EMPLOYMENT TRIBUNALS

Claimant: Mr S Hope

Respondent: Busy B's Limited

Heard at: Ashford

On: 22, 23, 24 & 25 October 2018

Before: Employment Judge J Pritchard
Ms R Serpis
Mr S Huggins

Representation
Claimant: Mr T Gillie, counsel
Respondent: Mr H Lewis-Nunn, counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

1 The Claimant was not a disabled person at relevant times and his disability discrimination claim is dismissed.

2 The Claimant's claim that he was unfairly dismissed is well-founded and accordingly succeeds. The Claimant did not contribute to his dismissal. There was a 10% chance that the Claimant would have been dismissed by reason of ill health in any event.

3 As to remedy, the parties have reached settlement by way of an ACAS Cot 3 agreement.

REASONS

Introduction

1. The Claimant claims unfair dismissal and disability discrimination. The Respondent resists the claims. The Tribunal heard evidence from the Claimant and from Michelle Hougham, one of the Respondent's directors. The Tribunal was provided with a bundle of documents to which the parties variously referred. The case was allocated a hearing over four days. At the conclusion of the second day, the Tribunal having heard the evidence, the parties made oral

submissions. In the Claimant's case, counsel amplified his written submissions. The Tribunal used the third day to deliberate in chambers and reach a decision as to liability, contribution, and Polkey. Judgment and reasons was given on the fourth day following which the parties reached settlement upon the terms of an ACAS Cot 3 agreement. These reasons are provided at the Claimant's request.

The issues

2. The issues had been agreed between the parties in writing and are reproduced here as follows:

3. The Claimant brings the following claims:

   3.1. Unfair dismissal, contrary to s.94(1) Employment Rights Act 1996 ("ERA") [the "Unfair dismissal claim"];

   3.2. Disability discrimination claims, which are claims of discrimination arising from disability, within the meaning of s.6 and s.15(1) of the Equality Act 2010 ("EqA") contrary to s.39(2)(c) EqA [the "Discrimination arising from disability claim"];

   3.3. Failure to make reasonable adjustments, within the meaning of s.6 and ss.20-21 EqA, contrary to s.39(5) EqA, [the "Reasonable adjustments claim").

DETAILED LIABILITY ISSUES

<u>Unfair dismissal claim</u>

4. Whether the Respondent's dismissal of the Claimant (notified on 2 May 2017 with notice to expire on 31 May 2017) amounted to an unfair dismissal contrary to s.94(1) ERA, having regard to the following:

   4.1. Did the Respondent's reason for dismissing the Claimant relate to capability (a potentially fair reason pursuant to s.98(2)(a) ERA);

   4.2. If so, in the circumstances was dismissal for this reason within the range of reasonable responses available to a reasonable employer in accordance with equity and the substantial merits of the case, pursuant to s.98(4) ERA? In the capability dismissal (long term ill health) context this would usually require consideration of the following:

      4.2.1. Did the Respondent adequately consult the Claimant?

      4.2.2. Did the Respondent conduct a reasonable investigation into the Claimant's medical position at the relevant time so that it had reasonable grounds for dismissing for capability?

      4.2.3. Were alternative options to dismissal, including employment opportunities as appropriate, considered?

Disability discrimination

5. The Claimant's alleged impairment for his claims of disability discrimination claims (Discrimination arising from disability claim and Reasonable adjustments claim) is back pain/injury. The Claimant is not pursuing any anxiety/stress as a separate disability, rather this is a symptom that flowed from the back pain/injury, and its treatment, and is potentially relevant in terms of any injury to feelings award.

6. The Respondent denies that at the relevant time the symptoms alleged by the Claimant were a disability as defined by s6 Equality Act 2010.

7. Further or alternatively, if the Claimant is found to have a disability at the relevant time for the purposes of the Equality Act. The following issues therefore need to be determined at a Preliminary Hearing:

    7.1. At the relevant time did the Claimant's back pain/injury amount to a disability as defined by s.6 and sch.1 EqA?

    7.2. If so, can the Respondent show that it did not know, and could not be reasonably expected to know, of the Claimant's disability (back pain/injury)?

Discrimination arising from disability claim

8. Whether contrary to s.15(1) EqA and s.39(2)(c) EqA, the Claimant was subjected to discrimination arising from disability by virtue of his dismissal, having regard to the following:

    8.1. Did the Respondent treat the Claimant unfavourably;

    8.2. If so, was this because of something arising in consequence of his disability;

    8.3. If so, was the treatment a proportionate means of achieving a legitimate aim?

9. In terms of paragraph 8.1 above, the unfavourable treatment is dismissal and there does not appear to be any dispute that this could be unfavourable treatment. Accordingly the only live issues are paragraphs 6(2)-(3).

10. With respect to paragraph 8.2, the Claimant asserts that his dismissal, the unfavourable treatment, was because of:

    10.1.1. His absence from work, and this arose in consequence of his disability;

    10.1.2. Difficulty mobilising (in general and at work in particular), and this arose in consequence of his disability;

    10.1.3. Difficulty carrying out strenuous activities (in general and at work in particular) and this arose in consequence of his disability.

11. The Respondent's Grounds of Resistance has indicated at paragraph 23 that it is asserting the dismissal was a proportionate means of achieving a legitimate aim.

12. The legitimate aim was to meet the needs of running a small store.

Reasonable adjustments claim

13. Whether, as defined by ss20-21 EqA, the Claimant's dismissal meant the Respondent failed in its duty to make reasonable adjustments towards the Claimant (contrary to s.39(5) EqA), having regard to the following:

    13.1. Did any relevant Respondent apply a 'provision, criterion, or practice' ("PCP");

    13.2. If so, did this PCP put the Claimant at a substantial disadvantage, namely dismissal and/or greater risk of dismissal;

    13.3. If so, has the Respondent taken such steps as were reasonable to avoid the disadvantage?

14. With respect to paragraph 13.1 above, the PCPs are:

    14.1. the requirement to attend work at a certain level in order to avoid a possible dismissal;

    14.2. requirement for consistent attendance;

    14.3. not obtaining occupational health advice about employee's injuries/health and/or;

    14.4. requiring the Claimant to lift heavy object.

15. The issues to be determined are:

    15.1. whether these were PCP's that applied to the Claimant;

16. If so, whether any of these PCPs put the Claimant at a substantial disadvantage. Although the duty is on the Respondent, for the purposes of ensuring the relevant evidence and matters are canvassed before a Tribunal, the Claimant has set out in his Grounds of Claim at paragraph 24 the steps which he asserts would have been reasonable for the Respondent to take to avoid the disadvantage.

DETAILED REMEDY (COMPENSATION) ISSUES

17. In the event that any disability discrimination claims succeed, the compensation issues are:

    17.1. What financial loss, loss of salary/benefits, has the Claimant suffered in light of the discrimination (ss.124(6) EqA and what is just and equitable to award

17.2. Has the Claimant failed to mitigate his loss and so his award needs to be reduced accordingly (the 'net loss' issue)

17.3. In terms of the non-pecuniary losses:

17.3.1. What level of compensation for injury to feelings is appropriate?

17.3.2. What, if any, personal injury has been suffered as a result of the discrimination found that needs compensating and what amount should this be?

17.3.3. What amount of interest is there for any non-pecuniary loss and past financial loss (s.124(2) EqA)

17.3.4. Does the award (or relevant elements of it) need to be 'grossed' up in light of the tax consequences?

18. If in addition to any disability discrimination claim, the Claimant is found to have been unfairly dismissed, the compensation is as set out above, however there is also the need for there to be a basic award for statutory loss and a basic award under s.119 ERA (including consideration of whether conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce the amount of basic award in accordance with s.122(2) ERA 1996)?

19. In the event that only the unfair dismissal claim succeeds, the compensation awarded will include the same basic award set out in the paragraph above, in addition to the compensatory award under the ERA. This requires determination of what is the amount of compensatory award that the tribunal consider just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the Respondent pursuant to s.123(1) ERA 1996, having regard to the following (below stated in order of relevant adjustments to the compensatory award):

19.1. Has the Claimant failed to mitigate his loss pursuant to s.123(4) ERA and so his award needs to be reduced accordingly (the 'net loss' issue)?

19.2. What is the chance that the Claimant could have been fairly dismissed in any event and when would this have occurred (the 'Polkey / just and equitable deduction' issue)?

19.3. Does the Tribunal find that the dismissal was to any extent caused or contributed to by any action of the Claimant and if so by what just and equitable proportion should the award be (further) reduced (the 'contributory fault' issue)?

19.4. Does the total award calculated in light of the above issues need to be 'grossed' up?

19.5. Does the total award calculated in light of the above breach the statutory cap (maximum of 52 weeks gross pay) and accordingly needs to be reduced accordingly?

Findings of fact

20. The Claimant commenced employment with the Respondent in October 1999. He was employed as a manager of one of the Respondent's four retail homeware and home furnishing stores in Herne Bay (the Respondent has second store in Herne Bay just minutes away from the branch where the Claimant worked). The Respondent is a relatively small family owned business with about twenty-four members of staff including family members. Although his job title was Manager, the Claimant's duties included lifting heavy items of furniture and mattresses upon delivery and for storage. He worked alongside two female members of staff at the store.

21. On 8 November 2016 the Claimant was unable to attend work because he was suffering from back pain. The Claimant's case is that he suffered an injury at work after lifting a heavy mattress onto a shelf which had to be reached by ladder. The Respondent's insurers have accepted liability on the Respondent's behalf for the Claimant's personal injury subject to medical reports to show the extent of the injury and the Claimant's losses. The Respondent has now ceased the practice of storing mattresses on this shelf upon the advice of its insurers.

22. The Claimant's pain was severe and his doctor was called out for a home visit. On 10 November 2016 the Claimant called the NHS 111 advice line and was advised to go to hospital. The Claimant called an ambulance to take him to hospital where he was X-rayed and subsequently discharged.

23. The Claimant thereafter consulted his GP on a number of occasions who prescribed pain-killing medication and issued Statements of Fitness for Work (sick certificates) to cover the Claimant's absence from work. All the sick certificates issued by the Claimant's GP up to the date of his dismissal record the Claimant as being "not fit for work". In February 2017 the Claimant also presented with a stress related problem.

24. In November 2016 the Claimant self-referred to a therapist for acupuncture. In December 2016 the Claimant commenced a course of physiotherapy treatment. On 28 December 2016, the Claimant had an MRI scan.

25. By letter dated 30 January 2017, the Respondent invited the Claimant to attend a formal absence review meeting to review his progress and to establish when he might be well enough to return to work. The Respondent wished to discuss the content of the anticipated medical report and to discuss any assistance or support the Claimant might need to facilitate his return. However, by email dated 30 January 2017, the Claimant told the Respondent that he would not attend a meeting, that he would be seeing an orthopaedic specialist on 29 March 2017, and that he did not know what would happen or the treatment he would be required to undergo. The Claimant told the Respondent that he was unable to drive (he told the Tribunal this was because of his medication), that he would keep the Respondent updated and give a firm date when he was able to return to work. He made it clear that he would not attend a meeting even if it were to take place at his home. The Respondent replied saying "We understand

from the email that you wish not to have a meeting to discuss your wellbeing, prognosis and recovery at this moment in time, which we will respect". The Respondent said the meeting would be re-scheduled to take place after the Claimant's appointment on 29 March 2017. The Claimant subsequently made it clear in an email of 5 February 2017 that he thought a meeting would be a waste of time and that neither his doctor nor the orthopaedic specialist could say when he would be fit enough to return to work. The tenor of the Claimant's emails at this time suggest he was rather depressed.

26. The Claimant told the Tribunal of a promise made in about 2012 by Mr Brian Bennett, the Respondent's Chief Executive, that the Respondent would make a goodwill payment to him if he remained employed by the Respondent. The Claimant's correspondence with the Respondent during his sickness absence makes reference to the payment and the Claimant consistently asserted his right to it. The Tribunal has no need to determine whether the Claimant had a right to such a payment in order to reach a conclusion in this case. Nevertheless, the Tribunal notes that the Claimant was dissatisfied by the Respondent's refusal to make this payment and this issue of the promised payment seemed to occupy the Claimant's mind at the time.

27. The Respondent then asked its solicitors, Hadfield & Co, to intervene on its behalf. Hadfield & Co wrote to the Claimant on 14 February 2017 asking the Claimant to sign and return a medical consent form. The Claimant did so. By letter dated 3 March 2017, the Respondent asked the Claimant's GP to provide a report. Although the letter of instruction to the GP asked, among other things, when the Claimant might be fit to return to work and what adjustments should be put in place, it did not describe the Claimant's role or the nature of his duties. Perhaps unsurprisingly, the Claimant's GP reported that she was unable to comment on the Claimant's ability for work since she was not privy to his work duties or work environment which would have to be assessed by an occupational physician.

28. The Claimant saw Dr Shah, orthopaedic specialist, at the Spine Clinic on 29 March 2017. The MRI scan had disclosed minor disc bulges but the conclusion was that there was no evidence of significant disc protrusion or nerve root infringement. The Claimant declined the offer to have injections under x ray and sedation, not least because it only had 30% chance of helping his back and leg pain. Dr Shah noted that the Claimant's back was now "much, much better", "more than 50% better", but that he still had pain. The main problem now was the Claimant's left knee which was clicking. It was noted that walking was no longer a problem for the Claimant. However, the Claimant remained on painkillers and was now on anti-depressant medication.

29. By email dated 10 April 2017, the Claimant informed the Respondent that his GP had signed him off as not fit for work for a further month but that he had asked his GP if he could return to work. The Claimant told the Respondent that his GP had advised him he could return to work three days a week at first to see how got on. The Claimant's evidence was that he had told his GP about his job and what it involved. The Claimant wanted to take his holiday following expiry of his sick certificate then return to work on 22 May 2017.

30. The Respondent did not reply to the Claimant's email. By letter dated 18 April 2017 the Respondent asked the Claimant's GP for her recommendations as to

the Claimant's return to work. The Respondent informed the GP of the Claimant's working hours and that his work involved a lot of carrying and lifting.

31. In an email dated 24 April 2017, the Claimant informed the Respondent that ACAS had suggested that the Fit for Work Scheme might be of assistance and he indicated his willingness to engage with it. The Tribunal understands this scheme to provide free return to work advice. The Respondent did not follow this up.

32. By letter dated 25 April 2017, the Claimant's GP replied to the Respondent saying that she could not comment with regard to the Claimant's return to work as she had not assessed the work environment; this, she said, would have to be completed by an occupational physician. Somewhat ambiguously, the GP stated "Mr Hope felt that he wanted to go back to work and I agreed also". Notwithstanding this comment, the Claimant remained certificated as not fit for work. The Respondent did not seek the advice of an occupational physician.

33. By letter dated 2 May 2017, the Respondent informed the Claimant that the decision had been taken to end his contract and that it was not a dismissal which could be appealed. The reason for the dismissal was said to be the Claimant's sickness absence since November 2016 with no prospect that he would return in the near future and that having considered all the circumstances it could not wait any longer. The Claimant's last day of employment was 31 May 2017. He was paid in lieu of notice.

34. The Tribunal makes the following findings as to the Claimant's day to day activities. For several weeks after the injury:

    34.1. The Claimant slept on his sofa;

    34.2. He cooked only convenience food in his microwave;

    34.3. He was unable to go shopping and relied on friends and home deliveries;

    34.4. He had great difficulty climbing the spiral staircase in his house and had to crawl up the stairs to reach his shower room;

    34.5. He was unable to do any housework;

    34.6. He had taken a taxi or went out with others when he left the house until 15 January 2017 when he left the house on his own for the first time to visit his paper shop.

35. The Claimant's condition gradually improved. The GP's notes record that Claimant reported reduced pain and improved mobility. As stated above, by April 2017 the Claimant felt he could return to work and carry out 80% to 90% of his job. He told the Tribunal that he felt "back to normal" by about March or April 2017 and, with pain killers, he could do most of his housework apart from lifting his heavy vacuum cleaner up and down the stairs. Although initially he did not drive his car, mainly because of the side effects of his medication, he drove again from about January or February 2017. The findings in this paragraph are based largely upon the Claimant's oral evidence, his impact statement having been unhelpfully drafted in that it did not appear to set out the

Claimant's position in a chronological order. The Tribunal notes that by June 2017 the Claimant's dosage of pain killers had been reduced by his GP. This is consistent with the Claimant's evidence that his back and leg condition was improving. Nevertheless, it remained the case that the Claimant was unable to lift items such as heavy mattresses and he remained on medication.

36. The Tribunal notes that at date of the Tribunal hearing the Claimant is back to carrying out normal day to day activities but remains on pain killers and anti-depressants.

Applicable law

37. The parties agreed that the law set out in Claimant's written submissions was an accurate summary of the applicable legal principles. The Tribunal too accepts the submissions contain an accurate summary of the legal principles and adds/expands as follows.

Disability discrimination

38. Section 6 of the Equality Act 2010 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. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

39. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant. The following extracts appear to be particularly relevant in this case:

    39.1. B12 which states that corrective treatment would include treatment with drugs

    39.2. C3. Likely should be interpreted as meaning that it could well happen.

    39.3. C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. (This is in accordance with the ruling of the Court of Appeal in Richmond Adult Community College v McDougall 2008 ICR 431). Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age.

    39.4. D4. The term "normal day to day activities" is not intended to include activities which are normal only for a particular person, or a small

group of people. In deciding whether an activity is a normal day to day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context "normal" should be given its ordinary, everyday meaning.

39.5. The appendix sets out illustrative and non-exhaustive lists of factors (indicators, not tests) which, if they are experienced by a person, it would or would not be reasonable to regard as having a substantial adverse effect on normal day to day activities. Difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or small piece of luggage, with one hand, is listed as a factor which it would be reasonable to regard and having a substantial adverse effect on normal day to day activities. On the other hand, inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley, is listed as a factor which it would not be reasonable to regard and having a substantial adverse effect on normal day to day activities

40. The Tribunal must focus on what the Claimant could not do, or only do with difficulty.

Unfair dismissal

41. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.

42. In this case the reason relied upon by the Respondent is capability which is a reason falling within subsection (2). That is defined as including ill health.

43. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4).

44. In S v Dundee City Council [2014] IRLR 131 the Court of Session stated that in a case where an employee has been absent from work for some time owing to sickness, the following issues would need to be specifically addressed:

44.1. Whether the employer could be expected to wait any longer and, if so, for how much longer. This is the critical question to be decided in dismissals of grounds of ill-health. Relevant factors could include whether the employee has exhausted his sick pay, whether the employer was able to call on temporary staff, and the size of the organisation.

44.2. Whether the employee had been consulted with, whether his views had been taken into account, and whether such views had been properly balanced against the medical professional's opinion.

44.3. Whether reasonable steps had been taken to discover the employee's medical condition and likely prognosis. It would not be necessary for the employer to pursue a detailed medical examination as the decision to dismiss is not a medical question but a question to be answered in the light of the available medical evidence.

45. The Court also pointed out that length of service is not automatically relevant. The important question is whether the length of service, and the manner in which service was rendered during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can.

46. It is clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

Contribution

47. Section 122 provides for certain circumstances in which reductions shall be made to the basic award. Such circumstances include where the Tribunal considers that any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the basic award. Conduct need not have contributed to the dismissal.

48. Where a 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. Before making such a deduction, the Tribunal must make three findings:

48.1. That there was conduct on the part of the Claimant in connection with his unfair dismissal which was culpable or blameworthy to the extent that it was perverse, foolish, bloody-minded or unreasonable in the circumstances;

48.2. That the matters to which the unfair dismissal complaint relates were caused or contributed to some extent by the Claimant's action (or inaction) that was culpable or blameworthy;

48.3. That it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent. See: Nelson v BBC (No.2) [1979] IRLR 346, CA

Polkey

49. The Polkey principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

50. Assessing future loss of earnings will almost inevitably involve consideration of uncertainties: Thornett v Scope 2007 ICR 236 CA. In Software 2000 v Andrews 2007 ICR 825 the following principles were enunciated:

50.1. In assessing compensation for unfair dismissal, the Tribunal must assess the loss flowing from the dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.

50.2. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all the relevant evidence, including any evidence from the employee (for example, that he intended to retire in the near future).

50.3. There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal.

50.4. However, the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence

50.5. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored

Conclusion

Was the Claimant a disabled person at the time of the alleged discriminatory act, namely in May 2017?

51. There was no suggestion that the effect of the Claimant's impairment on his ability to carry out normal day to day activities had lasted for at least 12 months

at the date of the alleged discriminatory act or that it was likely to last for the rest of his life.

52. Rather, the question for the Tribunal is whether, in May 2017, the effect of the Claimant's impairment on his ability to carry out normal day-to-day activities was likely to last, meaning it could well happen, for at least 12 months. This test is more generous to the Claimant that a balance of probabilities test.

53. Focussing on what the Claimant could not do in May 2017, namely his inability to lift his heavy vacuum cleaner up a difficult set of stairs, and his inability to lift heavy objects such as mattresses and furniture (which in his claim form he said weighed up to 40kg), and having regard to the general improvement in his condition in May 2017, in the Tribunal's view it cannot be said that it "could well happen" that the adverse effect on the Claimant's ability to carry out normal day to day activities would continue until November 2017. The Tribunal has been concerned as to what effect the pain killers might have had but there has been scant credible evidence to assist the Tribunal in this regard. It is nevertheless illustrative that the dosage was reduced shortly after the Claimant's dismissal.

54. The Tribunal has also had regard to the fact that the Claimant had been of generally good health and although this back injury gave rise to a particularly acute episode of back pain, the Claimant had previously recovered fairly quickly from former back injuries.

55. The Tribunal has had regard to the case law set out at paragraphs 28 and 29 of the Claimant's submissions but concludes that the lifting of heavy bulky items such as mattresses and sofas weighing up to 40kg cannot sensibly be thought to be a normal day to day activity as opposed to picking items in a warehouse of up to 25kg as in the case of Banaszczyk.

56. The Tribunal also notes that the Claimant's GP supported his phased return to work, the Claimant having told her what his job involved.

57. The Tribunal concludes that the Claimant was not a disabled person at relevant times.

Was the Claimant unfairly dismissed?

58. The Respondent has shown that the reason for the Claimant's dismissal was his long-term sickness absence from work which was for the potentially fair reason of capability. Although the Respondent has satisfied the Tribunal on this point, the burden of proof resting on the Respondent, the Claimant conceded that was the reason for the dismissal in submissions.

59. The Tribunal has had regard to Holmes v Qinetiq Ltd UKEAT/0206/15/BA, a case relied on by the Claimant in supplementary written submissions. The Tribunal concludes that the ACAS Code of Practice does not apply in the circumstances of this case. The Tribunal is not persuaded by the Claimant's submission that the Code should apply because Mrs Hougham appeared to suggest that part of the reason for the Claimant's dismissal was because he had made threats to initiate proceedings if he was not paid £12,000. In evidence, Mrs Hougham appeared to retract this suggestion and re-asserted that the reason for the dismissal was because of the Claimant's sickness

absence. In any event, the Respondent did not adopt a disciplinary approach to the matter.

60. Nevertheless, the Tribunal has no hesitation in finding that the Claimant was unfairly dismissed for the following reasons:

60.1. The Respondent failed to consult the Claimant about his wish to return to work. It cannot be accepted that Respondent's failure was because the Claimant had indicated he was unwilling to attend a meeting. That unwillingness was expressed before the Claimant felt well enough to return to work, an unwillingness which the Respondent understood and accepted. Indeed, the Claimant himself had told the Respondent that his unwillingness to attend a meeting was until he had met with his consultant. He met his consultant on 29 March 2017 yet the Respondent failed to invite the Claimant to a meeting or have any meaningful consultation with him. Nor did the Respondent reschedule the meeting despite saying it would. No reasonable employer would have simply moved to dismissal in the circumstances without seeking the Claimant's views and having had a meaningful discussion with him as to his health and whether and how he might return to work. As was stated in the East Lindsey case referred to in the Claimant's submissions, it is only in the rarest possible circumstances that it is a good answer to a failure to consult to be justified on the grounds that discussion and consultation would have been fruitless. This case does not feature such exceptional circumstances; on the contrary, consultation with the Claimant might well have given the Respondent a better understanding of the Claimant's back condition and led to the Claimant's return to work.

60.2. The GP had not expressed a firm documented view about the Claimant's ability to return to work. She did nevertheless, in a somewhat ambiguous phrase, agree with the Claimant's wish to return to work which he intimated would be on 22 May 2017 after his sick note had expired followed by two weeks' holiday. The Tribunal is persuaded by correctness of the Claimant's email of 10 April 2017 in which he informed the Respondent that his GP supported his wish to return to work on a phased basis. Although the Claimant remained certificated as not fit for work, the Respondent unreasonably failed to have regard to the Claimant's wish to return, especially taken together with what his GP had said about her agreement to it. While it is accepted that the Respondent did not have sight of Dr Shah's report, the Respondent unreasonably took the GP's certificates that he was not fit for work, and the incomplete information provided in the GP's letter, as determinative. This is despite the Respondent itself acknowledging in its email to the Claimant of 24 April 2017 that it needed detailed medical advice.

60.3. More than once the GP advised the Respondent that an occupational physician should be consulted. This was so that the Respondent could be properly informed as to the prospects and circumstances relating to the Claimant's return to work. The Respondent failed to seek any such advice, whether from an occupational physician or otherwise. To the extent that cost might have been an issue, which Mrs Hougham told the Tribunal it was not, the Respondent was made

aware of the Fit to Work scheme but did not follow it up. Regardless, the fact is that the Respondent failed to take reasonable steps to ascertain what it might be able to do to accommodate the Claimant's return to work in light of informed advice before making the decision to dismiss him.

60.4. The evidence shows that, despite being a relatively small employer, the Respondent could have been expected to wait longer for the Claimant's return to work before moving to dismissal. As Mrs Hougham told the Tribunal, the Respondent could have simply left the Claimant on the books at minimal expense, the Claimant's entitlement to statutory sick pay having been exhausted. There appears to have been little operational difficulty caused by the Claimant's sickness absence, other staff covering for the Claimant and another experienced member of staff being made up to Assistant Manager.

60.5. The Respondent failed to give the Claimant any warning that he might be dismissed. This was fundamentally unfair. The Respondent's letter of 2 May 2017 communicating his dismissal must have come as a complete surprise to him. Given that the Claimant was not given the opportunity to appeal the decision, he had no opportunity to challenge the decision any stage or put his case forward.

60.6. The Claimant was a long-serving employee and had indicated his wish to return to work. There was no suggestion that he had done anything other than render loyal service to the Respondent and it could reasonably be thought that he would wish to return to work as soon as he could, as was indeed the case.

61. The Respondent's decision to dismiss was thus outside the band of reasonable responses, especially in light of the fact that the Respondent appears to have admitted liability for an injury the Claimant suffered in the workplace. As Mr Gillie put it, in such circumstances an employer can reasonably be expected to go the extra mile.

Contribution

62. The Tribunal is unable to accept the Respondent's submission that compensation should be reduced under the contribution principles. Notwithstanding the Respondent's submission that the attitude and conduct of the Claimant did him "no favours", the Tribunal is unable discern any conduct on the Claimant's part such that it would be just and equitable to reduce the basic award nor any blameworthy conduct on the Claimant's part that contributed to his capability dismissal such that the compensatory award should be reduced.

Polkey

63. The Tribunal concludes that had the Claimant not been unfairly dismissed, it is likely that he would have returned to work, with temporary assistance from others with heavy lifting until the adjustments with regard to lifting and stacking heavy items were put in place. The Tribunal accepts that had the Claimant

returned to work, the anxiety and stress from which he now suffers would "probably" be resolved as stated in the GP's letter of 21 March 2017.

64. The Tribunal must do the best it can, based on the evidence, to consider whether the Respondent might have fairly dismissed the Claimant in any event. There is a degree of uncertainty of course but The Tribunal concludes that the compensatory award should be reduced by 10% to take account of the possibility that the Claimant might have continued to suffer from anxiety and stress and that the Respondent, acting fairly, would have dismissed the Claimant by reason of capability.

Remedy

65. The parties agreed settlement terms under and ACAS Cot 3 agreement.

Employment Judge Pritchard

Date: 26 October 2018