EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Rumbold	**v**	Jaguar Land Rover

Heard at: Birmingham Employment Tribunal (*by Cloud Video Platform ('CVP')*)

On: 21, 22, 23, 24 & 25 (& 28 & 30 in chambers) September 2020

Before: Employment Judge Johnson

Members: Mr R White and Mr D Falcounbridge

Appearances
For the First Claimant: Ms G Crew (counsel)
For the Respondent: Mr R Santy (solicitor)

JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded, which means it is successful. However, it is subject to the Tribunal's finding that a deduction to the compensatory award should be made by reason of the application of *Polkey* and the claimant's contributory fault.

2. The claimant's complaint of discrimination arising from a disability is not well founded, which means it is unsuccessful.

3. The claimant's complaint of a discrimination arising from the respondent's failure to make reasonable adjustments is well founded, which means that it is successful.

4. The case will now be listed for a remedy hearing with a hearing length of 1 day In the Birmingham Employment Tribunal on a date to be advised.

5. The parties shall prepare for the remedy hearing taking into account the further case management orders provided in the conclusion of this judgment.

REASONS

Background

1. These proceedings arise from the claimant's employment with the respondent from 1 February 1999 until his employment terminated on 7 December 2018.

2. On 9 April 2019, following a period of early conciliation from 14 February 2019 until 26 March 2019, the claimant presented a claim disability discrimination, age discrimination, unfair dismissal and unpaid wages.

3. The claim was subject to case management before Employment Judge Butler on 8 November 2019. The claims of age discrimination and unpaid wages were withdrawn on or around this time, a list of issues were agreed, case management orders were made and the case was listed for hearing.

4. The respondent presented an amended response on 28 November 2019 which accepted that the claimant was disabled within the meaning of section 6(1) of the Equality Act 2010 in relation to a diagnosis of avascular necrosis disease of the left hip. The hip complaint was diagnosed in March 2018. The respondent however, maintained that its managers could not have known that the claimant was disabled at the relevant time as they did not have any notification from the claimant or its Occupational Health or Human Resources teams, which would place them on notice of a disability.

The Evidence Used in the Hearing

5. The claimant relied upon his own oral witness evidence and the signed and dated witness statement of his union representative Paul Rodgers. The Tribunal was informed at the beginning of the hearing that Mr Rodgers would not give oral witness evidence, but that the claimant still wished to rely upon the written witness statement as evidence. The parties were informed that while the Tribunal would include this statement as part of the evidence used in this case, it would understandably be given less weight than the evidence of those witnesses who were willing to attend and give oral evidence under oath.

6. The respondent called 4 witnesses and they all gave oral evidence. They were Leigh Cripps (a manager and the investigating officer), Jon Carter

('Body in White' manager and the 'dismissing officer'), Gregg Niblett (Manufacturing Manager and First Appeal Officer) and Colin Walton (Technical Manager and Second Appeal Officer).

7. There was an agreed bundle of documents which was prepared in advance of the hearing and which was available to the Tribunal as an electronic 'pdf' document. The parties had also agreed a chronology of events.

8. Additional documents were disclosed during the hearing. The first which was marked 'R1', was a copy of a letter inviting the claimant to an investigatory meeting on 20 November 2018. It was disclosed on the second day of the hearing, was relevant and there was no dispute about its inclusion among the hearing papers.

9. The second document 'R2' was more problematic in that it was an extract from the respondent's company handbook and produced on the fourth day of hearing by the respondent. Its production was following the conclusion of oral evidence given by Mr Niblett during cross examination and before re-examination of this witness. Its introduction to the evidence was strongly objected to by Ms Crew. She felt that it was difficult to assess the value of this document, its disclosure was far too late in the proceedings and it was likely that to avoid any prejudice to the claimant, she said that she would need the opportunity to recall the witnesses who had already given their evidence and this would be disproportionate taking into account the limited hearing time remaining in this case.

10. The Tribunal considered the document and noted that it related to circumstances where the respondent might dismiss an employee where there was an ongoing health issue. Although the Tribunal were unimpressed by the late disclosure of this document, it was felt that it may be relevant to the issues in question. Accordingly, the Tribunal determined that on balance that it would be in accordance with the overriding objective under Rule 2 to allow its inclusion among the documentary evidence. It was a finely balanced decision, but one where they felt that any prejudice to the claimant caused by its late disclosure could be managed by either a request to recall the witnesses as appropriate (who were all still available for recall) and if appropriate, an order for costs, (if the claimant wished to make an application).

11. As it happened, Ms Crew decided not to recall any of the witnesses. She correctly asserted that Mr Santy could not re-examine Mr Niblett if he had not been 'recalled' for cross examination on this document. Limited questions were raised regarding this document with this witness. There were some supplemental questions of the respondent's final witness Mr

Walton concerning this document, but he was not able to assist substantially with the rationale behind its contents.

The Issues

12. As described above, the issues between the parties were agreed at the case management hearing before Employment Judge Butler on 8 November 2019 and are as follows:

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability and/or misconduct.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

(iii) If the claimant was unfairly dismissed and the remedy is compensation:

a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;
b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

EQA, section 15: discrimination arising from disability

(iv) Did the following thing(s) arise in consequence of the claimant's disability:

a. The claimant had a number of days of absences from work; and,

b. The claimant needed to attend a medical appointment on 20 November 2018?

(v) Did the respondent treat the claimant unfavourably as follows:

a. Dismissing him?

(vi) Did the respondent dismiss the claimant because of any of those things?

(vii) If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent put forward the following as its legitimate aim(s):

a. Maintaining an adequate workforce to enable protection to continue?

(viii) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know that the claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

(ix) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(x) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Preventing the use of a walking aid in the claimant's working area?

b. Preventing the use of suitable seating equipment (chair, stools) in the claimant's working area?

c. Requiring walking to the role that the claimant was engaged to do?

d. Expecting staff to work their contracted hours/shifts without the use of a walking aid and/or adequate seating area?

(xi) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: the claimant was dismissed?

(xii) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xiii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. Allowing for a walking aid to be used when walking between places in the work-station;

b. Allowing a chair or stool to enable regular rests when and as needed; and,

c. Allow time off to attend medical appointments.

(xiv) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Remedy

(xv) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded?

Findings of fact

<u>Background information concerning the parties</u>

13. The respondent is a large employer with a number of car manufacturing sites located in the West Midlands and in Liverpool. It has a generous sick pay policy, especially for a private sector company. It has a workforce that is largely unionised and it appears that a great degree of consultation takes place with unions in relation to working practices.

14. The Tribunal was shown the respondent's Attendance Management Procedure ('AMP') which was a revised procedure and which appeared to have been launched in November 2019. However, there was a transitionary period that applied to absence management measures imposed from 1 November 2018 where they would be converted from the old procedure to the new procedure. The procedure set out the role of respondent's Occupational Health ('OH') service and the roles and responsibilities of employees and management and described a number of formal , stages replacing warnings, with a final 'employment review' taking place where dismissal due medical incapability may be determined.

15. The AMP explained that OH should consider whether an employee is disabled within the meaning of the Equality Act 2010 and that reasonable adjustments may be considered.

16. An extract from the respondent's Code of Conduct and Company Rules included its Disciplinary Procedure and contained the usual processes for investigating matters relating to conduct, what might amount to misconduct and the sanctions that can be imposed.

17. Reference was made to the respondent's Updated Restricted Worker Process flow ('RWP'). This was essentially a flow chart which began with OH producing a Duty Disposition Report ('DDR') which would identify the restrictions an employee required because of an ongoing health issue. The process enabled management to explore possible work placements which could accommodate the affected employee and to allow them to undergo trial periods to establish whether they could be placed permanently in a role. It is understood that this could involve an employee undergoing a series of trial roles before a satisfactory role could be identified.

18. It should also be mentioned that when an employee is under the care of the respondent's OH, they could be required to participate in a Functional Restoration Programme ('FRP'), which was understood to involve a series of sessions and reviews with OH. This could involve therapeutic procedures and its intention was to assist the employee in remaining in work.

19. The Tribunal heard evidence from the four management witnesses that they had been trained in the respondent's procedures, the application of the Equality Act 2010 at work in general, disability in particular and that this was refreshed on regular basis.

20. The claimant was employed by the respondent from 1 February 1999 in various car assembly roles until 7 December 2018, when he was dismissed following an Employment Review meeting.

21. There was no dispute between the parties that the claimant had a significant number of absences from work during his (almost) 20 year career with the respondent. By the time of his dismissal, this amounted to an absence over 808 shifts and which had been estimated to have cost the company £95,860 in sick pay.

22. There were a variety of reasons for these absences, but during most years his absences reached double figures. Some absences related to injuries at work, there was an occasion of alleged assault against him in 2014 and other general health related matters. However, until 2018, it does not appear that the respondent subjected the claimant to any formal measures under the AMP which was in force at the relevant time. It was not made clear during the hearing why any such steps had been taken and it appears that until 2018, the claimant was unaware that his absence was a problem.

The claimant's hip problem and consequential absences in 2018

23. The claimant started to develop problems with his left hip in early 2018 and he was diagnosed as having avascular necrosis disease ('AVN'). This caused his hip to deteriorate and for him to suffer chronic pain. It was understood that this was a progressive condition that could only be remedied by him undergoing a hip replacement. The claimant was in such discomfort from the condition, that he was absent from work from 12 March 2018 until 13 August 2018.

24. Upon the claimant's return to work, he underwent a Return to Work ('RTW') interview with his supervisor, Leigh Hull on 13 August 2018. During this meeting, a review of claimant's present health took place and Mr Hull discussed what support could be given. The respondent's Duty Disposition Report ('DDR') from OH was read by Mr Hull and restrictions were identified. These were identified as being; *'no lifting parts above head height, sitting based checking process found on Loop, advice on phased return sought from OH'*. Mr Hull mentioned to the claimant that this was purely a RTW interview. He said that claimant's absence record would be checked with further action taken (with union 'interaction'), if the respondent needed follow its AMP. It should be noted that there was no criticism of the claimant for not using correct contact procedures during his absence.

25. The DDR was produced by Abby Radley (OH Physio therapist) on the same day as the RTW interview. It is understood that the purpose of the DDR was to assess claimant's present health and capabilities and to identify what could be done by management to support him back into work.

26. The claimant said that he returned to work under protest and on 13 August 2018, he sent a letter to management arguing that the respondent's OH had overruled his doctor's advice. The claimant thought this letter had been sent to Leigh Hull, although it was actually marked for '*to whom it may concern'*.

27. The hearing bundle did not include any documentation such as a contemporaneous fit note for the claimant recommended that he remain absent from work beyond 13 August 2018, or that measures should be implemented contrary to those assessed by Ms Radley in the DDR. There was a letter from his consultant orthopaedic surgeon confirming that he was suffering from avascular necrosis disease, which was dated 8 June 2018 and which explained a need to adjust his duties. It does not appear that the DDR 'overruled' this orthopaedic surgeon's views. Whatever the claimant's motivation for sending his *'to whom it may concern'* letter on 13 August 2018, he was clearly concerned that the respondent might assess him fit for work while he still suffered from symptoms relating to his hip.

28. On 14 August 2018, a senior manager, Padraig Bollard met with claimant. The claimant perceived the purpose of this meeting as being to communicate a warning that if he didn't enter into a settlement agreement, the respondent would look to terminate his employment at some stage due to the claimant's poor sickness absence record. There was no dispute between parties that this meeting happened on this date, some months before the actual termination. While the Tribunal was not concerned about the terms of the possible settlement discussed, it does note that at this point in time, the claimant was made aware that the respondent had concerns about the claimant's sickness absence record and that further absences would be subject to scrutiny by management.

<u>The Restricted Worker Procedure and job trials</u>

29. Upon returning to work, the claimant did not go back to his contractual car assembly role, but instead experienced a number of job trials under the respondent's Restricted Worker Procedure ('RWP').

30. His first job under RWP, involved him recording car vehicle identification numbers, ('VIN'). The claimant described it as being a job where he could sit down and use a walking stick to assist with his mobility. He said that he understood this role would last for 4 to 5 weeks, but that he only worked this role for 1 week before being moved onto another different role.

31. The claimant appeared resentful over this move as he was of the view that he could manage the VIN role, despite his ongoing hip problems. However, he did acknowledge that this was a; '*made up role to get me*

back to work'. He also said that; '*I expect them* [the respondent] *to work on my needs and put me on a job I could do'*.

32. The claimant was then given other roles and a number of workplace assessments took place from 21 August 2018 under the RWP. They appear to assess the various jobs which the claimant was considered by OH to be capable of being trialled on. On 25 September 2018, further assessments were considered. While it is not essential to go through each possible job in detail, the Tribunal noted that the need to provide seating in the claimant's work area was a continuing feature of the adjustments needed to support him in these trials. These assessments were carried out by Abby Radley from OH and sent to the claimant's supervisor. Ms Radley also looked at a number of roles on 18 September 2018, but noted these were incompatible because the claimant would not be able to have a seat in the locations under consideration.

33. It does appear to the Tribunal, that at this stage, the respondent was genuinely trying to find the claimant a suitable role that could accommodate the restrictions placed upon him, by his hip problem.

34. By November 2018, the claimant was moved to a role of Sealer (F Block) at the end of the paint line on the production process. This was a job that was identified under the RWP as being suitable for trialling. The claimant explained that he struggled with this role because he had to walk 4 times round each car, was not allowed to use his walking stick and no seat was made available. The claimant appeared to feel that he had been coping well with the other previously trialled roles. He seemed to feel that his line manager Mick Jones, was trying to get him working in a role which would become 'a full upstanding role'. The Tribunal understood this to suggest that the respondent's intention was for the claimant to resume working in a regular job, no longer subject to the RWP and the effectively supernumerary trial roles.

35. The respondent disputed that the claimant was prevented from using his stick in the sealer role. Instead Mr Cripps and the other manager witnesses said that he could use an adapted stick which had been wrapped in plastic. It is understood that the plastic was intended to cushion the hard surfaces on the stick and reduce the risk of damage to vulnerable car bodywork. Mr Cripps said the claimant refused this adjustment. The claimant and Mr Rodgers (the latter in his statement), argued that the supervisor in this area Mr Shah, refused to permit any use of a stick because of the risk of damaging car bodywork. The Tribunal noted that none or respondent's witnesses addressed this issue in their witness statements or could identify documentation which suggested that the issue with Mr Shah was different to the way it was described by the claimant. On balance, we find that although Mr Shah may have been well-

meaning in his concerns about the use of a walking aid, he was clearly unaware of the adjustments identified by Abby Radley on 25 September 2018 and insisted no sticks could be used in this work area. This was unfortunate as it made the claimant feel that he was not being supported in this role.

The claimant's GP appointment on 20 November 2018 and the investigation

36. The claimant was clearly unhappy with this Sealer role. As a long serving employee, the claimant had accrued an entitlement to a number of 'service days' which were effectively additional annual leave entitlement. Due to his lengthy sickness absence, the claimant had 3 untaken service days outstanding for 2018 and the Tribunal understands that these needed to be taken by the end of December 2018. Mr Cripps explained that there was a two-week shutdown in December and this meant that the claimant only had a few working weeks remaining in 2018 where this leave could be taken. It was understood by the Tribunal that the claimant could not carry this leave over into the next year. He therefore made a request for 2 days annual leave from Monday 19 and Tuesday 20 November 2018 in order that he could have 'a long weekend off work'. He requested this leave very late in day on Friday 16 November 2018 and he was told that he could not have this time off work.

37. There appeared to be some confusion in the investigation report subsequently produced by Mr Cripps and in the claimant's recollection about his entitlement to leave and when it could be taken. In any event, the claimant came into work on Monday 19 November 2018 and this was the first day of his trial on the Sealer (F Block) role where he was working alone. It was understood from Mr Walton that had the claimant completed the week successfully, the respondent would have restored the claimant to a full upstanding role which would have taken him out of the RWP.

38. The claimant said that when he returned to work on Monday 19 November 2018 he was suffering from '*excruciating pain to my hip and groin'* and he asked his wife to contact his doctor. Although he referred to the 'hospital' in his statement, the Tribunal accepts that the claimant meant that he was trying to contact his GP and it takes no issue with this error. The claimant says that an appointment was available the next morning on 20 November 2018 and at 15.49 he texted his line manager Mick Jones to advise him that he would not be in work the next morning. Mr Jones asked him to bring proof of the appointment and the claimant confirmed that he would.

39. At 6.10 on the next day, Mr Jones sent a further message to the claimant to check to see when his GP appointment. This was because the claimant's shift would ordinarily begin at 6.00. The 'thread' of the text messages between the claimant and Mr Jones, suggested that a copy of

the GP appointment text reminder, was sent to Mr Jones confirming it take place at 10.00 that day. However, while this might be the case, there is no evidence available that the claimant informed his line manager that he did not intend coming into work before the doctor's appointment. We find it surprising that given his many years' service and previous sickness absence history, that the claimant did not warn his line manager of the time of the appointment, that he would not be coming into work before this appointment, or alternatively, that he felt too unwell to come into work. The Tribunal heard that it was common ground for an employee to have four hours off work to attend a medical appointment. With a shift starting at 6.00 and an appointment starting at 10.00, the claimant would have been expected to come into work before going to his appointment. The claimant's failure to properly communicate did not take into account his manager's reasonable need to know when he would be absent and when he was attending work and the his behaviour suggests a reckless disregard of management's reasonable need to know when employees would be available for work.

40. The outcome of the GP appointment was that a fit note was produced. It did not determine that the claimant be signed off work or that he be given additional medication. It does reassert the need for adjustments, including the claimant being permitted to rely upon a walking aid, to have access to seating and to have his need to walk while working reduced.

41. The claimant returned to work after this appointment. However, by this time he had missed a previously booked functional restoration appointment and which the claimant had not asked to be cancelled. It is not clear why the claimant failed to notify his line manager of this possible difficulty or alternatively why he did not attempt to attend the functional restoration appointment as soon as his GP appointment had concluded. It is understood that the claimant lived close to the respondent's Castle Bromwich plant and travelling time between home, GP surgery and work appeared to be relatively short. The claimant provided the fit note on 20 November 2018 to his line manager upon his return to work that day.

42. On the same day, Mr Jones gave the claimant a letter inviting him to a meeting on 22 November 2018. The meeting was arranged to investigate allegations of '*failure to follow the correct Company contact procedure during your absence from work and going absent after the rejection of a holiday request*'.

43. The meeting took place on 22 November 2018 and was attended by the claimant, Mr Jones as investigating manager, the claimant's union representative Brian McGuigan and Hannah Carter from Human Resources. There were some initial introductions and Ms Carter explained that the claimant had had his request for holiday rejected for 20 to 22

November 2018 and then on 20 November 2018. The claimant told Mr Jones he could not attend work on 20 November 2018 due to an NHS appointment. It was alleged that the claimant did not request time off for the appointment and did not provide evidence of it and despite efforts being made by the respondent to contact him, he had not replied. The purpose of the meeting was described as being to; '*discuss your absence level during your employment history as this is unsustainable to business'*. The Tribunal notes that at this point, the respondent appears to have moved from the initial reason given in the meeting invitation of a discussion about a potential conduct matter relating to time off for a medical appointment and instead, was now looking to investigate the claimant's general sickness absence levels.

44. Mr McGuigan then objected to Mr Jones being investigating officer as he was a witness to the issues under investigation. The meeting was then adjourned to 29 November 2018 and Mr Cripps was appointed as the investigating officer.

45. Mr Cripps explained that he was asked to investigate the following allegations:

a. The claimant's failure to maintain contact with the respondent during his recent absences;

b. The claimant's absence following his Group Leader's rejection of his holiday request for Tuesday 20 to Thursday 22 November 2018;

c. No evidence had been provided for the medical appointment on 20 November 2018;

d. The claimant's unacceptable level of absenteeism.

Mr Cripps confirmed that 'a', 'b' and 'c' were conduct related issues and 'd' was more concerned with capability.

46. When the meeting resumed on 29 November 2018, Ms Carter provided fresh introductions and restated the reason for the meeting. The claimant explained that his leave request had been refused and that on Monday 19 November 2018 he was struggling to walk around the car in his work area and that he had no opportunity to sit. He said that he asked his wife to make a GP appointment and he texted Mr Jones at 15.49. The claimant was challenged that texting was not the correct protocol. Mr Rodgers the claimant's union rep however, argued that in practice texting was 'a grey area' and everyone was using this means of communicating. The claimant argued that he could not start work before his GP appointment because of sleep deprivation due to the pain that he was suffering. However, while

this might be the case, there was no evidence that upon waking up, the claimant (or his wife) immediately sought to notify his employer of these circumstances and this seems surprising, given normal practice which he should have known as a long standing employee.

47. Mr Cripps reminded the claimant of the need to complete the trial period of the current job role in order that he could achieve a full upstanding role. During this conversation, the claimant did not appear to give Mr Cripps the impression that he fully understood the importance of the completing the trial. Indeed, the tone of the claimant's responses appears to be of an employee who feels that his priority was taking all of his outstanding service days and the claimant gave the impression of being to be reluctant to complete the trial.

48. There was some discussion about the suitability of the current job and whether adjustments were being made. Mr Cripps did not acknowledge unequivocally, whether the claimant could use a stick in the work area and did not address the absence of seating or the amount of walking required. However, this was not a matter which Mr Cripps was being asked to consider at this meeting, being connected with his absences from work.

49. The claimant was asked why he did not attend the functional restoration appointment on 20 November 2018 at 11am and although the claimant said he was unaware of this appointment, Mr Cripps reminded him that he would have received an appointment card. The claimant's failure to acknowledge his responsibility for ensuring his doctor's appointment accommodated the restoration appointment or alternatively to give notice of cancellation is again surprising and demonstrates a lack of personal responsibility on his part.

50. Finally, the meeting then moved onto the claimant's absences and Mr Cripps noted that the claimant had not had a single 12 month period without an absence. His emphasis was with the claimant's absences during most recent 4 years of employment and his absences were described as involving 405 shifts being missed due to absence. Mr Cripps questioned whether the respondent could continue to 'sustain' absences of the level experienced by claimant during the previous 4 years.

51. The claimant and his representative Mr Rodgers emphasised that he was still waiting for a hip surgery and that once he has recovered, he would be fully fit.

52. While the respondent started looking at this as a conduct matter, it then moved onto capability issues. The meeting concluded with Mr Cripps determining that there was a '*case to answer on capability side*'. His concern was the claimant requiring hip replacement surgery on a date still

to be arranged and which would require 12 weeks recovery. He also noted the claimant's previous failure to engage functional restoration programme and presumably how this behaviour might affect his return to a full upstanding role at work.

53. He then went on to say there was also case to answer '*on contact procedure and not showing up start of shift [sic*]', which appears to relate to the conduct concerns.

54. Mr Cripps advised the claimant that the case would then be considered by a manager at an Employment Review and it is noted that Mr Rodgers questioned whether procedures were being 'bypassed' in his making this decision.

55. The Tribunal notes that although Mr Cripps believed that the claimant should proceed to an Employment Review under the AMP because of his sickness absence, he did not appear to have been instructed to consider this particular matter during the investigatory meeting. There was no evidence that the claimant had previously been subjected to any of the relevant stages or lesser sanctions under the AMP or similar procedures that applied to the claimant's workplace at the time.

56. What is clear however, is that Mr Cripps' reliance upon an employment review suggests that at this point, the respondent was focussing upon the claimant's capability to do his job because of his past sickness absence and ongoing health problems and it had become less concerned about the conduct issues which had originally prompted the investigation meeting to take place.

The Employment Review and its outcome

57. On 4 December 2018, the claimant was informed by letter that Jon Carter (Body in White Launch Manager Level 5) would conduct an Employment Review on 7 December 2018 in respect of:

a. The claimant going absent after the refusal of a holiday request;

b. Not maintaining contact throughout his absence;

c. Not turning up at the start of shift prior to appointment;

d. Claimant's absence not being sustainable to business;

e. The claimant demonstrating that he could not fulfil the needs of his contract by the high level of current absence and potential future absence; and,

f. The claimant's lack of engagement in improving his attendance and engaging in the restricted worker's process ('RWP').

58. The grounds to be considered appear to be expanded from those considered by Mr Cripps, with a particular emphasis on the ongoing costs caused by the claimant's absences.

59. The meeting took place as planned and in addition to Mr Carter and the claimant, Mr Rodgers union representative, Ms Carter from HR and Mr Tabb who was described as a 'Representative Observer' were present. The usual introductions took place and then Mr Rodgers immediately challenged the use of an Employment Review meeting to deal with matters which he believed mostly related to conduct. Ms Carter on behalf of management explained in reply that the Employment Review could examine all allegations and would look at both conduct and capability.

60. Mr Carter then stepped in and restated the issues to be considered as set out in the invitation letter. He then dealt with each issue in turn. However, Mr Carter seemed to be primarily interested in the claimant's absences throughout his career with the respondent. He felt able to give his opinion concerning these absences and went as far as to say '…*[h]onestly worst absence record I have ever seen. 808 shifts, price to organisation is almost £100,000. There is not one year since 2000 with full attendance record*.'

61. There then followed a discussion between Mr Carter, the claimant and Mr Rodgers concerning the reasons behind the absences with arguments being raised that some of the absences were due to matters beyond the claimant's control including accidents at work and sexual assault. However, Mr Carter was still keen to point out that even allowing for those, the remaining absences were significant.

62. Mr Carter made enquiries concerning the claimant's hip condition and the planned hip replacement operation. He seemed particularly concerned about the need for further absences from work and noted that an absence of 12 weeks post-surgery was likely to be required. Mr Rodgers on behalf of the claimant appeared to argue this absence should be considered in the context that employees are entitled to 104 weeks company sick pay, but Mr Carter was noted that consideration had to be given to the company sick pay already taken by the claimant and estimated to have cost £100,000.

63. Ultimately, there is a dominant theme in this meeting, namely the claimant's historic sickness absence record and its cost to the business. The fact that the claimant was almost certainly going to require a further

sickness absence of a minimum of 12 weeks following his planned hip replacement operation, meant that Mr Carter was concerned about this additional cost to the business. The other matters relating to conduct were discussed during the meeting, but took a lesser role in the discussions. Indeed, it is noticeable that Mr Carter in his evidence placed great reliance on a 'mantra' used by the respondent's OH practitioners, which he quoted as being; *'Past absence history is the best indicator of future absence'.* We have no doubt that this maxim featured heavily in Mr Carter's decision making, with a belief that the claimant would continue to have lengthy periods of sickness absence, which would have a consequential cost to the respondent's business.

64. Mr Carter had a 30 minute adjournment towards the end of the Review, before returning to give his decision. According to the minute of the Employment Review, his conclusion included the following observations:

    '*…when we look at your enthusiasm to come back, it is not there. The business is in a bad condition at the moment and the financial situation , diesel scares, Brexit which have caused a great volume loss to the plant and all plants. We need to reduce cost through charge and accelerate. Every person and every penny makes a difference. You were missing or late for 11 OH appointments. I deem that as unacceptable. Booking a Dr appointment over FRP and as you stated to get additional restrictions added to fit note. Level of absence last 18 years costing around 100K. we need to consider conduct, absence and evidence of enthusiasm to return. I took into account what you both presented. We have the potential for future absence following your operation. I believe this to be unacceptable to the organisation. My decision is to terminate your employment on grounds of conduct and capability which is shown in your attendance record.'*

65. Mr Carter confirmed his decision in writing in a letter dated 12 December 2018 and which was sent to the claimant. It immediately raised the issue of the claimant's absence record and its cost to the respondent, that there is a contractual obligation to attend work on a regular basis and that the claimant's absence record demonstrated a capability issue. He then referred to a DDR produced by Ms Radley on 22 November 2018 and mentioned that the claimant's forthcoming hip replacement operation would result in a further absence of 12 weeks.

66. The letter makes no specific reference to the claimant being disabled, although he does acknowledge the fit note produced by the claimant's GP dated 20 November 2018 which identifies a number of adjustments. He asserted his belief that the respondent had made adjustments to accommodate the claimant's health issues, while briefly acknowledging the claimant's argument that he was not provided with a chair at his work

area. However, Mr Carter then directed his attention to the purpose behind the RWP which was to get the claimant back to a full upstanding role and his belief that the claimant demonstrated a lack of engagement in this process.

67. In summary, Mr Carter stated that he believed the respondent had attempted to provide adjustments to support the claimant, but his historic sickness absence and the likely future absences resulting from hip surgery, together with the adjustments required by his GP, raised '*huge capability issues'.* Although he does make reference to the claimant's conduct with regards to his attitude towards the RWP, it does seem that the decision to dismiss is primarily related to the claimant's ongoing capability.

68. Mr Carter appeared confused on the subject of adjustments to support the claimant at work. He simply asserts that the respondent had made them, without considering the adjustments as stated in the GP Fit Note. He did not question whether the respondent had properly considered these adjustments and whether they could be accommodated in the trial role. Alternatively, if not, he did not suggest what alternative measures might be possible to support the claimant. Ultimately, he becomes so focussed upon past and future sickness absence, that he failed to review (and should not be forgotten that this is an Employment Review meeting) the trial job and the prospects of the claimant being supported into a full upstanding role.

69. On the date of dismissal, the claimant had not completed his trial and Mr Carter had not considered what the doctor's note of 20 November 2018 had said, namely that the claimant may be fit for work if he was provided with a *'…walking aid for stability, and suitable conditions for working including appropriate seating and limiting time spent walking'.* He had also annotated an additional comment, namely; *'If these conditions cannot be met adequately then he will require re-assessment for fitness to work'.*

70. Had Mr Carter properly considered what was the latest medical advice available (and which he had access to at the time of the Employment Review), he would have been able to consider whether these relatively simple measures could be accommodated into the claimant's trial role, to enable him to complete the trial and to enable the respondent whether a return to a full upstanding role was possible. As it was, Mr Carter had become distracted by the historic sickness absence, the anticipated future absence and the lack of engagement. Had this matter not proceeded straight to an Employment Review, it would have been possible to address issues such as future sickness absence and engagement with the RWP and to warn the claimant of the potential consequences if he failed to engage properly.

First and Second Appeals

71. The claimant was allowed the opportunity of two appeal under the respondent's policies. He gave written notice of his appeal on 9 December 2018, before he receives the official letter from Mr Carter, but he was required to make the appeal within 5 working days of the decision.

72. A central part of his appeal related to alleged disability discrimination including a belief that the respondent failed to follow its own policy, did not allow the claimant access to the RWP in full and a failure to follow the DDR produced by OH. He also suggested that Mr Carter had 'prejudged' him before the Employment Review.

73. Mr Niblett, the Sports Car Manufacturing Manager was appointed as the hearing officer. It was understood that his management role was separate from the claimant's role and the other managers involved in the claimant's case so far and that this would provide an element of separation in the consideration of the appeal. He wrote to the claimant on 22 January 2019 and invited him to an appeal meeting on 29 January 2019.

74. The appeal took place as arranged and in addition to Mr Niblett and the claimant, Ms Carter attended on behalf of HR was present and the claimant's union representative Brian McGuigan. According to the note of the appeal, the usual introductions took place, with Mr Niblett explaining that he wanted to consider each point of the claimant's appeal in turn.

75. The claimant made particular reference to the failure to follow policy and argued that the respondent was; *'not adhering to restricted workers [procedure] going from stage 0 to stage sack'.* Mr Niblett does not appear to properly consider this issue during the meeting, or in his witness evidence. Instead, he appears to assume that the process was following the RWP process and does not explain how this was the case.

76. There was lengthy discussion about the claimant missing functional restoration appointment. The meeting then discussed the question of the claimant being disabled with his hip condition and the meeting with Mr Bollard. Mr Niblett discussed how disability was defined by the Equality Act 2010 and asked whether the respondent discriminated against the claimant because of his hip operation. The claimant said that he had been discriminated and had not been properly allowed to engage with the RWP. The claimant also discussed the issues relating to the adjustments that he needed while working in the Sealer role and his argument that he was not allowed to use a stick and that he had to make a seat for himself using a box. The claimant's union representative Mr McGuigan also suggested that the respondent could not rely upon anu sickness absences caused by

work related accidents when determining the claimant's capability. The meeting adjourned in order that Mr Niblett could investigate matters further and access the DDR report produced by OH.

77. The meeting reconvened on 7 March 2019. Overall, Mr Niblett's decision was to uphold the decision to dismiss made by Mr Carter. He mentions the alleged discrimination, but does not address whether the claimant is disabled and that the claimant misunderstood the forms of discrimination alleged. He had spoken with Mr Bollard and stated that a settlement offer was made and he did not threaten to take the claimant's job. Mr Niblett was of the view that the trial jobs met the restrictions set out in the DDR. He also felt that it was appropriate to proceed to an Employment Review and that procedure was followed. His emphasis appeared to be more concerned with the lack of engagement on the part of the claimant with regards to the RWP. He did acknowledge that custom and practice had resulted in employees notifying managers by text with regard to absences from work and this was something he would raise with senior management. He also confirmed that some of the claimant's historic absences from work were due to work related accidents, but that these did not significantly impact upon the claimant's absence record.

78. Mr Niblett confirmed his decision in writing in his letter of 22 March 2019 and it confirmed the points that he made at the meeting on 7 March 2019. Meanwhile, the claimant had given notice of a further appeal in his letter dated 10 March 2019 and provided grounds of appeal in this letter. He argued that he fully engaged with the RWP and that any issues arose from a failure to provide the necessary adjustments. He disputed he had deliberately booked a GP appointment to avoid the functional restoration appointment on 20 November 2019, that a union representative Mick Tabb witnessed the claimant being threatened by Mr Bollard. Finally, he argued that many more of his absences from work were caused by work related absences than suggested by Mr Niblett.

79. There was a delay in the second appeal taking place, but on 3 September 2019, Colin Walton, Manufacturing Manager wrote to the claimant inviting him to a Second Stage Appeal Hearing on 5 September 2019. This took place as arranged with the claimant, Mr McGuigan and Ms Carter once again. In the meantime, Mr Walton had spoken with Mr Carter concerning his decision to dismiss the claimant at a meeting also attended by Ms Carter from HR. The purpose of this meeting appeared to be an attempt by Mr Carter to understand why the claimant was dismissed and to satisfy himself that there was not (as he put it); *'a conspiracy to manufacture his dismissal from the company?'* In the note of the meeting, Mr Carter is adamant that this was not the case and the real reason why the claimant was dismissed was because of his absences which were believed to be unsustainable and a failure to engage with the RWP. The Tribunal does

find that it was inappropriate for Mr Walton to hold this ‘pre-meeting’ with Mr Carter. However, it is not unusual for hearing officers to make further enquiries with managers due to issues that might arise during a hearing with an employee and while the ‘pre-meeting’ was unwise because of the inferences that it might give, we find that on this occasion it did not prejudice Mr Walton’s consideration of the case.

80. The second appeal hearing note reveals that Mr Walton considered the claimant’s grounds of appeal and he explained that his job was to look at new evidence or evidence that was missed out at a previous stage. Mr Walton then heard submissions from the claimant and Mr McGuigan and concluded with a short adjournment before restating the grounds of appeal. He was of the view that Mr Niblett investigated the issues raised by the claimant at the first stage appeal, but spent some time discussing the alleged ‘conspiracy’ on the part of Mr Carter and others to have the claimant dismissed. He confirmed his earlier meeting with Mr Carter and that he had only met with Mr Cripps prior to the Employment Review to discuss the claimant’s absences. He was not satisfied that there was any conspiracy or that he ‘prejudged’ the claimant. Mr Walton confirmed his decision in his letter sent to the claimant on 16 September 2019 and set out his reasons in some detail.

The Law

<u>Unfair Dismissal</u>

81. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct or capability is a potentially fair reason falling within section 98(2).

82. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see ***<u>W Devis and Sons Ltd v Atkins</u>*** **1977 ICR 6**

83. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

84. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in ***British Home Stores v Burchell*** **1980 ICR 303**, as explained in ***Sheffield Health & Social Care NHS Foundation Trust v Crabtree*** **[2009] UKEAT 0331**, the Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

85. In ***Polkey v Dayton Services Ltd*** **[1988] ICR 142**, it was stated that if an employer could reasonably have concluded that a proper procedure would be “utterly useless” or “futile”, he might be acting reasonably in ignoring it.

86. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal’s function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: ***Iceland Frozen Foods v Jones*** **[1982] IRLR 430***;* ***Post Office v Foley*** **[2000] IRLR 827.**

87. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

88. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

89. Mr Santy in his submissions referred to the case of ***Royal Bank of Scotland Plc v McAdie*** **[2007] EWCA Civ 806,** where the Employment Appeal Tribunal (‘EAT’) found that a Tribunal could hold that an employer was not prevented from fairly dismissing an employee on grounds of ill health by reason of the fact that its conduct was at least partly responsible for that employee’s inability to work. He also referred to the case of ***Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust*** **[2019] EWCA Civ 498** which followed the ***McAdie*** decision.

90. Ms Crew referred to ***Eastlands BC v Daulby*** **[1977] ICR 56**, ***Spencer v O'Halligan*** **[1977] ICR 30,** ***Linnock v Cereal Packaging*** **[1988] 670** and ***McAdie*** **[see above].**

Equality Act 2010

Disability

91. Section 6 of the Equality Act 2010 (EQA) provides that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities.

Discrimination arising from a Disability

92. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

93. In ***City of York Council v Grosset*** **2018 ICR 1492** (which was also referred to by Ms Crew), the Court of Appeal held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment under S.15, even if the employer did not know that the disability caused the misconduct. The causal link between the 'something' and the unfavourable treatment is an objective matter that does not depend on the employer's knowledge. The Scottish EAT in ***Sheikholeslami v University of Edinburgh*** **2018 IRLR 1090** clarified the S.15 causation test. It held that an employment tribunal had erred in rejecting a S.15 claim on the basis that the reason for the claimant's dismissal – her refusal to return to her existing role – was not 'caused by' her disability. The test is whether the reason arises 'in consequence of' the disability, which entails a looser connection than strict causation and may involve more than one link in a chain.

94. Unfavourable treatment will not be unlawful under S.15 if it is objectively justified. In ***Awan v ICTS UK Ltd*** **EAT 0087/18** the EAT overturned an employment tribunal's decision that the dismissal of a disabled employee on the ground of incapacity during a time when he was entitled to benefits under the employer's long-term disability plan was a proportionate means of achieving the legitimate aim of ensuring that employees attend work. The tribunal had wrongly rejected the employee's argument that an implied

contractual term prevented his dismissal on the ground of incapacity while he was entitled to such benefits.

95. In ***(1) <u>The Trustees of Swansea University Pension & Assurance Scheme (2) Swansea University v Williams</u>*** **UKEAT/0415/14/DM** the Employment Appeal Tribunal held that the words "unfavourable treatment" and "detriment" were deliberately chosen when being included in the Equality Act 2010 and had distinct meanings. Unfavourable treatment involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. It has the meaning of placing a hurdle in front of or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability.

<u>Discrimination arising from a failure to make reasonable adjustments</u>

96. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

97. In the case of the ***<u>Environment Agency v Rowan</u>*** **[2008] IRLR 20,** the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-

    (a) the provision, criterion or practice applied by the employer;

    (b) the identity of non-disabled comparators where appropriate; and

    (c) the nature and extent of the substantial disadvantage suffered by the Claimant.

Discussion and Analysis

98. As described above, the issues between the parties were agreed at the case management hearing before Employment Judge Butler on 8 November 2019 and are as follows:

<u>Unfair dismissal</u>
<u>What was the potentially fair reason(s) for the dismissal?</u>

99. The principle reason relied upon by the respondent to dismiss the claimant was capability. This was identified in the decision to dismiss made by Mr Carter at the Employment Review meeting and also in his subsequent letter confirming the decision.

100. It is correct that the claimant's alleged conduct did play a role in the decision reached by Mr Cripps to have his investigation proceed to an Employment Review. This was in relation to the claimant's absence following the refusal of his holiday request, not coming into work before his GP appointment and his failure to engage with the RWP. However, it became clear that during the Employment Review meeting that Mr Carter became increasingly focused upon the historic sickness absence and the absence that would be required following the planned hip replacement surgery and the consequential cost to the business.

101. Mr Carter conceded in cross examination that the conduct issues in themselves would not have been sufficient to warrant a dismissal if they had been proven. He confirmed that it was the capability issue relating to sickness absence which resulted in the decision to dismiss and which of course, is a potentially fair reason to dismiss.

Was the dismissal fair or unfair in accordance with ERA section 98(4)

102. Having identified the reasons for the dismissal and it being a potentially fair reason decision to dismiss the claimant, it is then necessary to consider whether the decision to dismiss by reason of capability was actually fair or not.

103. The respondent is very large employer with significant access to HR and OH advice. The Tribunal was made aware of the policies and processes that applied to the management of sickness absence including the AMP the FWP and FRP. It has a written code of conduct and disciplinary procedures and it is reasonable to expect that they would pay close attention to following fair and proper processes when considering employment matters that might result in the termination of employment.

104. Unfortunately, as we determined in the Findings of Fact (above), there was a failure by management to follow its AMP and other processes when considering the claimant's case. The investigation of the claimant originally appeared to be connected with concerns regarding conduct and his decision to attend a GP appointment at short notice and by notifying his line manager by text. This was exacerbated by his failure to come into work before the appointment took place, despite there being 4 hours between the start of his shift at 6am and the appointment at 10am and his failure to ensure that he did not miss his FRP at 11am. The claimant did

not behave reasonably in ensuring his GP appointment was properly notified and that the FRP was attended or cancelled. This behaviour showed some disregard to the reasonable expectations of his employer that he would attend work if possible and that he would engage with them where absences were required.

105. While this might be the case, as the investigation of the claimant proceeded, both Mr Cripps and Mr Carter became increasingly bothered about the sickness absence. The difficulty was that because of the conduct issues remaining in the background, there appeared to be a general unwillingness to consider the application of the AMP and the correct stage of the process that should be applied to the claimant at this time. The Tribunal was not made aware of the claimant being previously subject to any sanction under the AMP (or its predecessor) and it appeared that the general frustration by management with the claimant's perceived attitude to work, meant that they were determined to proceed straight to an Employment Review. Unfortunately, no good reason was offered throughout the process which justified why it was reasonable to approach the claimant's case in that way. The respondent simply saw an opportunity to consider the claimant's employment and did not consider how the AMP should be used in relation to the claimant, given that he had not been taken through it in accordance with its processes.

106. The respondent did not consider whether the claimant should have been placed on the AMP while the trial period he was currently working on was concluded, with the appropriate adjustments recommended by the DDR and his GP.

107. Ultimately, the respondent failed to follow its own procedures and for a company of this size, this is wholly unreasonable and unfair.

108. The Tribunal did consider that some of the claimant's absences were potentially caused by failures on the part of the respondent due to accidents at work. However, while his absences were judged in the context of an employment history which included absences for a variety of reasons, the decision to dismiss was based upon the overall perception of the claimant having a 'problematic' employment history which was far in excess of the typical employee. It was the overall perception that the claimant had continued to maintain a poor sickness absence record and that the underlying trend, especially considering his disability, was likely to continue. On this basis, these earlier absences did not render the dismissal unfair, rather that it was the reasons given above concerning procedural errors which give reason to the finding of unfairness.

Was the decision to dismiss within the band of reasonable responses?

109. Even if the respondent had behaved reasonably under section 98(4), the Tribunal must consider whether the decision to dismiss fell within the band of reasonable responses available to an employer in the circumstances of this case. Taking into account the failure of the respondent to properly apply the AMP in relation to the claimant's capability, they had not reasonably reached a stage under that process where they could consider dismissal. While there were understandable concerns regarding the historic patterns of sickness absence and the extent to which further absences were required following the hip replacement surgery, they were at a stage where the claimant's RWP had not yet concluded and it had not been possible to determine whether the claimant could return to a full upstanding roles with appropriate adjustments. At best, had the AMP been applied properly they would have reached a stage where the claimant could have been issued with counselling or a warning concerning his absences and the need for improvement to avoid further sanction. Simply put, the respondent should have followed their own procedures and at the point in time when they decided to dismiss the claimant, this was not a sanction which fell within the range of reasonable responses available to them.

Adjustments to the compensatory award in accordance with 'Polkey'?

110. As we have already mentioned above, had the respondent followed its procedures properly, the claimant would not have been subjected to an Employment Review in December 2018 and while he may have been subject to a sanction under the AMP, he would not have been dismissed on grounds of his capability.

111. However, the Tribunal does recognise that the claimant had a very poor history of sickness absence and that it was likely that this would continue. It is understandable that he would have needed some time off work for his reasonable recovery post-surgery, but taking into account his previous sickness absences, it would be likely that he would have had further sickness absence prior to hip surgery. Moreover, the claimant would have probably been off work for more than 13 weeks post-surgery.

112. While this might be the case, it must be remembered that the claimant remained subject to the RWP when his Employment Review took place. The respondent would have had to complete this process had the claimant not been dismissed. But if the claimant was unable to be found a full upstanding role as part of the RWP, the respondent would have been left with no opportunity but to refer him to an Employment Review under

the RWP and which would have resulted in him being dismissed on capability grounds.

113. The Tribunal finds that taking into account the way in which the claimant behaved in relation to the trial jobs provided and also taking into account his evidence that the respondent had an obligation to find him a suitable job, he was unlikely to cooperate properly with the respondent. The claimant gave a clear impression that he did not want to or feel able to return to a full upstanding role. Even if the adjustments had been properly implemented as set out in the latest DDR and GP Fit Note of 20 November 2018, it is doubtful that the claimant would be able to reach the necessary standard which would enable him to achieve this objective.

114. As a consequence, the Tribunal finds that had the claimant been allowed to return to work in order that the RWP could be completed, it is likely that the claimant would have been dismissed in a matter of months following the Employment Review on 7 December 2018 due to capability concerns regarding his ability to return to full upstanding role. Although it is by necessity ‘a broad-brush approach’, the Tribunal finds that the compensatory award should be reduced on the basis that the claimant would have been fairly dismissed by reason of capability on 31 March 2019

Contributory negligence and sections 122(2) and 123(6) ERA?

115. The Tribunal also had to consider the question of whether there should be a deduction for contributory conduct taking into account whether there is an overlap between the factors considered in this matter and the making of a *Polkey* deduction.

116. The Tribunal’s judgment with regard to the basic award, is that there was not any conduct on the part of the claimant which was culpable or blameworthy and which caused or contributed to his dismissal.

117. In relation to the compensatory award, the Tribunal’s judgment is that there should be a reduction for contributory conduct. This was because of the claimant’s failure to turn up at work in November 2018, the way in which he dealt with booking leave despite being aware of the FRP appointment and his failure to seek a variation of the date. These were actions that were culpable and blameworthy and which caused or contributed to his dismissal. While the decision to dismiss was ultimately due to the capability issues arising from sickness, the investigation and Employment Review was to a great extent prompted by these failures on the part of the claimant and gave rise to the overall consideration of his attitude towards continued employment with the respondent. For these reasons, the Tribunal finds that it is just and equitable that there should be

a deduction of the claimant's compensatory award in the percentage of 25%.

Percentage increase/reduction to reflect failure by employer to comply with the ACAS disciplinary code (section 207A TULR(C)A 1992)

118. This is something that the Tribunal has considered because there were clearly failings on the part of the respondent as employer in how it followed its own processes and which to some extent reflected codes provided by ACAS.

119. The relevant code of practice is the *ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).* Ultimately, the claimant was dismissed for the potentially fair reason of capability. The ACAS Code only applies in cases of capability dismissals where there is *'culpable conduct'* or performance correction or punishment.

120. This is however, a case where the respondent did initially approach this matter as one relating to conduct. As Mr Canter confirmed in his evidence, this was a matter where the claimant's behaviour in relation to his ill health, moved from being a conduct matter to one of capability. It will be noted that the Tribunal has been critical of the respondent in the confused way in which it applied its procedures and that ultimately the claimant was dismissed before the AMP was followed properly. It was simply not at a stage where the decision to dismiss was a fair one, or where the decision to dismiss fell within the range of reasonable responses available to an employer.

121. The letter dated 4 December 2018 inviting the claimant to an Employment Review before Mr Canter on 7 December 2018 (and which resulted in his dismissal), did refer to a mixture of conduct and capability issues. While the decision to dismiss was one arising from the claimant's conduct and although closely connected with his capability, where not in themselves the real reason for the dismissal, nor as Ms Canter explained, would they have been sufficient to justify dismissal if proven. Nonetheless, it would have been possible for disciplinary sanctions to be applied by Mr Canter at this meeting because of issues relating to conduct and it is the Tribunal's judgment that the relevant ACAS Code should have applied in this process and should have been complied with.

122. The Code provides the minimum standards that should be expected in matters relating to disciplinary procedures. In this respect, an employer should avoid delay, act consistently, investigate properly, inform the employee of the problem, give the employee an opportunity to put their case before decisions are made, allow them to be accompanied and allow

a right of appeal. Taking account of this basic set of principles, the Tribunal is satisfied that the claimant was afforded a process which was consistent with these principles. The Tribunal may have criticisms of how the respondent followed its own internal processes, but in respect of the ACAS Code, it did enough to follow its minimum standards. For this reason, we do not feel that an adjustment to the claimant's award for unfair dismissal would be appropriate.

123. For the avoidance of doubt, the Tribunal does not find that there was any failure by the claimant in following the Code and therefore no adjustment should be made against him.

Disability Discrimination
Was the claimant disabled?

124. There is no dispute claimant was disabled within meaning of section 6(1) Equality Act 2010 because of his avascular necrosis disease to his left hip which was diagnosed in early 2018. By the time of the relevant events that led to his dismissal, the claimant had suffered an absence from work due to this condition from March to August 2018. Although he had returned to work, he continued to be impaired and required the support of OH, its FRP and the operation of the respondent's RWP in order that suitable work could be found for him. His treating surgeon had by June 2018, made clear that this condition would continue to progress and could not be resolved unless he had a hip replacement operation and that following surgery, the claimant would require an absence of work to recover of a minimum of 12 weeks.

125. The Tribunal accepts that from June 2018 that the claimant had a condition that was likely to be long term in nature and until his hip replacement took place (at some time in 2019), his condition would have a substantial impact upon his day to day activities including work and sleep.

126. In terms of the knowledge of the respondent concerning the claimant's disability at the time of his dismissal, they argued that his managers were not aware that he was so disabled. Having heard the evidence from the respondent's witnesses, it appears that their argument behind this lack of knowledge is that the respondent's OH and HR did not provide an unequivocal opinion as to whether the claimant was disabled at this time.

127. The claimant was required to keep in touch during his sickness absence from March to August 2018 and it is likely that he would have let the respondent's line manager Mick Jones know about his consultant's decision. He returned to work in August 2018 and his continued health issues required the operation of the RWP and the provision of FRP.

These matters would have involved OH and HR and they would have been aware that this would have a substantial and long-term impact upon the claimant's ability to carry out his job. While the Tribunal was not taken to any specific communications from OH or HR stating that the claimant was disabled within the meaning of the EQA, it was known to management once the claimant returned to work that he was not going to return to his pre absence car assembly role and it was necessary to look at alternative roles within the workplace. This would not have been necessary had the claimant been experiencing a mild or minor condition and Mr Cripps upon investigating the claimant in November 29018, would have been aware of these ongoing problems and their substantial nature and likely long term implications. Indeed, this was a consideration which caused Mr Carter some concern when he considered capability. In any event, both the claimant and his union representative did allude to disability during the Employment Review and subsequent appeals and the question of discrimination was alleged.

128. For these reasons we are satisfied that the respondent's managers involved in the decision to dismiss the claimant and subsequent appeal hearings had sufficient information available that would give a reasonable expectation that they should conclude the claimant was disabled following the diagnosis of the hip condition. It was not necessary for OH or HR to spell this out to management and their knowledge of the claimant's health at this time, his impairments and forthcoming treatment should have made a conclusion that he was disabled, an obvious one to reach. These were managers who were very honest and open about the amount of training they had received and they certainly were equipped to consider issues relating to disability.

Discrimination arising from a disability (section 15 EQA)

129. The Tribunal has first of considered the 'things' in the list of issues, whether they occurred and if they can be considered as having arisen as a consequence of the claimant's disability.

130. The claimant had a period of absence from work between March and August 2018 connected with his hip condition. This was entirely connected with his disability and for no other reason. It is also correct that the claimant asked for holiday during the week of 20 November 2018. It was refused by the respondent and the claimant's then his wife booked a GP appointment on 20 November 2018 because he was experiencing pain and discomfort in his hip. While the respondent clearly had concerns about the claimant's motivation for making this appointment, the Tribunal has no reason to doubt that the claimant needed to consult his GP because of the symptoms that were described. This absence was

because of his disability and his GP's Fit Note produced on 20 November 2018 made clear comments about the claimant's disability.

131. The next question is whether the respondent treated the claimant unfavourably by dismissing him? It is certainly the case that the respondent dismissed the claimant following his Employment Review meeting on 7 December 2018. However, was this because the 'things' described above?

132. The decision to dismiss the claimant on 7 December 2018 was because of Mr Carter's anxiety about the claimant's historic sickness absence. He was concerned about the cost and the likely future absences that would take place due to the claimant's hip surgery and other potential future absences that he felt his past record would suggest would happen. To some extent the decision to dismiss was therefore connected with the absence between March and August 2018, but primarily it is because of the significance of the claimant's absences over his entire career and in particular, his previous 4 years. It seems that the absence between March and August 2018 and on 20 November 2018 were not the sole reasons for the decision to dismiss, but they did form a significant part of the reasoning that the claimant should be dismissed. Mr Carter was clearly concerned about the claimant's ongoing health issues and the likelihood that this would impact upon his overall ability to work in an upstanding role, together with anticipated sickness absences. The absences in 2018 relating to the claimant's disability were a significant factor in the reason for the decision to dismiss.

133. The respondent has argued that if the claimant was dismissed by reason of things arising from his disability, they put forward the legitimate aim of maintaining an adequate workforce to enable production to continue. While the Tribunal does find that the claimant was dismissed because of the things arising from his disability under section 15 EQA, it does find that it is a legitimate aim for the respondent to maintain an adequate workforce to enable production to continue. The respondent was a private company relying upon an efficient production with an appropriate level of active employees who could ensure that productivity was maintained at a viable level to remain in business in a competitive global market. It was noted that concerns regarding tight margins and the impact of Brexit were genuine considerations at the time that the claimant was dismissed.

134. As to whether the way in which the claimant was treated, demonstrated that this legitimate aim was being achieved in a proportionate way, the Tribunal would make a number of points. The respondent had a generous sick pay scheme and an elaborate system of managing employee attendance. The claimant was allowed a significant

number of absences during his career without management sanction and it was only towards the end of his career that greater scrutiny was applied. It was clear from the conversations that took place between the claimant and [name] when he returned to work in August 2018 following his lengthy sickness absence due to his disability, his sickness record been a subject of management scrutiny.

135. However, the claimant was not at risk of dismissal at this point and he was carefully line managed and provided with a number of trial jobs to see what he was capable of achieving. It was understandable that management had a long term goal of returning the claimant to an upstanding role. The claimant did not embrace this legitimate aim and seemed quite happy to remain in a role which would not be production line based. The decision to dismiss was not because of the respondent exhausting the opportunities that might be available for the claimant to return him to an upstanding role. It arose because the claimant was not entering into the spirit of the process which involved a number of management support services including production management, OH and HR. The respondent had to see that a successful return to work was achieved in the not too distant future and the Tribunal is satisfied that it did behave proportionately in seeking to return the claimant to an upstanding role and did not rush to dismiss him because of a single absence, but because of a pattern of absences which reached a point where a realistic return to work was unlikely to be possible.

Reasonable adjustments: EQA, sections 20 & 21

136. As the Tribunal considered above, the respondent either knew or should have reasonably have been expected to know the claimant was a disabled person.

137. Turning to the question of PCPs, the Tribunal has been asked to consider a number of different provisions, criterions and/or practices. In terms of whether the respondent prevented the use of a walking aid in the claimant's working area, the Tribunal did note that Mr Shah unfortunately did tell the claimant that he could not use his stick when working in the Sealing area. While this was the case, we did identify this action as an unfortunate one off incident which did not reflect the willingness of management to allow the claimant to use a stick. Indeed, the evidence that was heard about the use of a stick wrapped in plastic so that it was padded and would not damage car bodywork, demonstrated to the Tribunal that sticks would be allowed. The PCP in relation to sticks was that their use was restricted due to concerns about damage to car bodywork and that they would only be allowed with appropriate adaptations to minimise this risk.

138. The Tribunal was also asked to consider whether there was a PCP, where the respondent prevented the use of suitable seating equipment (chair, stools) in the claimant's working area? It was fair to say that the the respondent's workplace was carefully regulated and was not readily given without good reason. It is noted that the claimant without permission found a box to sit on. The respondent did appear concerned about the use of the box and Mr Niblett did confirm that there were no sitting down jobs on the production line. Health and safety concerns and possibly the risk of damage to car bodywork meant that seating was something that was not available in the immediate work area. As a consequence, the Tribunal does find that in relation to the production line, it was a PCP that suitable seating equipment would not be provided in the claimant's work area.

139. The Tribunal also finds that the production line roles did require employees to walk and that walking and standing played a large part in being able to carry out the roles which were found in this area.

140. In terms of the alleged PCP that staff were expected to work their contracted hours/shifts without the use of a walking aid and/or adequate seating area, the answer should be referred to the previous PCPs above. In relation to the production line, there was an expectation that staff would not have seating within their work area and that walking aids should be suitably adapted when working near car bodies. The Tribunal's judgment is that there was not an absolute bar and the Tribunal finds that during the shift, employees could have used adapted walking aids and could have taken breaks to find a seat outside of their work area. In this respect, this allegation did not amount to a PCP. However, this matter is relevant in terms of the PCP of walking and standing (above) and how adjustments could be achieved in alleviating any disadvantage which is discussed below.

141. The PCPs which have been confirmed did place the claimant at a substantial disadvantage because in the production line roles that he tried, he would have to walk around the car that he was working on and would not be provided with a seat in the immediate work area. The claimant was clearly in discomfort walking frequently and he needed to find himself a seat by using a box. This did affect his ability to remain fit enough for work and ultimately the claimant was at a significant disadvantage in relation to these matters in comparison with persons who are not disabled at any relevant time. This disadvantage resulted in it being difficult for the claimant to be able to achieve an upstanding production role and contributed to his dismissal.

142. The respondent could reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage because of the ongoing involvement of its OH, HR and line management with the claimant's health issues relating to his disability following his return to work in August 2018 and the monitoring of how successfully he was able to return to work on the production line.

143. A number of steps have been identified that could have been taken by the respondent to avoid this disadvantage. The claimant referred to the use of a walking aid when walking between places in the workstation. As has been mentioned above, it was recognised by the respondent that the claimant required a walking aid and subject to the necessary adjustment of plastic padding, it was something that would be allowed. Even when the claimant referred to refusal by his line manager Mr Shah, the Tribunal did not give evidence that he sought support from his union or OH and the Tribunal is satisfied that this adjustment was provided in an appropriate and reasonable way.

144. It was accepted that there was an ongoing issue concerning the provision of seating in the claimant's work area. The claimant believed a chair or stool nearby to his work area, would assist in allowing him regular rests. It did seem clear that with the claimant's disability causing him difficulties with his mobility, the ready access to a chair may have assisted him in continuing in a production role. While there were clearly concerns about such provision in the work areas by management, the Tribunal finds that insufficient consideration was given by the respondent with regards to assessing how the claimant's impairment might have been ameliorated by seating provision. The provision of seating some distance away from the work area was not a realistic adjustment for the claimant.

145. In relation to the adjustment of allowing the claimant time off for medical appointments, the Tribunal finds that this adjustment was provided by the respondent. The issues arose from the way in which the claimant booked time off for appointments, his failure to fit them in with his shifts and if possible, to work part of his shift. He also failed to properly communicate his absences to management. There was certainly no suggestion that he would be prevented from taking appropriate time off for medical appointments.

146. In terms of whether the adjustment relating to seating was reasonable, the Tribunal notes an absence of evidence from the respondent of a clear assessment which balanced the claimant's impairments, the appropriate seating adjustment allowed and how that might prejudice health and safety or production. Accordingly, the Tribunal does find that there was a failure to make reasonable adjustments concerning seating in the claimant's work area in relation to the PCPs .

Conclusion

Judgment

147. The claimant's complaint of unfair dismissal is well founded, which means that it is successful. However, it is subject to the Tribunal's finding that a deduction to the compensatory award should be made by reason of the application of *Polkey* and the claimant's contributory fault.

148. The claimant's complaint of discrimination arising from a disability is not well founded, which means it is unsuccessful.

149. The claimant's complaint of a discrimination arising from the respondent's failure to make reasonable adjustments is well founded, which means it is successful.

150. The case will now be listed for a remedy hearing with a hearing length of 1 day In the Birmingham Employment Tribunal on a date to be advised. Parties are requested to provide details of dates to avoid for the purpose of listing this case for the remedy hearing during 2021 within 7 days of the date in which the judgment is sent to them by the Tribunal. The hearing will be listed as an in person hearing, but it may be converted to a CVP hearing either by the Tribunal or upon application by the parties.

Further case management orders

151. The claimant shall provide the respondent with an updated schedule of loss by **15 January 2021**.

152. The parties shall exchange documents relating to the determination of remedy by **5 February 2021**

153. The parties shall by **26 February 2021** agree an index for the remedy hearing bundle and by **5 March 2021** the respondent shall provide the claimant with a hard and pdf copy of the bundle for use at the hearing.

154. The parties shall exchange witness evidence relating to the determination of remedy by **5 March 2021**.

155. The respondent shall ensure that 14 days before the remedy hearing, a pdf copy of the bundle and 4 hard copy bundles together with a pdf copy of the parties witness evidence and 4 hard copy statements are

provided to the Tribunal. This will ensure that in the event it is necessary for the hearing to be converted to a CVP hearing, the Tribunal will be able to forward the hard copy bundles and statements to the non legal members and the Employment Judge.

Employment Judge Johnson

1 December 2020