EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Hodgson

Respondent: Cox Motor Group Limited

Heard at: Manchester **On:** 27, 28 and 29 November 2018
18 December (In Chambers)

Before: Employment Judge Hill
Ms M Dowling
Mr Clissold

REPRESENTATION:

Claimant: Ms Levene, Counsel
Respondent: Mr Keenan, Consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for unfair dismissal is well founded and succeeds.

2. The Claimant's claim for direct discrimination fails and is dismissed.

3. The Claimant's claim for failure to make reasonable adjustments is well founded and succeeds.

4. The Claimant's claim for failure to pay a bonus fails and is dismissed.

REASONS

1. The Claimant brought claims of Unfair Dismissal, direct Disability Discrimination, failure to make reasonable adjustments and failure to pay a bonus. The Tribunal confirmed with Counsel for the Claimant that no claim was being made for discrimination arising from the Claimant's disability.

2. It was agreed with the parties at the beginning of the hearing that the issues the Tribunal was being asked to determine were:

3. Unfair Dismissal – S98(1) ERA 1996

   (a) Has the Respondent shown that the reason for the dismissal was one of the potentially fair reasons for dismissal?

   (b) Did the Respondent hold that belief in the Claimant's incapability on reasonable following a reasonable investigation? In coming to that belief did the Respondent act in the way a reasonable employer could have done?

   (c) If the dismissal was unfair, did the Claimant contribute in any way to his own dismissal?

   (d) Does the Respondent prove that if it had adopted a fair procedure that the Claimant would have been fairly dismissed in any event? And/or to what extent?

5. Direct Disability Discrimination S13 EQA 2010

   (a) Is the Claimant's claim of Direct Disability Discrimination out of time and if so is it just and equitable to allow the claim to continue?

   (b) Was the Claimant treated less favourably as a result of his disability in any of the following alleged ways?:

      (i) The Respondent's management bullied and harassed the Claimant in Front of other employees. The service manager would leave post it notes for the Claimant where other employees could see them, stating "you deaf bastard" and "how many fucking times do I have to put these in car did you hear me".

      (ii) The Claimant as invited to attend a disciplinary meeting on 25 October 2016 whilst he was off sick.

      (iii) The respondent refused to allow the Claimant to return to work without a report from a doctor and made the Claimant remain off work on SSP.

      (iv) The Respondent failed to allow the Claimant's appeal.

      (v) The Respondent ridiculed the Claimant in front of other employees for is inability to use the chrome system.

      (vi) The Respondent failed to allocate the Claimant jobs that he was capable of carrying out which resulted in the loss of bonus.

      (vii) The Respondent terminated the Claimant's employment

   (c) Failure to comply with the duty to make reasonable adjustments in any of the following alleged ways:

(i) The Respondent refused the Claimant assistance in positioning ramp legs so that kneeling could be avoided.

(ii) The Respondent refused the Claimant from carrying out driving/delivery duties.

(iii) The Respondent refused the Claimant from carrying out MOTs when no kneeling was necessary.

(iv) The Respondent disposed of the Claimant's computer chair when he was off sick.

(d) If so, do the above PCP's constitute a PCP, which puts the Claimant at a substantial disadvantage in comparison to persons who were not disabled?

(i) What is the nature and extent of the substantial disadvantage suffered by the Claimant?

(ii) Did the respondent take such steps, as it was reasonable to have taken to avoid the disadvantage?

(e) The Claimant relies upon a hypothetical comparator.

Evidence

6. Witness statements were provided to the Tribunal:

For the Claimant	- Mr Hodgson - The Claimant
For the Respondent	- Mr Whalley - Service Manager
	- Mr Morphy - After Sales Manager and Dismissing Officer
	- Ms Hayton - Group Financial Director and Appeals Officer - No Oral evidence given

Two bundles of documents numbered 1 – 374. A List of Issues was agreed between the parties as set out above and a chronology.

Relevant Findings of Fact

7. Although we heard a lot of evidence from the parties, we have not referred to all of it in our judgment but have limited our findings to those matters we consider relevant to the issues.

8. The Respondent business is a privately owned Honda dealership group. At the time of the Claimant's dismissal they employed six Vehicle Technicians, two receptionists and 1 valet/service person and a driver.

9. The Claimant suffers from sciatica, arthritis, hearing loss and depression and is disabled for the purposes of the Equality Act. The Respondent accepted that the Claimant satisfied the definition of disability for the purposes of the Act.

10. The Claimant was employed as a Vehicle Technician (VT) from October 1999 until 20 December 2016. In 2004 the Claimant (who was employed as a VT) had an accident at work and was absent as a result of the injuries he suffered. When he returned to work the Claimant had back problems and he was assigned alternative lighter duties and was based in the body shop doing primarily sales preparation work.

11. The Claimant remained in that role until around 2011/2012. The recession hit and the number of cars sold reduced and therefore there was insufficient work for the Claimant to do on a full time basis. The Claimant was asked if he wanted to return to work as a VT and he agreed.

12. At that time all the sales work moved to the main workshop and the work previously carried out by the Claimant was merged with the vehicle technician role. As a result of the recession, car sales reduced from around 20-30 cars per week to 5 or 6 per week. The Claimant did not dispute these facts or that there had been a decline in sales and therefore sales preparation work.

13. The duties of a VT was wide a varied and included carrying out MOTs, servicing, tyre fitting, sales appraisals, pre delivery inspections, clutch repairs, vehicle health checks and general repairs/maintenance work. VTs were also required to complete paperwork in connection with their duties.

14. In 2015 the Claimant had a hearing test that showed that he had 13% hearing loss and tinnitus. The Claimant informed his employer that this affected his ability to diagnose problems with vehicles particularly if there was background noise or it was raining. The Claimant also had a number of other health conditions including depression, back and neck pain.

15. On 18 September 2015 the Claimant had a telephone consultation with Occupational Health (OH) organised by the Respondent. A medical capability meeting was held on 2 December 2015 to discuss the report.

16. The report is set out in detail at pages 58 – 65 of the bundle. The report, in summary, states that the Claimant was fit to work with adjustments and recommends that the Respondent should carry out a work related stress risk assessment. A workplace Stress assessment document was produced in the bundle at pages 63-65. This document was only partially completed and the Claimant had not seen it or been involved.

17. The OH report also recommended that the Claimant should be able to take time away, around 10 minutes, from his work station to recompose himself if he felt that symptoms were building up and that he should be given additional time to check his work as his concentration could be affected. It recommended that the Claimant's work should be rotated to manage back and neck pain and a work related risk assessment moving and handling should be done. This assessment was not done.

18. The Respondent confirmed this meeting in writing and stated that the Claimant was to return to full normal duties and although the Claimant had said that he could not do clutches, turbos or master cylinders that they believed he was able to do them so long as they were spaced out. The respondent also confirmed that the Claimant could take breaks when he felt he needed to do so.

19. An informal meeting was held with the Claimant on 19 February 2016 because he had been unable to lubricate a clutch master cylinder and he could not hear properly on a test drive. The Claimant stated that the reason he could not do the job was because of his size and he could not get under dashes and that he had had a cold that had affected his hearing. The Respondent said they needed to know what he could and could not do and the Claimant advised that he could do most things. Mr Whalley provided a list of jobs and the Claimant advised of what he could and could not do. This list was not provided to the Tribunal and although the Respondent included a list of jobs the bundle it was not the list that the Claimant had provided details on.

20. On 15 March 2016 the Claimant was called into an investigatory meeting over the quality of his work for four incidences of poor workmanship alleged to be misconduct. The detail of the misconduct is set out in a letter at page 78 of the bundle. As a result of this meeting the Claimant was required to attend a disciplinary hearing 18 March 2016. The outcome of that was that he was found guilty of misconduct for one of the incidences, namely that he had failed to install an auxiliary belt that resulted in damage to the cam belt. The Claimant was given a verbal warning and the right to appeal. The Claimant did not appeal this decision.

21. In June 2016 the Claimant went off sick with knee problems and required an operation, which took place on 13 July 2016. The Claimant returned to work on 1 September 2016. The Claimant provided a letter from the hospital regarding reasonable adjustments when he returned to work. The letter stated that the Claimant would have difficulty knelling down and it would be best if he worked at desk level and avoided kneeling.

22. Upon his return to work the Respondent met with the Claimant to discuss the reasonable adjustments. At this meeting the Claimant said that he had already adapted the way he worked prior to the operation to avoid kneeling down and could not think of any jobs he had previously being doing that he would be unable to do. However, the Respondent asked the claimant to provide a list of jobs that he felt he could not do and that they would meet the following day to discuss. The Respondent also enquired whether there were any other jobs in the group that the Claimant would find easier for example valeting. The Claimant said that valeting would not assist him, as it required a lot of bending over and leaning into cars and that he wanted to do technical work. The Respondent said that they would meet again the following day.

23. The Claimant prepared a note of the things that caused him pain and set out a list of jobs he could do. This is set out at page 112 of the bundle and whilst it does not provide a list of things he could not do it does set out that bending causes him pain, laying on his back caused him pain, working with his hands in the air caused him neck pain. The claimant stated that he was in pain most days which caused him stress and depressed and anxious. He provided a list of his current medication and

said that the jobs he could do were: servicing, Tyre Fitting, MOTs and pre MOTs, sales appraisals and vehicle health checks.

24. A further meeting was held on 8 September 2016 at the request of the Claimant and the Respondent confirmed that they had received his 'note' but that it did not list the jobs he could not do. The Claimant was asked to let the Service Manager, Mr Whalley, know if there was anything he could not do or was struggling with. At this meeting the Claimant enquired about other less stressful roles and the valet position was discussed again but it was too manual for the Claimant.

25. The Respondent continued giving the Claimant normal duties and said it was for the Claimant to say if there was anything he was struggling with or could not do. The Respondent also said that they would assess the job list and if it shows he cannot do most jobs then there would be a further meeting, as they owed him a duty of care.

26. Despite this it appears that the Respondent did not get back to the Claimant regarding the jobs he could or could not do. The Respondent confirmed in evidence that they could not recall having done this.

27. On 10 October 2016 the Claimant was called in for a further 'informal meeting' regarding two issues over his conduct. There had been two incidences on 5 October 2016 where it was alleged the Claimant swore at a colleague and 8 October 2016 where it was alleged the Claimant acted in an aggressive and confrontation manner and threatened a colleague.

28. On 12 October 2016 the Claimant was asked to attend a disciplinary meeting on 13 October 2016. The Claimant spoke to the After Sales Manager, Mr Morphy and said that he needed to go home because he could not cope. A note of this meeting is set out at page 129 of the bundle. At this meeting the Respondent showed concern for the Claimant but told him that they had intended holding a performance review meeting with him that day because he had been back at work for six weeks but that they had not seen any improvement. It was agreed at that meeting that the disciplinary would be postponed until 25 October 2016, no mention was made of a performance review. The Claimant went off sick until 18 October 2016.

29. The Claimant attended a return to work interview on 18 October 2016 with Mr Whalley. At this meeting the Claimant explained that he could not focus and had not slept and that he was trying to cope with a lot at that time and that he would speak to his doctor. It was also agreed to refer him back to occupational health. On 25 October 2016 the Claimant attended his disciplinary hearing with his Union representative. The outcome of that meeting is set out in a letter dated 27 October 2016 at page 150 of the bundle. The Claimant was issued with a first and final written warning and advised that he had a right to appeal within 5 days of receiving the letter.

30. The Claimant appealed on 2 November 2016. The Respondent refused the appeal on the basis that the Claimant had sent the appeal out of time. During evidence when referred in detail to the timing of the letters and the delivery date, the Respondent accepted that it was in fact in time based on the fact that the claimant

did not receive the letter advising him of the outcome until 1 November 2016. The Claimant alleges that the refusal to hear his appeal was because he was disabled. The Tribunal finds that it was a mistake on the part of the Respondent and the refusal was not because of his disability.

31. During this period another issue was ongoing in that on 25 October after his disciplinary hearing the Respondent wrote to the Claimant on 25 October 2016 stating that they had concerns over his fitness to work and requested that he remain at home on sick leave until they had confirmation from his doctor that he was fit to return to work.

32. The Claimant alleged that this was an out of the blue request and that the respondent had instructed the claimant to stay off work because of his disability. The Tribunal finds that it was a reasonable request based on what claimant had said in the meeting on 18th and that they were referring him to occupational health. Indeed the Claimant did go to his GP, who provided a sick note for that period for stress and in fact agreeing with the respondent that he was not fit for work. The Tribunal finds that this was not direct discrimination. The Tribunal finds that the Respondent had a genuine reason to believe that the Claimant was not fit enough to attend work. The Doctors notes provided by the Claimant's GP confirming that he was not fit for work supported the Respondent's view. The sick notes do not say that the Claimant was able to return to work with adjustments and that at this time he was suffering from stress related illness.

33. On 23 November 2016 the Claimant attended a meeting with Health Assured who produced a report set out at pages 161 – 167 of the bundle. This report was sent to both the Claimant and the Respondent. Essentially the report concluded that the Claimant was fit for work with reasonable adjustments.

34. The Claimant was invited to attend a capability meeting on 19 December 2016. The notes of this meeting are set out at pages 172 – 178 of the bundle. At this meeting the Respondent stated that said that they could not save all the PDIs for one person. However, the Respondent did not set out then or at this hearing the number of PDIs that the Respondent was likely to carry out or details of the level of work that the Claimant was able to do. The Respondent also referred to the Claimant being on amended hours when no one else in the business was and said that they had made as many adjustments as they could. The Respondent's view was that because the Claimant was in pain that there was nothing they could offer.

35. The outcome of the meeting was that the Claimant was dismissed on the grounds of capability on 20 December 2016. The Claimant appealed the decision to dismiss. An appeal hearing was held on 5 January 2017 and was conducted by Helen Hayton, the Financial Director. At this meeting the Claimant set out a number of reasonable adjustments that he considered would assist him in returning to work. He also provided a list of jobs that were affected by his medical conditions. This list was not provided in the bundle and the Respondent did not know where it had gone. There was also a discussion around alternative work with the Respondent stating that there was a not alternative position. The Claimant stated that he could be an MOT tester but Ms Hayton said that they had three MOT testers at each site and it would mean creating a new role. The Claimant asked that Ms Hayton look at any other roles within the group and she agreed.

36. A further 'medical capability meeting' was arranged for 19 January 2017. The Claimant provided a letter from his GP and was represented by his UNITE Union representative. The letter from his GP confirmed he was fit to return to work with adjustments. This meeting was adjourned because the Respondent considered that the Union representative was obstructive and did not allow Ms Hayton to put her questions or for the Claimant to answer. Ms Hayton stated that she was unable to 'put her case'.

37. The Respondent arranged a reconvened meeting now labelled an appeal hearing for 31 January 2017. A representative from Peninsula was appointed to hear the appeal.

38. The notes of this appeal meeting were provided at pages 203 to 218 of the bundle. The outcome of this hearing was that the decision to dismiss was upheld. It was not clear who made the decision whether it was Peninsula or the Respondent and neither Ms Hayton nor the representative from Peninsula were present at the hearing.

The Law

39. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed. Section 98(2) ERA sets out the potentially fair reasons for dismissal. One of those reasons is capability 98(2)(a).

> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

40. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

41. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The range of reasonable responses test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

42. In DP Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09, the EAT observed that in respect of ill health capability dismissals the Respondent must show:-

> (i) It had a genuine belief that ill health capability was the reason for dismissal;
>
> (ii) It had reasonable grounds for its belief; and
>
> (iii) It carried out a reasonable investigation.

Polkey

43. Polkey v A E Dayton Services Limited [1998] ICR 142. Though the decision of Polkey arose from a redundancy case it is a concept of much wider application and addresses the statutory question posed by s.123(1) of the Employment Rights Act 1996 ("ERA") in asking the question, what compensation is just and equitable to be awarded to a Claimant? The House of Lords held that procedural fairness was an integral part of the statutory test for assessing the reasonableness of the dismissal.

44. The approach in Polkey was set out by Lord Bridge as three possibilities:

(i) a finding that there was no chance of a dismissal and thus no deduction;

(ii) a finding that the employee would have been dismissed in any event and thus no award of financial loss; or

(iii) a finding that a dismissal was not certain but that there was a substantial chance of the same and thus the employee's losses are reduced to reflect that possibility.

Equality Act 2010

45. S 13 Direct discrimination:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

46. S20 Duty to Make Reasonable Adjustments:

(a) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(b) The duty comprises the following three requirements.

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

(ii) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(iii) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a

> substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

47. A claim of failure to make reasonable adjustments requires a Tribunal to consider a number of questions. Firstly, it must identify the provision/s, criterion/s or practice/s and/or a physical feature of premises occupied by the Claimant's employer, which is in issue. Secondly, it should consider who the non-disabled comparators are. Thirdly, it needs to identify the nature and extent of the disadvantage the Claimant has suffered or will suffer in comparison with the comparators. Only then can the Tribunal go on to judge whether any proposed adjustment is reasonable (Environment Agency v Rowan [2008] ICR 218).

48. If the duty to make reasonable adjustments arises it does not require an employer to make every adjustment that could conceivably be made, only those that are reasonable. Reasonableness is a matter for the Tribunal to assess objectively; accordingly, the mere fact that the employer considers its approach to be reasonable does not make it so (Smith v Churchills Stairlifts Plc [2006] IRLR 41). An adjustment is unlikely to be reasonable if it will not address the employee's disadvantage.

49. The burden of proof under the Equality Act is set out in Section 136 of the 2010 Act and provides:

(i) This section applies to any proceedings relating to a contravention of this Act.

(ii) 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.

(iii) But subsection (2) does not apply if A shows that A did not contravene the provision.

50. A Claimant is therefore required to prove facts consistent with their claim: that is facts, which, in the absence of an adequate explanation, could lead a tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences that it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof shifts to the Respondent to prove that it did not commit the unlawful act in question (Igen v Wong [2005] IRLR 258). The Respondents' explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic.

51. We have borne this two-stage test in mind when deciding the Claimant's claims. We have not however separated out our findings under the two stages in the conclusions below. We have reminded ourselves that detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims.

52. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see Anya v University of Oxford [2001] IRLR 377). We have considered the guidance given by Elias J on this in the case of Law Society v Bahl [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (Madarassy v Nomura International plc [2007] IRLR 246). 33 A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

53. The primary question for the Tribunal to ask is: why did the Respondent treat the Claimant in this way? The fact that a claimant has been treated less favourable than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is something more from which the tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic. **Madarassy v Nomura International plc [2007] IRLR 246 [CA]**.

Time limits for claims under the Equality Act

54. The time limit for claims under the Act is contained in Section 123 which provides as follows:

> (i) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable ……
>
> (ii) For the purpose of this section – (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it. (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something – (a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

55. It can be seen from this provision that time does not begin to run in respect of acts continuing over a period until that period has ended. This might suggest that a failure to make a reasonable adjustment is a continuing act but, as was explained by the Court of Appeal in Kingston upon Hull CC v Matuszowicz [2009] ICR 1170, the correct position is that a failure to make a reasonable adjustment is an omission which is deemed to have been done either when the omission was decided upon or, if there is no evidence of a deliberate decision, when the omitted act might

reasonably have been expected to be done (there is contrary authority at EAT level but we are bound by the decision of the Court of Appeal). This can give rise to a situation where the primary time limit for a claim for failure to make reasonable adjustments has expired at a time when the Claimant could not have reasonably known this. In such a case a Tribunal is likely to be willing to allow a reasonable extension of time on just and equitable grounds.

56. Employers are expected to act positively and constructively. In the key case of Archibald v Fife Council, [2004] IRLR 651, HL the House of Lords said:

> "The DDA does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination."

Conclusions

Unfair Dismissal

57. The Tribunal finds that the Respondent has shown a potentially fair reason for dismissal, namely, capability. The Claimant argued that the reason for dismissal was that the Claimant was disabled and that it was direct discrimination. The Claimant argued that this was illustrated by the fact that the Claimant was never put through any performance improvement process. Whilst the Tribunal accepts that this is the case, we find that the Respondent genuinely believed that the Claimant was incapable of carrying out his role as a Vehicle Technician and that the reason for the dismissal was because he was unable to perform the duties required of him and was not because the Claimant was disabled. The Tribunal raised with the Claimant's representative at the beginning of hearing whether the Claimant was arguing under s15 of the Equality Act, Discrimination arising s from disability and the Claimant's representative specifically confirmed he was not. Whilst it may have been a reason arising from his disability this issue was not pleaded.

58. The burden of proof is on the employer to establish that capability was the reason for the dismissal. They do not have to prove that the employee was incapable of doing their job, just that they honestly believed they could not do it and had reasonable grounds for that belief. The Tribunal finds that the Respondent did honestly believe that the Claimant was incapable of carrying out his role as a VT.

59. However, s98 provides that an employer has a duty to show that they acted reasonably in all the circumstances. A tribunal is required to look not only at what steps the employer took once they became aware that there was a capability issue but also what steps they took to ensure that the employee was able to do their job. A Respondent must satisfy a tribunal that they took steps to provide support and gave the employee an opportunity to improve. In cases of ill health dismissals an employer is expected to ensure that they have relevant medical information in order to establish the employee's fitness to work and to consider alternatives to dismissal. In addition in the case of an employee who is disabled for the purposes of the Equality Act and employer is required to considered reasonable adjustments.

60. The Claimant argued that the Respondent failed to follow a proper procedure and failed to consider the medical evidence adequately which supported the Claimant remaining in work with adjustments; secondly that the Respondent did not have reasonable grounds to sustain their belief that the Claimant was incapable of doing his job; thirdly the Claimant did not have an opportunity to demonstrate his capability because reasonable adjustments were not put in place and fourthly the Claimant was directed to stay at home on sick leave and again not able to demonstrate his abilities within the framework of reasonable adjustments.

61. The Respondent argued that they followed a fair procedure and that they made reasonable adjustments but there was no improvement.

62. The Claimant provided the Respondent with a least two lists of jobs he could do or not do and made suggestions regarding alternative work. Page 112 of the bundle sets out jobs the Claimant could do including PDIs, Tyre fitting, MOTs and pre MOTs, sales appraisals and VHCs. The Claimant however, conceded that he could not do valeting work because he could not bend and also agreed that holding his hands in the air would cause him pain and he could not do it for long periods. The Tribunal has found that the Respondent failed to implement effective process in implementing reasonable adjustments and whilst the Tribunal acknowledge that there were some informal adjustments put in place, ie given more time to complete jobs, jobs being spaced out, the tribunal finds that nothing was reduced to writing and that it was not clear to either the Claimant or indeed the Respondent what adjustments had been put in place or how the Claimant performance/capability would be monitored against those adjustments.

63. Some of the adjustments made, i.e. using the ramp and using a chair, were at the Claimant's own instigation and not supported by the Respondent. Further the Tribunal finds that the Respondent removed a chair the claimant had provided himself whilst he was off sick and did not replace this with either another chair or other aid to support the Claimant. The Tribunal finds that this was a failure to act positively by providing a chair. We accept the Respondent's explanation that they removed the chair the Claimant had brought in because it was not safe but conclude that it was reasonable for the Respondent to have replaced it.

64. It is also clear that despite the Respondent stating that they had put reasonable adjustments in place the Claimant was criticised when he required assistance from colleagues in order to complete certain tasks.

65. The Respondent also failed to demonstrate to the Tribunal what steps it took to ensure that the Claimant was allocated work that he was able to do. The Respondent's attitude to allocating work was that they had to be fair to all employees and by allowing the Claimant to do certain tasks was unfair. The Tribunal finds that the Respondent failed to properly consider reasonable adjustments and that a reallocation of work would have been a reasonable step for the Respondent to have taken. The Respondent did not produce any evidence to the Tribunal of how a reallocation of duties would have negatively impacted on the business or what amount of work would have been available had they done so.

66. However, we find that the Claimant had said at virtually all the meetings both informal and formal that he was in pain when carrying out any of his duties. The

Tribunal also finds that the Respondent had experienced a downturn in work that meant they were unable to offer him alternative work as they had done previously. The Claimant could not do certain jobs; that he was in pain all the time and that this was causing him stress and depression. He also conceded that bending; laying on his back and working with his hands in the air caused him pain.

67. The procedure the Respondent followed was flawed and ad hoc. The Claimant was not warned that dismissal was an option the Respondent was considering. Further Mr Morphy conceded in evidence that the company should not have gone straight to a dismissal meeting after the last medical report. The adjustments the Respondent suggested they had been put in place were never reduced properly to writing and the Respondent did not measure the Claimant's performance effectively in light of those adjustments. Further the respondent failed to follow its own procedure as set out at page 271 of the bundle.

68. Whilst the Respondent did seek medical evidence it is clear from this evidence that the Claimant was considered fit for work with reasonable adjustments. As the Respondent failed to implement clear reasonable adjustments and/or standards that the Claimant was required to meet there was, therefore no way for the Claimant to show that he would have been able to carry out his duties within that framework. However, the Tribunal notes that the Claimant did on several occasions informed the Respondent that he was in pain after doing certain tasks and also referred to his 'size' as being a factor in not being able to do certain task. The Respondent did not pursue this further with medical professionals nor did they properly assess the amount of work available that the Claimant said he could do. In summary the Claimant was unable to demonstrate his abilities within a structured clear assessment of the reasonable adjustments.

69. The appeal process was also flawed. A representative of Peninsula conducted the final appeal hearing and they were in a position of conflict. It was also not clear who had made the decision to uphold the dismissal. Neither Ms Hayton nor the representative from Peninsula attended the hearing and no explanation was provided.

70. From the evidence before the Tribunal and in particular the notes of the first appeal meeting, it shows that Ms Hayton had a closed mind and referred to the hearing as her 'case'. Again during the appeals process the Claimant referred to work that he considered he could do with adjustments. It appears to this Tribunal that insufficient consideration was given to making clear reasonable adjustments and that assumptions were made on the basis that the Claimant stated he was in pain and that the Respondent had not seen any improvement. What improvements the respondent expected to see were unclear to this tribunal. No expectations had been set out to the Claimant and the Respondent's main complaints appeared to be that the Claimant required assistance for certain jobs and their was not enough work in MOTs or PDIs.

71. Given that the Respondent's case was that they had made reasonable adjustments by spacing his work out and allowing him extra time to do his job it was not clear what improvements the Respondent's expected. If it was the case that these were genuine adjustments then the Tribunal would have expected to see

evidence of the fact that despite the adjustments the Claimant could not do the amount of work required in the time allocated.

72. The Claimant provided a list of jobs that he felt he could do (referred to earlier in this judgment), however, the Claimant also gave evidence that he was in pain doing most jobs and that there were certain jobs he could not do. For example the claimant stated that he could not hold his hands above his head for long periods when doing MOTs and yet said in his appeal that he wanted to work solely on MOTs. The claimant also stated that he could not do valeting work because it would involve a lot of bending so the alternative work discussed by the Respondent would not have been suitable. In addition the claimant said that there were certain jobs he could not do because of his size that was not related to his disability and could not have been adjusted by the Respondent. The Claimant argued that he could have been allowed to just do MOTs, PDIs and sales, however the Tribunal finds that the medical evidence provided and the Claimant's own evidence was that these jobs would also have caused him pain.

73. In conclusion we find that the Respondent did not act reasonably and did not consider sufficiently alternatives to dismissal at that time. We find that a reasonable employer would have set out clearly the reasonable adjustments made and set out a clear framework for the Claimant to work within. It may have been appropriate for the Respondent to seek further medical evidence on the proposed adjustments and type of work.

Direct Disability Discrimination

Time Limits

74. The Claimant appears to have worked without incident until December 2015 when he says a post it note was left on his computer. The claimant alleges that it was Dave Morphy who left the note. When cross-examined the claimant's evidence on this point was unclear. He originally said it was the service manager but agreed that Mr Morphy was not the service manager at that time. The Claimant conceded he did not know who actually left it and also conceded that he could not remember when the note was left. He further conceded that it could have been up to six years ago. The Tribunal finds Mr Morphy's evidence to be credible and that it was not him who left the note and further finds that it was, in any event, a one off incident that occurred at least 12 months before his employment was terminated and possibly up to six years ago. The Tribunal does not find that it was a continuing course of conduct and therefore finds that the Claimant's claim for harassment is out of time.

75. The Tribunal also considered that the Claimant claimed that he had been ridiculed and laughed at. Neither party pursued this in cross-examination and the Claimant was vague and did not provide any dates or specific incidents, other than comments being made that he could not use the Chrome system after he had been off during the summer of 2016. In any event the Claimant made no allegations regarding incidents after October 2016. His claim was lodged on 2 June 2017 and therefore the Tribunal finds that any claim is out of time and it is not just and equitable to extend time.

76. The Claimant had the benefit of advice from his union representative and provided no explanation as to why he did not raise either issue prior to submitting his claim form.

Specific allegations of direct discrimination not referred to above

77. The Tribunal has considered the additional specific allegations in addition to the termination of the Claimant's employment and matters determined above.

The Claimant was invited to attend a disciplinary meeting on 25 October 2016 whilst he was off sick

78. The Tribunal finds that the invite to the disciplinary hearing was not an act of direct discrimination. There was a lot of confusion in evidence over when the Claimant was actually on the sick during this period in any event. It would appear from the evidence that the Claimant was taking some time off as annual leave and some as sick. It is clear that on 18 October 2016 the Claimant had returned to work and attended a return to work interview. Importantly the meeting was rearranged at the Claimant's request and the date agreed by all parties, the Tribunal cannot see how this was an act of direct discrimination. The disciplinary was unrelated to the Claimant's disabilities and the Tribunal found no evidence that the Respondent's called the claimant to the meeting because he was disabled. The Claimant accepted that the incidents had occurred and although he may not have agreed with the outcome of the disciplinary there was no suggestion that the Respondent had made up the allegations or that they were disciplining him because he was disabled. We also find that the Respondent would have called a non disabled person to a disciplinary who was also absent from work, who had also been investigated for gross misconduct.

79. The Tribunal finds that this was not an act of direct discrimination.

Bonus

80. The Claimant claimed that the Respondent failed to allocate him jobs that would attract a bonus. During evidence that Claimant confirmed that he was given a bonus for 'upselling parts' and that this was paid before Christmas 2016. The Claimant could not say what work had been held back and neither did he provide the Tribunal of any information on previous bonuses, when he expected to receive a bonus; how much he considered he was entitled to. Both parties were legally represented and yet the Tribunal was not provided with any evidence except a bonus that the claimant did receive in November 2016.

81. The Respondent confirmed that the bonus in Nov 2016 was as a result of selling £80k worth of parts. The Claimant's wage slip confirmed the bonus was paid. The claimant did not provide any details of how much he thought he had lost or how much he thought he should have been paid. He provided no evidence on previous years' bonuses or what he believed others had received. No requests for disclosure had been made to the Respondent. The claim for 'loss of bonus' was not sufficiently pleaded and the evidence shows that a bonus was in fact paid. Therefore the Tribunal finds that the Claimant's claim for failure to allocate jobs in order for him to make a bonus fails and is dismissed.

Failure to allow appeal

82. We find that the failure to allow the Claimant's appeal was a genuine mistake on the part of the Respondent. It was clear when giving evidence that the Respondent was still of the view that the appeal was out of time. It was only when the dates were set out and the date the Claimant received the letter informing him of his right to appeal was agreed that the Respondent realised that the appeal was in fact in time. We find that the reason why the Respondent refused the appeal was due to its mistake on the calculation of the date not because the Claimant was disabled.

Sending the Claimant home after the meeting on 18 October 2016

83. We find that the reason the Respondent sent the Claimant home was because of a genuine concern for the Claimant's health. The Claimant had said that he felt stressed, had not slept and could not focus and it was for these reasons that the Respondent felt that Claimant should not be in work. There was no evidence to support the Claimant's view that this was engineered to so the Respondent could dismiss him. Indeed we find that the Claimant was in fact not fit to work and that this was supported by his GP. The reason why the Respondent asked the Claimant to go home was because the Claimant had told them he was ill and could not focus and was not because he was disabled.

Terminating the Claimant's employment

84. The Claimant argued that the reason his employment contract was terminated was direct discrimination. We have already set out our findings in respect of this above but for the avoidance of doubt we find that the reason the Claimant's employment was terminated was the Respondent's belief that he was not capable of performing his duties as a Vehicle Technician and not because he was disabled.

Reasonable Adjustments

85. We are satisfied on the evidence that there were a number of provisions criterions or practices ("PCPs"):

(i) The Claimant was required to carry out tasks that required him to kneel;

(ii) The Claimant was required to carry out all tasks required as a Vehicle Technician.

86. The first question in respect of reasonable adjustments is whether the PCPs put the Claimant at a substantial disadvantage compared with non-disabled employees? In our judgment the PCPs did do so in that the Claimant was more likely to be subject to pain and discomfort. The Respondent was unhappy that the Claimant had said that he could only do parts of his job and Mr Morphy stated at page 172 that the Claimant was required to do all jobs and not 'bits of it'. There is no evidence about the treatment of potential comparators but we do not find that such evidence is necessary in this case to infer that the Claimant's was unable to carry out all duties that other employees carried out.

87. We are satisfied on the evidence that the disadvantage to the Claimant was substantial. The Respondent knew that the Claimant was disabled and knew of the effect on him when carrying out certain tasks in particular kneeling down and had had medical evidence confirming this.

88. Judged objectively, a reasonable adjustment was to allow the Claimant to do work that did not involve kneeling, to allow him extra time to do jobs; to use ramps to assist him; to have a chair to sit on when doing paperwork and to request assistance when needed. The Respondent could have set out in writing what reasonable adjustments they proposed to make in agreement with the Claimant and then monitor whether this enabled the Claimant to carried out restricted duties and or whether there was sufficient work for him to do.

89. The Tribunal has found that the Respondent failed to act positively and constructively in making any proposed adjustments. The Respondent had several opportunities to take steps to reduce the disadvantage suffered by the Claimant including at the appeal stage and yet repeatedly but the burden on the Claimant to produce lists of jobs he could not do but then did not act on the information provided. The Tribunal further finds that the failure of the Respondent to provide a chair was a failure to make a reasonable adjustment. Although the Tribunal accepts that the chair provided by the Claimant was unsatisfactory the Respondent failed to act positively and provide suitable seating for the Claimant upon his return to work.

90. There was an opportunity for the Respondent to implement reasonable adjustments after the meeting on 23 November 2016 when they were aware that he was fit for normal hours but needed adjustments to his duties. At this point should have called him in to discuss those adjustments. Instead the Respondent invited the claimant to attend a capability meeting 19 December 2016, where they set out an agenda at page 170 including discussing reasonable adjustments but also that dismissal could be a possible outcome.

91. At this meeting the Respondent said it could not save all PDIs for one person and that it was not fair on others. They also said that they had made as many adjustments as they could. The Tribunal accepts that the Respondent believed they had made some adjustments and the Claimant accepted that they had done so; spacing his work out and allowing him more time, but this misses the point that the Respondent had made the adjustments in a ad hoc way and still required the Claimant to do all the tasks of a Vehicle Technician.

92. The Respondent argued that there was not enough work to give the Claimant limited duties and that the duties requested by the Claimant would in any event still cause him pain. The Tribunal finds that there had been a substantial downturn in the Respondent's work and the Claimant did not dispute this evidence. The Tribunal also finds that the Claimant's medical condition had deteriorated despite the ad hoc adjustments that had been put in place.

93. The Claimant argued that he should not have to do tasks that caused him pain but on the Claimant's own evidence it was hard to see what duties he could perform without being in pain.

Contributory Fault

94. The Tribunal finds that the Claimant did not contribute to his own dismissal. The Claimant attempted to continue working and made adjustments himself to try and ensure that he was able to do his job.

Polkey

95. The Tribunal finds that the had a fair procedure been followed i.e. proper reasonable adjustments put in place, effective monitoring of his performance with the adjustments in place and further medical evidence sought in respect of the pain the claimant was in during the performance of his duties that there was a 40% chance that the Claimant would have been dismissed in any event.

96. The Claimant's own evidence was that he could not do a significant amount of his duties and even the jobs he felt he could do e.g. MOTs he had confirmed that was in pain with his hands over his head and it was not supported by the medical evidence and we find that there is a 40% likelihood that the Claimant would not have been able to fulfil his role after the suggested adjustments and therefore dismissed fairly.

97. The case will now be listed for a hearing to determine what remedy is appropriate in view of the above findings.

Employment Judge Elayne Hill

Date 19 March 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 March 2018

FOR THE TRIBUNAL OFFICE