused them and as such the respondent was under a contractual obligation to do all it could to avoid dismissal by applying the Stood Off Provisions.

268. Given the facts as found by the Tribunal, this is not the case of the claimant having a veto over management decisions as alleged by the respondent but rather the respondent having failed to properly apply the contractual matrix pertaining to the claimant on a hugely important issue, whether he remained in employment or not.

269. On the facts and in context it was not reasonable for the respondent to proceed as it did and refuse to consider the claimant for the vacancies. The admin roles were available and no steps were taken to properly clarify the position during the appeal.

270. The **second** ground was that the respondent unreasonably failed to permit the claimant a trial period in the stores role.

271. The medical position before the respondent was that there was as much a chance the claimant could do the work as he could not. When viewed in context and in light of the full factual matrix, particularly given the claimant's belief he could do the work and the fact the respondent had sought an

occupational health report for the role, the respondent did not act reasonably in failing to permit the claimant a trial period in the stores role. No reasonable employer would have refused to offer the claimant a trial role, given the context and contractual matrix.

272. The Tribunal did not accept the respondent's submission that the stores role was not suitable and as such did not require to have been offered to the claimant. Ms O'Donnell had chosen to refer the role to occupational health, whose position is to be preferred to that of the GP. The occupational health physician was unable to say the role was unsuitable or suitable. A trial period was the only way to determine the issue. The claimant clearly believed the role was suitable and wished to try it. The matter is assessed at the time the decision was made at which time the claimant and his trade union representative were strongly of the view the stores role was suitable and there was a clear dispute. The claimant was entirely reasonable in his approach and belief given the context. The respondent did not believe it was suitable, despite the medical position. There was therefore a dispute that ought to have been escalated and in terms of the Stood Off Provisions.

273. There was no evidence before the Tribunal as to what precisely was discussed between the more senior union officer and senior HR. The Tribunal could not accept that the matter had been escalated as required in terms of the Stood Off Provisions from the evidence before the Tribunal. There was no correspondence issued to the claimant that would have set out the position.

274. The Tribunal could not accept this matter was a procedural error with limited significance. The claimant had not rejected an offer of a suitable alternative and the respondent had failed to comply with its contractual obligations. In dismissing the claimant against the background of the Stood Off Provisions (which were contractual) the respondent did not act within the range of reasonable responses.

275. **Thirdly** it is alleged that the respondent failed to follow its contractual Stood Off policy which would have entitled the claimant to be Stood Off with pay for a period of up to two years before being dismissed.

276. The Tribunal considered the respondent's interpretation of the policy. Their position was that they had offered the claimant a suitable alternative role, namely the technical and clerk roles. The respondent's agent conceded that if the Tribunal concluded the Provisions had not been applied, that would be relevant as to the fitness of the dismissal. While the respondent believed the admin roles had been declined by the claimant, the respondent unreasonably failed to ascertain the position (which a reasonable employer would have done given the consequences).

277. The respondent unreasonably failed to follow its contractual policy on the facts found by the Tribunal.

278. **Fourthly** it was alleged that the respondent unreasonably failed to consider the claimant for any other alternative employment. The respondent had identified suitable vacancies, which the claimant accepted in cross examination were suitable. The claimant's sole focus in relation to the stores roles prevented him from reasonably alerting the respondent to the position he advanced at the Hearing, that he was prepared to carry out other roles. No formal offers had been given to the claimant such as to allow the claimant to properly and clearly consider the position. The matter was not considered at the appeal stage. Had the position been properly examined at the appeal stage, the claimant would have accepted an admin role, which the respondent accepted was a suitable alternative role, if the respondent was not prepared to progress the stores role. That would have been determined had the Stood Off Provisions been properly applied.

279. On the facts of this case the respondent did not act reasonably in failing to consider the claimant for other roles.

280. **Fifthly,** it was argued the respondent failed to properly consider the claimant's long service with the respondent. The Tribunal was surprised that the appeal officer did not take length of service into account in reaching the decisions he did. Length of service is often an important consideration. However, the Tribunal accepted that in this case there were no reasonable alternatives for the respondent.

281. The respondent had reasonably offered the claimant other roles which the claimant had not said he was willing to undertake or try. The claimant had said he wished to carry out a role which was a role that was not vacant and not likely to be vacant within the next 2 years. Length of service was irrelevant to those considerations.

282. There was no suggestion what the respondent should have done in considering the claimant's lengthy service. The claimant for example had not raised his length of service at all during the appeal. There was no suggestion length of service resulted in a different outcome on the facts.

283. While it was unusual, the Tribunal was satisfied that the respondent in this case on the facts acted reasonably in its approach in considering that length of service did not materially alter the conclusions reached from the material available at the time.

284. **Finally** it was alleged that the respondent failed to allow the claimant to exercise his right to appeal within a reasonable timeframe. The Tribunal considered this carefully. The period from dismissal until appeal was around 7 months. That is unusual and lengthy and must be viewed in context. The respondent's position was that the appeal was being held back pending a resolution of the claimant's appeal in relation to this voluntary service application. That was disputed by the claimant.

285. There was no evidence led by the respondent to show when the appeal was issued and the respondent did not issue any correspondence during the delay to explain the position.

286. Looking at matters on the round, the Tribunal considered that the time taken to allow the claimant to exercise his appeal was not within a reasonable timeframe on the facts of this case. The dismissal was unfair.

Procedure generally

287. The Tribunal also considered the procedure that the respondent undertook in reaching its decision to dismiss the claimant to assess whether the procedure fell within the range of reasonable responses open to a reasonable employer.

The Tribunal concluded that the procedure that was followed was not a procedure that a reasonable employer in the position of the respondent could follow on the facts given the Stood Off Provisions which fundamentally altered the procedure that a reasonable employer would require to follow.

288. The claimant had been advised at welfare meetings that alternative roles were being explored but the alternatives that the respondent considered to be reasonable were not properly explored. A reasonable employer would have set out clearly and in detail what the new roles were given the claimant's position and made enquires at to the position at the appeal stage.

289. The respondent reasonably offered the available roles to the claimant but did not properly conclude that process by making the offers clear and making clear what the claimant's position in relation to those roles were. The respondent did not reasonably conclude the claimant had rejected those roles. A reasonable employer would have permitted a trial for the stores role, from the information before them given the Stood Off Provisions. No reasonable employer would do as the respondent did in this case given the context and contractual position.

290. The information before the dismissing officer was not clear with regard to the alternative roles and the respondent had chosen not to offer a trial in the stores roles, contrary to the occupational health report they had sought. That was not reasonable (given the importance of the roles in determining whether the Stood Off provisions were engaged and thereby whether the claimant's employment was to continue or not). The respondent had not set out its position in relation to the Stood Off Provisions in writing or otherwise in a clear way resulting in a lack of certainty as to what the respondent's position in relation to the Stood Off Provisions was.

291. The claimant was given the right to appeal but after significant time had passed without setting out the reasons for the delay at the time.

292. The backdrop of the Stood Off Provisions resulted in the procedure that was undertaken in this case being a procedure that no reasonable employer would have followed on the facts.

Acting fairly and reasonably in all the circumstances

293. The Tribunal considered the fairness of the dismissal in all the circumstances taking account of the size of the respondent, its resources, equity and the substantial merits of the case.

294. The issues in this case arose because of the contractual Stood Off Provisions which fundamentally altered the assessment of the fairness of the dismissal. The respondent's actions required to be viewed in light of these provisions. Given the claimant's continued employment was at stake, it was vital the contractual provisions were properly and fully considered by the respondent. The provisions were not properly nor fully applied either at the dismissal or appeal stage, despite the matter being brought into focus on behalf of the claimant. There were fundamental and not procedural errors.

295. The Tribunal found that the respondent had unreasonably interpreted the claimant's contractual entitlement. The respondent believed the claimant was incapable of carrying out the role which he was employed to do. The respondent had sought to identify alternative roles and offered the claimant suitable roles that existed at the time. The respondent did not properly explore the alternative roles nor properly apply the Stood Off Provisions which would have avoided his dismissal.

296. The respondent believed the stores role involved manual labour that created a risk for the claimant but that was a conclusion reached without giving the claimant an opportunity of trying the role and did not fully take into account what the claimant could do in relation to the stores role. The information before the respondent did not reasonably support the conclusion that the claimant was incapable of doing the role and a reasonable employer would have followed the contractual process. No reasonable employer would have progressed matters as the respondent did on the facts and in context.

297. The delay in respect of the appeal hearing was unreasonably lengthy with no explanation being given at the time.

298. The Tribunal did not consider the fact that Ms O'Donnell took the lead in gathering information after the dismissal to result in an issue as to impartiality. The person who heard the appeal was impartial and he genuinely and fairly considered all the information before him. He made enquiries in relation to the points the claimant had raised and engaged with Ms O'Donnell. There was no information to support the suggestion Ms O'Donnell had sought to influence the appeal officer unfairly or that she only sought information that supported her decision. The evidence was that Ms O'Donnell fairly sought to fully understand what the role would entail.

299. Ms O'Donnell had sought information in relation to the stores roles but the information did not support the conclusion that the claimant could not reasonably carry out the role. The risk assessment undertaken was relatively basic (and did not involve the claimant) and no up to date medical information was sought at the appeal stage despite the passage of time. It was also relevant that the respondent's senior occupational health adviser was of the view further information was needed.

300. The Tribunal accepted the assertion that the respondent acted unreasonably in assessing the claimant's suitability for the stores role. While The Tribunal must avoid applying a counsel of perfection or their own decision, the Tribunal considered the assessment carried out by the respondent to fall outwith the range of reasonable responses open to a reasonable employer in all the circumstances. While there were manual handling requirements involved in the role, these were not properly placed in the context of what the claimant could do. Reliance was placed on older medical reports pertaining to a different role and the respondent did not follow the advice of the most recent occupational health report sought for that very purpose (and the risk assessment eventually undertaken did not properly or fully involve the claimant which was unreasonable given it specifically related to the risks arising if the claimant undertook the role).

301. The Tribunal considered it a fair criticism of the appeal officer that he unreasonably failed to explore the possibility of deployment to suitable alternative roles. The claimant had made it clear that he had not refused the

admin roles. Despite that, no steps were taken to put the position beyond doubt (particularly where it had become clear that the claimant's sole focus, that in relation to Stores, was not a role the respondent was prepared to consider). Had the position been set out and the claimant understood that dismissal could be avoided if he were to agree to undertake the admin roles, the position would have been different. The appeal officer did not act reasonably in failing to explore the admin roles or the stores role given the context in terms of what the claimant said, the contractual matrix and the consequences for the claimant. The respondent had not complied with the contractual requirement to make every possible endeavour to accommodate the employee in suitable alternative work, taking account of skills, knowledge, experience and training to accommodate the claimant.

Taking a step back

302. The Tribunal assessed matters in light of the information that was available to the respondent at the time in light of its size and resources.

303. The procedure that was followed that led to the claimant's dismissal did not fall within the range of procedures open to a reasonable employer on the facts of this case. The Tribunal was not satisfied that the respondent acted fairly and reasonably in all the circumstances of this case, taking account of the size, resources, equity and merits, in treating the reason for his dismissal as sufficient to dismiss. The decision to dismiss the claimant by reason of his capability was a decision that did not fall within the range of reasonable responses open to a reasonable employer on the facts of this case.

304. The claimant was accordingly unfairly dismissed.

Unlawful deductions from wages

Were the respondent's 'Stood Off' provisions wages which were properly payable to the claimant?

305. The claimant's agent argued that the entitlement to the benefit of Stood Off Provisions amounted to wages properly payable in terms of the claimant's contract. The respondent's agent argued the sums claimed were not wages.

306. The Tribunal sought comments from the parties on the impact of the case of **Delaney v Staples** 1992 ICR 483 since that case appeared to be authority that a claim in respect of unlawful deduction of wages can only be brought where the sum claimed relates to a subsisting contract (and not for sums due in the future, in the absence of an ongoing employment relationship).

307. The claimant argued that case was not relevant as the only issue in that case was whether or not payment in lieu of notice fell within the statutory definition of 'wages'. In this case, the Tribunal is being asked to consider Stood Off payments which is not a payment which could be said to be in connection with termination of his employment, and it did not arise upon termination. Rather, the payment fell due at the point at which the claimant satisfied the criteria. At that point the right to be Stood Off with pay crystallised and the respondent made unlawful deductions by failing to pay wages due.

308. It was argued that Stood Off payments become due when the claimant met the relevant criteria. The sum properly payable was the readily quantifiable basic weekly wage. It was submitted that the fact employment has ended, does not change the nature of the payments because they are not payments in respect of the termination of the contract.

309. The respondent's agent noted that Lord Browne-Wilkinson (at 488E, emphasis added) stated: "*if an employer terminates the employment (whether lawfully or not) any payment in respect of the period after the date of such termination is not a payment of wages*" which was said to show that if the deductions claim is assessed on the assumption that the dismissal would have occurred in any event, even if unlawful, payments in respect of the Stood Off provisions are not wages.

310. On the facts of this case, the claimant was paid full salary until the date of his dismissal. He argued that he ought to have been "Stood Off" in terms of the Stood Off Provisions and thereby paid a sum equivalent to 2 year's wages which he says he would have been paid had he not been dismissed in breach of the Stood Off Provisions. The position was unclear given the lack of correspondence from the respondent at the time setting out what the

respondent had actually done (and how it treated the claimant *vis a vis* Stood Off), but it appears that the respondent had determined Stood Off was not applicable (as it believed the claimant had rejected the admin roles) and as such the provisions were not engaged and the claimant was dismissed.

311. The claimant in this complaint is arguing he ought to have been Stood Off rather than dismissed. The claim was that 2 year's salary should be paid in respect of the contractual entitlement to have been Stood Off rather than dismissed and that such payments were wages. The Tribunal considered that the nature of the payment was similar to that set out in **Delaney:** It related to payments due following the end of the contract of employment and not for sums due in respect of the subsistence of the contract.

312. The payment is not referable to an obligation on the worker under a subsisting contract of employment to render his services, and as such it does not constitute "wages". The sums claimed are referable to a period after termination (when the payment of wages stopped) and are not wages for the purposes of the protection of wages provisions. On a proper analysis of the nature of the sum sought, the payment of the lump sum was made in connection with the breach of the Stood Off Provisions (a contractual entitlement) and not in respect of rendering services under the contract of employment. It was not a sum in respect of service rendered but a sum for damages for breach of contract.

313. Had the claim been successful, no award would have been made as the sums sought by way of wages are covered in the compensation awarded in respect of the discrimination claim.

314. The complaint in respect of unlawful deduction of wages is dismissed.

Remedy

What financial loss, if any, has the claimant suffered as a result of any alleged unlawful discrimination and unfair dismissal, if found?

315. As the Tribunal upheld the unfair dismissal and section 15 claim, the Tribunal turned to consider remedy. The first issue was what financial loss the claimant suffered as a result of the unlawful treatment.

316. The claimant is entitled to a **basic award** of £16,845.

317. The Tribunal decided to award no compensatory award and instead make an award in respect of the discrimination claim to avoid any overlap in compensation (pursuant to section 126 of the Employment Rights Act 1996). Recoupment does not therefore apply to the award.

318. The central aim of **compensation** in an unlawful discrimination case is to place the claimant in the same position, so far as is reasonable, that he would have been had there been no discrimination. It is only the losses sustained as a result of the unlawful discrimination that is recoverable.

319. The Tribunal considered that, had there been no discrimination, the claimant would have accepted one of the admin roles and his employment would have continued (with the same pay and benefits he received at the point of dismissal).

320. The Tribunal also considered from the evidence and its experience as an industrial jury that it was certain the claimant would secure comparable income (with the same pay and comparable benefits) 21 months following his dismissal.

321. His financial losses are therefore 21 months. The claimant's financial loss is accordingly £525 x 52 / 12 x 21 which is £47,775.

322. In deciding that the claimant would have secured a comparable role within 21 months from the date of his dismissal, the Tribunal considered the evidence before it and noted while there was an absence of evidence, in the sense of employability evidence or evidence about the job market, both agents speculated future loss of up to 18 months from the hearing may be a fair assessment given the claimant's skills and circumstances. The claimant's agent had noted in his submissions that the claimant's "entire focus" since his dismissal had been on the Tribunal.

323. Although in the claimant's schedule of loss "losses until the date of retirement" (7 years of losses) were sought, the claimant's agent did note that it was anticipated the claimant would be able to secure employment once the Hearing had concluded.

324. The Tribunal considered that to be fair in light of the circumstances and evidence and was not satisfied this was a career loss case. The Tribunal concluded that there was a 100% chance of the claimant's losses ceasing 21 months from the date he was dismissed. It was self evident that the claimant was skilled and that it was the Tribunal that had been the claimant's principal focus since his dismissal. No issue was raised about that by the respondent.

325. The Tribunal considered that given the Hearing has concluded, it was certain that the claimant would secure comparable work within 21 months from the date his employment ended. That was just in all the circumstances.

326. The respondent's agent noted that the claimant had sought to leave the respondent's employment via voluntary severance and had sought to be Stood Down.

327. There was no evidence led as to other jobs the claimant could have done in the period since his dismissal that were vacant. There was no suggestion the claimant had not mitigated his loss, the onus being on the respondent to show that the claimant had not done so. There was no suggestion of alternative roles the claimant would have secured (or would secure).

328. The Tribunal considered, from the evidence led and its careful assessment of the position, that there is a virtually 100% chance the claimant would secure comparable employment 21 months from the date of dismissal. That was arrived at using the Tribunal's industrial expertise and assessing the position in light of the authorities and the evidence. The Tribunal considered the chance that the claimant would secure comparable employment (with similar terms and conditions) 21 months form the date of dismissal. There are vary many imponderables in predicting what would have happened, given particularly the limited evidence that there was, but that the Tribunal considered that a date 21 months after termination was the appropriate date

to select, on the basis that it considered that the claimant would have obtained comparable employment at that time. It was, in the Tribunal's view, 100% certain it would occur then (and not before or after).

329. The Tribunal considered the chance of the claimant not agreeing to the admin roles had they been asked of him and did not consider there to be anything less than a 100% chance the claimant would accept the role had it been offered to him (the alternative being his dismissal).

330. This conclusion was reached from the limited evidence before the Tribunal which is assessed using the panel's industrial expertise. There was no independent evidence. The onus is on the claimant to establish his loss going forward in evidence. Absent clear medical evidence the Tribunal could only assess matters using the evidence that was presented, which was vague. The Tribunal therefore assessed the evidence it had using its experience as an industrial jury to carry out the assessment exercise as best it could in those challenging circumstances and in context of the evidence led, making sure ultimately the sum awarded is just and fair in light of the unlawful act, with the sum being awarded properly reflecting what the Tribunal considers the losses to the claimant to be, so far as flowing from the unlawful act given the uncertainty and speculation.

331. The Tribunal found the assessment as to future loss challenging in the absence of clear evidence as to the position. The claimant clearly has transferable skills and experience. Equally the respondent did not provide evidence of alternative roles the claimant would secure within the period compensation is awarded. This is a highly speculative decision that is based on limited evidence. It was regrettable that no specialist independent evidence was presented to assist the Tribunal as to the position and the Tribunal can only make a decision from the information that has been presented to it and did so carefully applying the legal principles above to the facts.

332. The total sum in respect of wage loss is therefore £47,775.

Deductions

333. The parties accepted that the ill health severance payment fell to be deducted from the sum awarded. That was a proper concession since the Tribunal found the claimant would have remained in employment (and therefore would not have been dismissed in terms of the ill health severance policy and would not therefore have received the ill health severance payment). The sum of £30,111.18 falls to be deducted from the sums awarded to the claimant.

334. The claimant chose to draw upon his pension as he had no other income on which to survive. The Tribunal considered that to be a matter for him and there was no submission as to how the pension payments ought to be taken into account, given the agreed position in respect of pension loss (which is awarded as below). The fact the claimant chose to draw on his pension is not something that ought fairly to be taken into account.

335. The claimant has been in receipt of fortnightly payments of £169.60 in respect of Employment Support Allowance. There was no evidence that this was likely to change. During the 21 month period the claimant would have received £169.60 x 42 which is £7,123.20 which falls to be deducted.

Net wage loss

336. The total net wage loss is therefore £47,775 less £30,111.18 and £7,123.20 which amounts to £10,540.62.

Interest on financial sums

337. Interest is due on the £10,540.62. As the unlawful act occurred on 14 March 2023 which is 389 days ago interest on the pecuniary sums is calculated from the midpoint, 194 days ago, meaning interest is at 8% and is therefore 194 x 0.08 x 1/365 x £10,540.62 which is £703.32.

Pension loss

338. The parties agreed that the loss in respect of one year pension's loss was £7,040 and for 2 years it was £13,620. In this case the Tribunal considers that an appropriate and fair way to compensate for pension loss for 21 months would be apportion the difference thus awarding £7,040 plus nine twelfths of

the difference, namely 9/ 12 x (£13,620 - £7,040) which is £4,935. The total pension loss is therefore £11,975.

339. Interest should be added. The financial loss was £9,233.33. As the discriminatory act occurred on 14 March 2023 which is 389 days ago interest on the pension loss is calculated from the midpoint, 194 days ago, meaning interest is at 8% and is therefore 194 x 0.08 x 1/365 x £11,975 which is £509.18.

What award, if any, should be made for injury to feelings?

340. The Tribunal considered the impact of the dismissal upon the claimant. The claimant's agent argued that the dismissal had impacted upon the claimant's injury to feelings as his confidence had been dented and he had trouble sleeping. He also feels embarrassed having been unemployed after 38 years of work. The lower end of the mid band was sought.

341. The respondent's agent submitted that the claimant had already sought to leave his employment via voluntary severance. At most he knew he was only likely to remain in employment for 2 years given he was not fit for his substantive role and the role he wished did not exist and was not likely to exist such that dismissal was inevitable after 2 years. The impact of dismissal was therefore minimal in these unusual circumstances.

342. The Tribunal carefully assessed the evidence that had been led together with the parties' written and oral submissions in detail. It also considered the legal position mindful that the purpose of injury to feelings is to compensate the claimant for the anger, distress and upset caused by the unlawful treatment. It is compensatory and not punitive. The Tribunal was careful to focus its enquiry upon the actual injury suffered by the claimant in respect of the unlawful acts only. The injury to be considered is the injury to feelings (and not other injuries) and only in respect of the acts found to be unlawful. It is the impact upon the claimant which is to be considered.

343. The context in which the unlawful act occurred was important, including his application for voluntary severance and the Stood Down Provisions.

344. There was no medical evidence setting out the impact of the dismissal upon the claimant but the Tribunal did, however, have the evidence of the claimant and was able to assess the impact upon the claimant of the dismissal within the context.

345. The Tribunal must ensure that the award is compensatory and fair to both parties, compensating the claimant fully without punishing the respondent. The Tribunal ensured the award it reached bore a similarity to the award that could be made in a personal injury claim, taking account of the value of the sum in everyday life whilst seeking to ensure public respect on the level of award is maintained.

346. The Tribunal was satisfied that the dismissal merited an award for injury to feelings in the upper half of the lower band. The Tribunal was not satisfied that the unlawful acts merited an award in the middle band in light of the authorities in this area and given the context in which the dismissal occurred. It would not have been just to have placed the claimant in a different band.

347. The Tribunal assessed the position as a whole from the evidence before it and concluded that it was fair and just to award the sum of £7,500 in respect of the unlawful actions and the impact upon the claimant on the facts.

348. In concluding that the injury to feelings award fell within the lower band, the Tribunal took account of the nature of the discrimination and impact from the evidence before it. This was a “less serious” case, compared to, for example, a situation where dismissal was not likely and not known. The claimant had known dismissal was likely on the facts of this case. He knew it was a probability. Equally the Tribunal took account of the purpose of the award and that the treatment amounted to unlawful discrimination and had an impact upon the claimant from the evidence.

349. In assessing compensation, the Tribunal took account of the subjective feelings of upset, frustration, worry, anxiety, mental distress, unhappiness, stress and depression exhibited by the claimant, to the extent the Tribunal considered to stem from the unlawful acts.

350. It was in the interest of justice to make the award the Tribunal has from the evidence presented given the impact of the failures upon the claimant in respect of injury to feelings.

351. Interest is awarded as follows. The award is £7,500. The relevant date is 14 March 2023. The calculation date is 14 March 2023. That is 366 days. The judicial interest rate is 8%. Interest is therefore 366 x 0.08 x 1/365 x £7,500 which is £601.64.

ACAS Code of Practice on discipline and grievance

352. Neither party made any submissions that there was any unreasonable failure to follow the Code. The Tribunal did not consider it just or equitable to make any award in this regard.

Grossing up

353. As the award exceeds £30,000 it is necessary to consider grossing up the figures, to ensure the sums the claimant receives are the sums awarded (taking into account the impact of tax) as best the Tribunal can.

354. However, in this case the total sum to be grossed up is awarded is £31,829.76 (all awards except the basic award which is calculated based upon the gross income). The first £30,000 is deducted from the sum, leaving £1,829.76. As the personal allowance is £12,570 there are no sums that requires to be grossed up.

Taking a step back

355. The Tribunal once it concluded its deliberations took a step back to assess the decision it had reached to ensure that the sum awarded was properly attributable to the losses sustained by the unlawful act. The Tribunal recognises this is not a science nor an arithmetical exercise which is why it has made certain assumptions and used the sums it has and taken the approach it has taken.

356. The Tribunal was careful in reaching its conclusions as to loss of chance that the assessment was based upon the evidence. There was limited evidence

available. While it is rare for a Tribunal to be 100% certain that things will occur, on the facts of this case and after careful and lengthy deliberations given the surrounding facts and context the assessment carried out was fair and reasonable in all the circumstances applying the legal principles summarised above. It was as accurate an assessment as to future loss that the Tribunal was able to achieve from the evidence before it to ensure the claimant is put into the position that would have occurred, so far as money can do so, had the unlawful act not occurred given the uncertainty and imponderables in this assessment.

357. Taking a step back, the Tribunal is satisfied that the total sums awarded fully compensate the claimant for the losses he sustained as a result of the unlawful act from the evidence presented to the Tribunal avoiding double recovery and ensuring the sums properly and fairly compensate the claimant for the unlawful acts.

Summary

358. The Tribunal has unanimously found that the following sums flow directly from the unlawful act of discrimination (and unfair dismissal) and should be paid to the claimant:

Basic award: £16,845

Injury to feelings: £7,500

Interest on injury to feelings: £601.64

Net wage loss: £10,540.62

Interest on net wage loss: £703.32

Pension loss: £11,975

Interest: £509.18

Total award: £48,674.76

D Hoey

Employment Judge

8 April 2024

Date

Date sent to parties 11 April 2024