Case Number: 2302882/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr J M Devine	and	1 S T Sunrise Limited 2 Mr K Gangatharan

Held at Ashford on 12 June and 10,11 and, In Chambers, 12 September 2018

Representation	**Claimant:**	Mr M Grant, Legal Representative
	Respondent:	Mr S Joshi, Solicitor
	Members:	Mr D Clay Mr S Sheath

Employment Judge Kurrein

JUDGMENT

Breach of contract

1 The First Respondent wrongfully dismissed the Claimant and is ordered to pay the Claimant the sum of £850.29 as compensation for breach of contract.

Unfair dismissal

2 The First Respondent unfairly dismissed the Claimant and is ordered to pay the Claimant:-

2.1 a basic award of £39.72; and

2.2 a compensatory award of £16,848.00.

That award is subject to the Recoupment Regulations and for that purpose

The total award is £36,308.40

The prescribed sum is £15,673.68 for the period from 22 August 2017 to 12 September 2018.

The total award exceeds the prescribed sum by the sum of £20,634.72

Disability Discrimination

3 The First and Second Respondents discriminated against the Claimant contrary to Equality Act 2010 and the Respondents are ordered to pay the Claimant an award for injury to feelings in the sum of £19,420.68.

4 The Claimant's claims for holiday pay and in respect of pay statements are not well founded and are dismissed.

REASONS

The Claims and Issues

5 On 12 October 2017 the Claimant presented a claim to the tribunal alleging unfair dismissal, breach of contract, failure to make payment of holiday pay, disability discrimination and a failure to provide updated terms and conditions of employment.

6 On 6 December 2017 the Respondents presented a response in which they denied the Claimant's claims.

7 A preliminary hearing took place on 20 December 2017 before EJ Wallis, who gave further directions for the conduct of the claim and made a deposit order. The deposit was paid, but on the 2 February 2018 the Respondent presented an amended response in which it admitted the Claimant had been unfairly dismissed.

8 The Respondent has subsequently admitted that the Claimant was at all relevant times a disabled person for the purposes of the Equality Act 2010, and that the Claimant was wrongfully dismissed.

9 The case management order contained a list of issues as defined by the Claimant as follows: –

> UNFAIR DISMISSAL
>
> 1. Did R1 dismiss C for the purposes of s. 95 (1)(a) ERA 1996 by reason of its letter dated 28 July 2017?
>
> 2. Was the dismissal for a potentially fair reason and was it fair pursuant to the provisions of section 98 (4).
>
> WRONGFUL DISMISSAL
>
> 3. If R1's letter dated 28 July 2017 amounts to a dismissal, did R1 dismiss C with the correct amount of notice when writing to terminate his employment with effect from 31 July 2017? (Did the Claimant act as alleged; did it amount to gross misconduct justifying summary dismissal, or is he entitled to notice pay).
>
> HOLIDAY PAY
>
> 4. Did R1 pay C in lieu of all annual leave that he had accrued but not taken as at termination on 31 July 2017?
>
> ITEMISED PAY STATEMENTS
>
> 5. Did R1 provide C with itemised pay statements for wages due/paid in July and August 2017?
>
> DISABILITY DISCRIMINATION
>
> 6. For the period of 25 May 2017 – 28 July 2017, was C disabled by reference to s. 6 (1) Equality Act 2010?

Harassment

7. Did R1 engaged in the following conduct:

a. R2 stating on 25 May 2017 that he does not take any notice of fit notes and expects everyone to work the same;

b. R2 speaking over C on 30 June 2017 when C reported his sickness absence;

c. Lorraine Funnelll stating to C on 17 July 2017 “why don’t you leave?”

8. Was the conduct unwanted?

9. Was the conduct related to disability?

10.Did the conduct have the purpose or effect of violating C’s dignity and/or of creating an environment that was intimidating, hostile, degrading, humiliating or offensive for C?

Discrimination arising from disability

11.Is R1 able to show that it did not know, and could not reasonably have been expected to know, that C was disabled?

First allegation

12.Did R2 treat C unfavourably on 25 May 2017 by stating that he does not take any notice of fit notes and expects everyone to work the same?

13.Did R2 do so because:

a. C submitted a fit note citing “ongoing medication and treatment, needs to avoid night working in order for this to be effective and will need regular rest breaks”; and/or

b. C was less able to work nights and/or because C required regular rest breaks?

14.Did those matters arise in consequence of disability?

Second allegation

15.Did R2 treat C unfavourably on 30 June 2017 by speaking over him during a telephone call?

16.Did R2 do so because C had rung to report sickness absence?

17.Did C’s telephone call to report his sickness absence arise in consequence of disability?

Third to eighth allegations

18.Did R treat C unfavourably by:

a. Gary Laurence’s text message to C on 14 July 2017 and the instruction from R2 preceding it: “Selvan has asked me to tell you that it’s not possible for light duties as the job is already light duties and therefore there will be no hours for you next week he will be in touch”

b. Lorraine Funnell stating to C on 17 July 2017 “why don’t you leave?”

c. Issuing a warning on 17 July 2017

d. Issuing a warning on 20 July 2017

e. Issuing a warning on 24 July 2017

f. Dismissing C by Rs' letter of 28 July 2017

19.Did R2 do so because of:

a. C's reduced ability to work nights;

b. D's reduced ability to lift items;

c. C's need for additional breaks

d. C's reduced ability to stand and bend

e. C's reduced ability to sweep, mop and clean

20.Do those matters absence arise in consequence of disability?

Failure to make reasonable adjustments

First adjustment

21.Did R1 apply a provision, criterion or practice ("PCP") of telephoning employees at/around midnight to discuss work-related matters (in this case, on 27 June 2017)?

22.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C had a greater need for rest and/or to conserve energy levels?

23.Was R1 aware, or ought R1 to have been aware, that this was the case?

24.Did R1 take all steps that it was reasonable to take, namely holding work-related conversations during day time?

Second adjustment

25.Did R1 apply a provision, criterion or practice ("PCP") of requiring employees to work:

a. As part of a rota which included shifts of 7am–3pm, 3pm–11pm and 11pm-7am;

b. Frequent shifts of 3pm-11pm and/or 11pm-7am.

26.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that it exacerbated his back pain and interfered with C's increased need for rest?

27.Was R1 aware, or ought R1 to have been aware, that this was the case?

28.Did R1 take all steps that it was reasonable to take in connection with avoiding and/or reducing night work? In particular:

a. Not requiring C to work later than 9pm;

b. Allocating C a fixed shift of 7am–3pm;

c. Allowing C to alternate between shifts of 7am–3pm and 3pm–11pm;

d. Allocating an even spread of shifts.

Third adjustment

29.Did R1 apply a provision, criterion or practice ("PCP") of requiring employees to take one 20-minute break or 4x 5-minute breaks?

30.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C required greater and more frequent rests as a result of pain?

31.Was R1 aware, or ought R1 to have been aware, that this was the case?

32.Did R1 take all steps that it was reasonable to take, namely allowing C to take up to 6 additional breaks of 5 minutes each during each shift?

Fourth adjustment

33.Did R1 apply a provision, criteria or practice ("PCP") of requiring employees to:

a. Lift and move 18 litre containers of milk.

b. Lift and move piles of newspapers in and out of the service station shop;

c. Lift items of stock and place them onto shelves, including above elbow height;

d. Sweep and mop floors

34.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C was less able to lift, reach, sweep and mop due to pain?

35.Was R1 aware, or ought R1 to have been aware, that this was the case?

36.Did R1 take all steps that it was reasonable to take, namely reallocating those duties, or reducing the frequency with which C was expected to undertake them?

Fifth adjustment

37.Did R1 apply a provision, criterion or practice ("PCP") of requiring employees to stand for 6-8 hours per shift in order to operate the till?

38.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C was less able to stand for long periods due to pain?

39.Was R1 aware, or ought R1 to have been aware, that this was the case

40.Did R1 take all steps that it was reasonable to take, namely varying C's duties such that he was no longer required to stand continuously for more than 1 hour at a time.

SECTION 38 EMPLOYMENT ACT 2002

41.Did R fail to provide C with a statement pursuant to s. 1 and/or s. 4 ERA 1996?

Procedural matters

10 We regret to say that the directions were not complied with in a manner that was acceptable to us:-

10.1 In particular the bundle was not, as required, in strict chronological order. The pagination was almost completely haphazard such that documents bearing the same date were sometimes over 100 pages apart. On another occasion this may result in the hearing being postponed.

10.2 We were also concerned at the Respondent's late disclosure of a document, some two months before the hearing resumed, yet its representative sought leave to lead evidence as to the provenance of that document despite having had months in which to prepare a brief statement. We refused leave for that document to be admitted.

The Evidence

11 We heard the evidence of the Claimant and Mr M Hilton, former store manager; Leanne Hilton, the Claimant's fiancé and Mr Hilton's sister, in support of the

Claimant's case. We heard the evidence of Lorraine Funnell, assistant manager, and the Second Respondent on behalf of the Respondents.

12 We have to record that the Second Respondent was a most unsatisfactory witness. The hearing of this case was originally adjourned when it became apparent, virtually at the point at which the Second Respondent came to take the oath, that his English was wholly insufficient to deal with the detailed cross examination that he was likely to undergo. We appointed an interpreter for his benefit, although it appears that he told the interpreter that he understood things sufficiently not to need his assistance, except when asked for. We thought that inappropriate and asked the interpreter to interpret everything that took place.

13 On many occasion the Second Respondent did not answer the question that was asked: he sought to jump ahead, and answer what he anticipated would be a further question. On other occasions he gave one answer and then gave quite the opposite answer when the question was repeated.

14 We were also perturbed by the variance in the Second Respondent's ability to recollect matters. In respect of a phone call between the Claimant and the Respondent on 30 June 2017 the Second Respondent was quite able to recall in detail what was said, he asserted, but quite unable to remember that the Claimant had lost his temper in the course of that discussion.

15 It is against this background that where there has been a direct conflict of evidence between the Claimant or his witnesses and the evidence of the Second Respondent we have preferred the evidence of the Claimant and his witnesses.

16 We read the documents to which we were referred and read and heard the submissions on behalf of the parties. We make the following findings of fact.

Findings of Fact

17 The Claimant was born on 18 September 1986. He has suffered from pain in his neck, right shoulder, lower back and right leg since late 2011. He has been treated with a wide variety of prescription medicines, including those containing morphine, and similarly powerful painkillers such as Tramadol. He has been diagnosed with osteoarthritis in his lower neck and spine and a cervical rib. He has had two nerve block operations with limited success. He has a limited ability to bend down, lift weights or lift his arms above shoulder height. If he tries to do so he suffers severe pain. He has great difficulty sleeping and lack of sleep exacerbates his symptoms.

18 The Claimant started his employment with one of the First Respondent's predecessors, ROC UK Ltd, as a sales assistant on 22 July 2014 at that company's Isenhurst petrol service station. Mr Hilton had been employed by ROC from January 2010 and became the store manager at Isenhurst in 2013. He helped the Claimant obtain this employment, and was well aware of the Claimant's health problems and limitations at that time.

19 The Claimant was one of eight members of staff in addition to Mr Hilton. They were sales assistants, supervisors, and an assistant manager, Mrs Funnell. The station operated shifts of 7 am to 3 pm, 2 pm to 10 pm and 10 pm to 7 am. We accepted Mr Hilton's evidence that many of the staff were recruited to work fixed

shifts. Some staff had transport difficulties and could only work mornings or nights. For his first year of employment the Claimant work night shifts. He gave no evidence to indicate this was a problem at the time.

20 The Claimant did his best to carry out all the duties that were assigned to him. He discussed his limitations with Mr Hilton and as a consequence various adjustments were made such as: –

20.1 moving the Claimant from one set of duties to another so that he did not have to stand for too long.

20.2 giving him additional short breaks;

20.3 limiting the time the Claimant spent stacking shelves, and the weight of the items he had to move;

20.4 not requiring the Claimant to stack higher shelves or move heavy objects;

20.5 not requiring the Claimant to deal with the bundles of newspapers delivered in the early morning in the course of the night shift;

20.6 not requiring the Claimant to sweep the forecourt because the physical movements caused him pain.

21 Mr Hilton made it clear that there may be times when the Claimant would be required to do tasks that he preferred to avoid, but informed the Claimant's colleagues that they should carry out those duties whenever possible.

22 On 29 May 2015 the Claimant's employment was TUPE'd to Marcob Convenience Limited, a business formed by Mr Hilton to take over the franchise of the service station.

23 The Claimant's condition deteriorated in July 2015 and he was off work for almost a year.

24 On 14 October 2016 the Claimant was promoted to be a Supervisor, in the hope it would give him more confidence, and provided with comprehensive terms and conditions of employment. These included new duties such as: –

24.1 checking temperature records of chillers;

24.2 checking serial numbers of the card machine;

24.3 carrying out safety checks on fuel pumps;

24.4 inducting and training new starters;

the Claimant was able to carry out these further duties without difficulty.

25 The takings at this service station were, by any measure, substantial: each of two tills was taking in excess of £10,000 on a busy shift. Mr Hilton's evidence, which we accepted, was to the effect that errors were common place. He thought it to be "unavoidable" and "part of retail". It was his experience that staff are not normally given a warning for errors unless they were very big or happened every day. He expressed the view that if he gave warnings for every till error that occurred he would not get any other work done.

26 In the spring of 2017 Mr Hilton decided not to seek a renewal of the franchise. It was to go to the First Respondent. Before that happened, the Second Respondent visited a few times to discuss the handover. Mr Hilton's evidence was clear, and we accepted it. The Second Respondent's evidence, which was not given in evidence in chief, consisted of nothing but bare denials.

27 In his meetings with Mr Hilton before he took up the reins the Second Respondent was given detailed information concerning each member of staff including their strengths and weaknesses. He was told of their roles, and that the Claimant was a supervisor. He was specifically told that the Claimant's health was such that he was not able to do all the same tasks as other staff and would not be able to lift heavy weights. The staff shift patterns, at this time the Claimant was working fixed shifts, 2 pm to 10 pm, were also discussed at length.

28 The Claimant's employment transferred to the First Respondent on 1 May 2017. Shortly afterwards the Second Respondent took the decision to change the rotas so that they were from 7 am to 3 pm, 3 pm to 11 pm and 11 pm to 7 am.

29 A few days after this, the Claimant spoke to the Second Respondent to tell him of his health issues and the history of them. He sought to explain to the Second Respondent the impact of them on his ability to perform some of the duties at work and how it impacted on other aspects of his life, such as his ability to sleep. He explained the variations and adjustments that have been made by Mr Hilton to assist him, but thought the Second Respondent not to be interested. He asserted that the Second Respondent simply told him he had to do the same as everybody else.

30 We thought the Claimant's evidence as to the Second Respondent's attitude, in particular his view that all staff should carry out all duties, to be corroborated by later events that we refer to below.

31 As a consequence the Claimant was expected to work a variety of shifts and to carry out all the usual duties of those shifts, despite the pain caused by his attempting to do so. In addition, the Second Respondent regularly walked around the shop and assigned tasks to a member of staff additional to those on the rota, such as cleaning the toilets, which also caused the Claimant difficulty. Even when the Claimant protested the Second Respondent took no steps to assign duties to another member of staff.

32 On another occasion the Second Respondent left a note for the Claimant to clear up after an attempted robbery of the cash machine which required the Claimant to carry buckets of water and sweep the area. Despite the Claimant's protestations, the Second Respondent insisted he continue.

33 The Claimant's difficulties were exacerbated by the fact that despite his role as a supervisor his colleagues rarely complied with his attempts to delegate tasks to them. Even when tasks were undertaken they were done so poorly they had to be finished by the Claimant. One member of staff outright refused to assist the Claimant.

34 On the date that TUPE took effect the First Respondent was staffed by the Second Respondent and seven other members of staff. In the rotas seen by us in that and the following weeks, the following appears: –

34.1 week commencing 1 May 2017 the Claimant was rostered to work six shifts, 7 am to 7 pm, 2 pm to 10 pm, 2 pm to 10 pm, 2 pm to 10 pm, day off, 7 am to 3 pm and 7 am to 3 pm

34.2 week commencing 8 May, no records were available.

34.3 week commencing 15 May 2017, the Claimant was rostered to work 2 pm to 10 pm, day off, day off, 2 pm to 10 pm, 2 pm to 10 pm, 7 am to 7 pm, and 6 am to 2 pm.

34.4 week commencing 22 May 2017, the Claimant was rostered to work, 11 pm to 7 am, day off, 3 pm to 11 pm for three days, a day off, and 7 am to 3, pm.

34.5 week commencing 29 May 2017 the Claimant was rostered, after a day off, to work three days, 3 pm to 11 pm a day off and two days, 3 pm to 11 pm.

34.6 week commencing 5 June 2017 the Claimant was again rostered to work five shifts of 3 pm to 11 pm with two days off.

34.7 week commencing 12 June 2017 the Claimant was again rostered to work all shifts, 3 pm to 11 pm with two days off.

34.8 week commencing 19 June 2017 the Claimant was rostered to work four shifts of 3 pm to 11 pm with a day off before and after that series and one shift of 7 am to 3 pm

34.9 week commencing 26 June 2016 the Claimant was again rostered to work one day off, followed by four shifts of 3 pm to 11 pm a day off and then one shift of 7 am to 3 pm

34.10 in week commencing 3 July 2017 the Claimant was rostered to have the first day off, one shift of 3 pm to 11 pm, followed by four shifts of 11 pm to 7 am.

35 It appeared to us that on at least two occasions early in this series of rosters the Claimant was expected to work until 11 pm one day and return to work at 7 am the next morning. That appears to us to be a breach of the Working Time Regulations, but no complaint is made in that regard.

36 However, up until the week commencing 5 June 2017 we thought it notable that the Claimant was very largely working the equivalent shift to that he had prior to the TUPE change, being 3 pm to 11 pm. We did not think that shift could be characterised as a “night” shift.

37 The Claimant has contended that it would have been ideal for him to have been given the 7 am to 3 pm shift because he had to wake up early to take medication and it would have allowed him an “optimal routine”. We thought that contention to lack merit: during the extensive period when Mr Hilton was his manager prior to TUPE, and gave him every consideration, the Claimant had worked fixed late shifts from 2 pm to 10 pm. He had never sought to suggest that this was unsuitable for him, and we thought the slight change in shift hours to start and finish one hour later to be of little consequence.

38 On 23 May 2017 the Claimant was off work and saw his GP. We noted that this was on the morning following his first night shift under the First Respondent’s employment. He was issued with a MED3 which stated that he might be fit for

work with altered hours and amended duties. The GP commented, "ongoing medication and treatment, needs to avoid night working in order for this to be effective and will need regular rest breaks." That statement extended for a period of three months until 22 August 2017.

39 The Claimant called in sick on the morning of 24 May 2017.

40 It was the Claimant's evidence that he was still in severe pain on the 25 May 2017, but pushed himself to go to work. When he arrived he gave the Second Respondent the MED3 and explained what his GP had recommended. We accepted his evidence that the Second Respondents response was to effect that he had to run a business, with people to do the job, and needed everybody to carry out the necessary duties.

41 The Claimant has complained about the shift he was assigned in the weeks immediately following this. He alleges they were unsuitable for him because he had, initially, six shifts in a row before he had a day off. He complained that this exacerbated his pain because he did not have sufficient rest.

42 However, it is clear that the Claimant worked these shifts, through to the end of June, without raising any identified complaint with the Second Respondent or anyone else concerning the shift patterns that had been set out for him. Although the Claimant worked six consecutive shifts on two occasions, and seven consecutive shifts on another occasion during this period, it did appear to us that overall he was having at least one, and often two days a week off.

43 On 27th of June 2017 it fell to the Claimant as the supervisor on duty to effect a fuel price change. It will not come as a surprise to any motorists that this was an increase. The process required the changes to be effected on each of the 12 pumps and to be reflected in the signage on the street. The Claimant worked with a colleague, Karen Hazelden, to do this job. They made an error as a consequence of which fuel was priced at 1 pound less per litre than it should have been. Some 375 litres of fuel were sold at this incorrect price before the error was put right. The Claimant finished his shift and got home at about 11:30 pm.

44 The Second Respondent learned of this error at about midnight. He telephoned the Claimant at 12:06am and told him he wished to discuss a fuel price error. The Claimant accepts that the phone call was brief and that the Second Respondent said to him, "Don't worry, we'll talk about it later", but the Second Respondent went on to say that such mistakes cost a lot of money and that the Claimant should not make such mistakes, but they would discuss it in the morning.

45 It was the Claimant's evidence that he went to bed immediately he got home, having taken his medication, and was woken up by this phone call. He says he told the Second Respondent that it was midnight and he was in pain and needed to sleep. He also alleged that he was unable to get to sleep until three hours after the call, partly because it had woken up his three month old daughter.

46 We thought that evidence to be inconsistent with the evidence the Claimant gave concerning his routines when he was previously working other shifts, mostly from 2 pm to 10 pm on a fixed basis, under Mr Hilton's management. It was his

evidence that when he got home he would have a cup of tea and watch television and talk to his wife before going to bed, but despite the assistance of sleeping pills, often did not get to sleep until 2 am or later. In another passage he asserts that when working the 3 pm to 11 pm shift he did not get to sleep until 1am, "sometimes later".

47 We concluded that although the Claimant thought it inappropriate for the Second Respondent to have telephoned him at that time we could not accept the balance of his evidence concerning the that call. It was no more than a very minor inconvenience.

48 The fuel price error was briefly discussed between the Claimant and the Second Respondent the following morning. The Claimant asserted that his colleague Ms Hazelden was also responsible because she had signed a receipt containing the wrong price.

49 The Claimant saw his GP on 30 June 2017 following a brief spinal spasm on the night of 28/29 June 2017. He says the GP recommended that he take a few days off to rest, prescribed some further medication, and encouraged the Claimant to refer himself to a musculo/skeletal hospital clinic. She did not issue a Med3.

50 The Claimant sought to make contact with the other supervisor, Gary Laurence, to tell him he would not be at work that day. He left a message. He also messaged a sales assistant colleague, who told him that she could not cover his shift.

51 Shortly after 12 pm that day the Claimant phoned the service station and spoke to the Second Respondent. It was the Claimant's evidence that he told the Second Respondent he had been signed off and could not come in, and when he sought to explain this to the Second Respondent the Second Respondent sounded irritated.

52 We thought the Claimant's statement that he had been "signed off" to be inaccurate. He had not been issued with a Med3 by his GP and the notes of that consultation do not refer to any advice that he take time off.. To the extent he intended to take time off, therefore, it would therefore be self-certified.

53 We have no doubt that the Second Respondent was less than happy to be told at less than two hours notice that the Claimant would not be attending to work his shift. The Claimant may have wished to explain to the Second Respondent about the spasm he had had two nights earlier, but we are not surprised that the Second Respondent did not take great interest in this. The Claimant accepts that he lost his temper, accusing the Second Respondent of talking over him whenever he raised an issue concerning his health. The Second Respondent simply said "goodbye" and put the phone down.

54 The Claimant later had a conversation with Gary Laurence and apologised to him for the short notice of his unavailability. The Claimant was told that the Second Respondent wanted proof of his visit to the doctors, and the Claimant responded to say that he was entitled to self-certify for 7 days.

55 On 1 July 2017 the Claimant received the rota for the week commencing 3 July 2017, via WhatsApp. As noted above, the Claimant was due to work one shift 3

pm to 11 pm on 4 July 2017, and then four consecutive shifts of 11 pm to 7 am. The Claimant says he was stressed by this and "knew I would be unable to cope.". The Claimant telephoned the Second Respondent on his mobile phone and left a message but, contrary to his usual practice, the Second Respondent did not respond.

56 The Claimant worked his rota'd shifts on 4 and 5 July 2017. However, on 6 July 2017 the Claimant was so fatigued and in pain he returned to see his GP. As a consequence the Claimant was signed off as unfit to work from that day until 14 July 2017. The Claimant sent a copy of this Med3 to the First Respondent.

57 On 10 July 2017 the Claimant emailed a lengthy grievance to the First and Second Respondent. In the course of that the grievance he raised a number of matters that are not relevant to the issues in this case. However, he raised issues regarding the following relevant matters: –

57.1 he made a specific complaint of discrimination in respect of his disability. This might have been relied on as a protected act to found claims of victimisation, but was not.

57.2 he alleged that the Second Respondent was well aware of his difficulties in doing night shifts and that despite this knowledge, the Claimant had been placed on night shifts.

57.3 the Respondent had been provided with a Med3 giving advice against night shifts and the need for regular breaks which had not been complied with.

57.4 the Respondent had telephoned him in the early hours and he had lost sleep as a result.

57.5 the Second Respondent had inappropriately rota'd him for four consecutive night shifts.

58 The Claimant concluded by suggesting that the Respondents should vary his shifts, exclude him from night shifts and allow him to work more effectively and minimise absence.

59 On 14 July 2017 the Claimant received two texts from his colleague Gary Laurence. The first stated that he needed to know whether the Claimant would be back at work on Monday or, if not, he would need to get a another sick note. The second said he had been told by the Second Respondent to tell the Claimant that, "it's not possible for light dutys *[sic]* as the job is already light dutys *[sic]* and therefore there will be no hours for you next week he will be in touch"

60 The Claimant responded by email to the Respondents later that day, to suggest that he and they work together to make reasonable adjustments that would enable him to return to work on Monday. He set out a list of the duties he could do with little difficulty, and also set out in detail the jobs or roles that might cause him difficulty. He asked for a reply by email.

61 On 15 July 2017 . Mrs Funnell texted the Claimant to ask him to attend a meeting on 17 July 2017. When the Claimant telephoned her to ask what the meeting was about she said she didn't know, the Claimant would have to speak with the Second Respondent, but she thought it was something to do with his sickness.

The Claimant then sent the Second Respondent an email on 15 July ask what the meeting was regarding and received a phone call to tell the Claimant that it was concerning his grievance letter. The Claimant pointed out that there should be a formal grievance hearing to discuss his concerns.

62 On 17 July, the Claimant went to the service station and a meeting took place in the office that was conducted by Mrs Funnell in the presence of the Second Respondent. We accepted his evidence that there was no discussion before he was handed a written warning concerning the fuel price error that had taken place on 27 June 2017 and told he would have to repay the £375. The Claimant responded by saying that Ms Hazelden should pay half of it. He also asked if Ms Hazelton had received a warning and was told that she had.

63 There was then a discussion concerning the Claimant's grievance and his later email of 14 July when he set out the adjustments he thought necessary. The Claimant referred to the Equality Act 2010 and neither Mrs Funnell nor the Second Respondent accepted they had any such obligations. They took the view, for instance, that additional rest breaks would be unfair to other staff. There was then discussion of night shifts to which the Claimant objected and in the course of these discussions Mrs Funnell said to the Claimant, "Why don't you leave".

64 It was Mrs Funnell's evidence that while she did say this, it was said in the context of her knowledge that the Claimant wished to find other employment and had been trying to do so without success. She thought she had said it in a well-meaning way. The Claimant's response was to say that he did not intend to leave because he had been doing the job well for a number of years with appropriate support and adjustments, to which Mrs Funnell replied that Mr Hilton was no longer there and, "there's a new Sheriff in town".

65 There was then discussion about a return to work, and the Claimant raised the issue of a phased return. As a consequence, he then signed a document indicating that he would work two shifts a week for two weeks and have a review after that period and that from 1 August 2017 he would also do two shifts and then review the situation in light of his annual leave.

66 The Claimant returned to work on 18 July working 7 am to 1 pm that day. He thought Mrs Funnell to be quite supportive when she directed Mr Laurence to cover the tills to enable the Claimant to undertake a range of duties. In the course of that shift, when the Claimant was on the till, he asked a customer whether he had any fuel to pay for in addition to the items he had picked up in the shop, and the customer said "No". The Claimant trusted the customer and put through the customers purchases. The Claimant now accepts that the customer had lied to him and as a consequence there was a loss of £21.30.

67 We accepted the Claimant's evidence, corroborated to an extent by that of Mr Hilton and Mrs Funnell, that such events, which are known as "dream offs", are not infrequent. The phraseology appears to be based on the till operatives failure to identify the customer as someone who has filled their car with fuel. Mrs Funnell accepted that it was quite possible for this to happen without any blame, particularly in the start of the morning shift when both tills are extremely busy.

68 On the same date Mrs Funnell sent the Claimant a letter with the subject "not charging customers for fuel", which was a written warning for the Claimant's error amounting to £21.30.

69 The Claimant's next shift was from 7 am to 1 pm on 20 July 2017. He thought Mrs Funnell to be less helpful than she had been previously: he had to work on the till "virtually all day". It appears that the Claimant was also responsible for a further "dream off" that day for the sum of £5.

70 At the end of the day, when cashing up, the Claimant's till was £15.67 short, and Gary Laurence's till was £16 over. This was raised with Mrs Funnell, who thought it was a consequence of Mr Laurence having put change into his own till and then paid for it out of the Claimant's till. The Respondents have not disclosed Mr Laurence's till report, only the Claimant's. The Claimant's evidence that till operatives commonly stayed logged in during breaks, as a consequence of which such errors could arise, was unchallenged.

71 On the 27 July 2017 the Claimant received two letters from Mrs Funnell. Both were dated 20 July 2017, but they were not posted until 24 July 2017. Both were further written warnings:-

71.1 the first was for the Claimant's error amounting to £5;

71.2 the second was for an alleged till shortage of £15.67.

72 On 31 July 2017 "out of the blue" the Claimant received a letter from the First Respondent, signed by the Second Respondent, dated 28 July which terminated the Claimant's employment with "immediate effect" for purported redundancy. It enclosed copies of the four warning letters referred to above. A "redundancy payment" of £942.00 was paid with the last pay slip. No notice was given and no PILON made.

73 On 2 August 2017 the Claimant sent a letter before action to the First Respondent. This was followed up with a letter from his present solicitors dated 16 August 2017 which set out his complaints, as mirrored in these proceedings, in full.

74 On 24 August the First Respondent, in a letter signed by the Second Respondent, purported to withdraw its dismissal of the Claimant. It also admitted that redundancy was not the true reason for the dismissal and asserted that the four warnings were the true reason. The Second Respondent accepted that it had not followed appropriate procedures and invited the Claimant to accept reinstatement and attend a grievance meeting with an external HR adviser, Mr G Pegg, on 4 September 2017.

75 On 29 August 2017 the Claimant's solicitors responded to that letter. They pointed out that the Claimant had not appealed his dismissal and was unable to return to his former employment because of the way he had been treated. There was no trust and confidence to sustain the relationship, but the Claimant would attend the grievance hearing.

76 That hearing took place as planned. The Claimant's solicitor sent all relevant documents to Mr Pegg on 15 September 2017 but this was not acknowledged. A grievance report extending to over 80 pages was apparently produced on 11

September 2017, therefore without sight of the documents sent on behalf of the Claimant. It only upheld the Claimant's grievance "in part", in fact a single complaint about staff arranging cover for themselves, but not in respect of any aspect of the grievance that alleged discrimination. The report was not disclosed to the Claimant until 14 February 2018. The Claimant has complained that Mr Pegg was struck off as an Insolvency Practitioner but we take the view that nothing turns on this of itself.

77 The report concluded with a statement to the effect that the Claimant had a right of appeal. In the above circumstances that "right" appears to have been nugatory.

78 The Claimant has kept detailed records of his attempts to find alternative employment. They are extensive and have been updated regularly. The Respondent does not seek to argue that he has failed to mitigate his loss, or that his decision to start a "Vape" fluids business is unreasonable.

79 The Respondent does assert that the Claimant's errors were such that he contributed to his dismissal and that his employment was not likely to continue for more than six months. We rejected those submissions for the reasons set out below.

Submissions

80 We received very lengthy and detailed written submissions on behalf of the Claimant and more proportionate submissions on behalf of the Respondent. Both parties supplemented those submissions orally. It is neither necessary nor proportionate to set them out here.

The Law

81 We have had regard to the relevant provisions of the Employment Rights Act 1996 and the Equality Act 2010.

82 We have also had regard to the authorities to which we were referred.

Further Findings and Conclusions

83 We deal with each of the Claimant's claims in the order in which they were set out on his behalf. For ease of reference we repeat them here. Our principal findings of fact are set out above and there is no need to repeat them.

Unfair Dismissal

1. Did R1 dismiss C for the purposes of s. 95 (1)(a) ERA 1996 by reason of its letter dated 28 July 2017?

2. Was the dismissal for a potentially fair reason and was it fair pursuant to the provisions of section 98 (4).

84 This has been conceded.

Wrongful dismissal

3. If R1's letter dated 28 July 2017 amounts to a dismissal, did R1 dismiss C with the correct amount of notice when writing to terminate his employment with effect from 31 July 2017? (Did the Claimant act as alleged; did it amount to gross misconduct justifying summary dismissal, or is he entitled to notice pay).

85 This has been conceded.

Holiday pay

> 4. Did R1 pay C in lieu of all annual leave that he had accrued but not taken as at termination on 31 July 2017?

86 The Claimant failed to adduce any evidence as to this alleged non-payment. There were no details before us as to what holiday he had taken and what holiday, if any, was owing at the date of termination. In the circumstances we are quite unable to make a finding in favour of the Claimant.

Itemised pay statements

> 5. Did R1 provide C with itemised pay statements for wages due/paid in July and August 2017?

87 The Claimant failed to adduce evidence as to the receipt or non-receipt of a pay statement, or as to any errors that one he did receive might contain. In the circumstances we are quite unable to make a declaration as to what such a statement should have contained.

Disability discrimination

Disability

> 6. For the period of 25 May 2017 – 28 July 2017, was C disabled by reference to s. 6 (1) Equality Act 2010?

88 This has been conceded.

Harassment

> 7. Did R1 engaged in the following conduct:
>
> a. R2 stating on 25 May 2017 that he does not take any notice of fit notes and expects everyone to work the same;
>
> b. R2 speaking over C on 30 June 2017 when C reported his sickness absence;
>
> c. Lorraine Funnell stating to C on 17 July 2017 “why don’t you leave?”
>
> 8. Was the conduct unwanted?
>
> 9. Was the conduct related to disability?
>
> 10.Did the conduct have the purpose or effect of violating C’s dignity and/or of creating an environment that was intimidating, hostile, degrading, humiliating or offensive for C?

89 It is clear from our above findings of fact that each of these events took place largely as described by the Claimant.

90 We are unanimous in our conclusions that this conduct was unwanted by the Claimant.

91 We are similarly unanimous that it related to his disability because: –

91.1 The Second Respondent’s attitude to the Med3 presented by the Claimant was clearly related to its contents, which made direct reference to the Claimant’s disability and its effects on his ability to perform his duties.

91.2 The Second Respondent's conduct on 30 June 2017 was in direct response to the Claimant's report of his sickness, which clearly arose from his disability.

91.3 Mrs Funnell's comment, however well-meaning, clearly had direct reference to the discussion concerning the limitations on the Claimant's abilities.

92 We accepted the Claimant's evidence that the attitude displayed by the Second Respondent and Mrs Funnel was hostile, humiliating and offensive. Having regard to all the circumstances of the case, we are also satisfied that it was objectively reasonable for him to take that view.

93 We have therefore concluded that the First and Second Respondents have discriminated against the Claimant contrary to section 27 Equality Act 2010.

Discrimination arising from disability

11.Is R1 able to show that it did not know, and could not reasonably have been expected to know, that C was disabled?

First allegation

12.Did R2 treat C unfavourably on 25 May 2017 by stating that he does not take any notice of fit notes and expects everyone to work the same?

13.Did R2 do so because:

a. C submitted a fit note citing "ongoing medication and treatment, needs to avoid night working in order for this to be effective and will need regular rest breaks"; and/or

b. C was less able to work nights and/or because C required regular rest breaks?

14.Did those matters arise in consequence of disability?

Second allegation

15.Did R2 treat C unfavourably on 30 June 2017 by speaking over him during a telephone call?

16.Did R2 do so because C had rung to report sickness absence?

17.Did C's telephone call to report his sickness absence arise in consequence of disability?

Third to eighth allegations

18.Did R treat C unfavourably by:

a. Gary Laurence's text message to C on 14 July 2017 and the instruction from R2 preceding it: "Selvan has asked me to tell you that it's not possible for light duties as the job is already light duties and therefore there will be no hours for you next week he will be in touch"

b. Lorraine Funnelll stating to C on 17 July 2017 "why don't you leave?"

c. Issuing a warning on 17 July 2017

d. Issuing a warning on 20 July 2017

e. Issuing a warning on 24 July 2017

f. Dismissing C by Rs' letter of 28 July 2017

19.Did R2 do so because of:

a. C's reduced ability to work nights;

b. D's reduced ability to lift items;

c. C's need for additional breaks

d. C's reduced ability to stand and bend

e. C's reduced ability to sweep, mop and clean

20.Do those matters absence arise in consequence of disability?

94 It is clear from our above findings of fact that both the First and Second Respondent were well aware of the Claimant's disability and its effect on his ability to carry out normal day to day activities: –

94.1 Mrs Funnell had been aware of this since the Claimant was first employed. Her knowledge must be imputed to the First Respondent.

94.2 The Second Respondent was aware of this because the Claimant had told him of his disability and its effects at an early stage, as had Mr Hilton even before the Second Respondent took up his position. His knowledge must also be imputed to the First Respondent.

95 We are unanimous in concluding that the manner in which the Second Respondent treated the Claimant on 25 May 2017 was unfavourable treatment. He did so because he was less than happy with the Claimant's inability to perform all the duties that he would wish him to. It is clear from the circumstances of this case that that inability arose in consequence of the Claimant's disability.

96 We are similarly unanimous in concluding that the manner in which the Second Respondent spoke over the Claimant in the telephone call on 30 June 2017 was unfavourable treatment. However, we did not find that this was because the Claimant had rung to report his sickness absence, but because the Second Respondent wish to express his point of view. Therefore, although the telephone call arose in consequence of the Claimant's disability the necessary causal link does not exist.

97 It is our unanimous conclusion that the five allegations set out under paragraph 18 have been proved to be unfavourable treatment. Any other findings would fly in the face of reason.

98 It is also our unanimous conclusion that the Respondents acted as they did because of the adverse effect of the Claimant's disability on his ability to perform the duties the Respondents wished him to. In reaching this conclusion, we have had regard to all the evidence before us. As noted above, the First Respondent was well advised to concede that this was an unfair dismissal. However, had that not been the case, we would have been unanimous in concluding that the First Respondent had wholly failed to establish a potentially fair reason for the dismissal.

99 In reality, each of the later three warnings issued to the Claimant on 17, 20 and 24 July 2017, was wholly unjustified in light of the evidence from Mr Hilton, the Claimant and Mrs Funnell that minor errors by those operating tills were never actioned as misconduct save in exceptional circumstances.

100 On the basis of all the evidence before us we have come to the conclusion that the Claimant has established on the balance of probabilities that the conduct of the Respondent could have been discriminatory because the matters in the mind of the Second Respondent arose in consequence of the Claimant's disability.

101 In those circumstances the onus has shifted to the Respondent's to show that their conduct involved no discrimination at all. They have failed in that endeavour. We simply could not accept that the Respondents conduct in issuing these warnings was anything other than an artificial construct to enable them to dismiss the Claimant.

102 It was unclear whether the Respondent was seeking to allege that the steps it took that are complained of were proportionate means of achieving a legitimate aim. The evidence to that effect was sketchy, to say the least. The Respondents only sought to raise this issue in respect of the text message from Mr Laurence. It was suggested that this was evidence of the Respondents seeking to ensure that the premises were properly and sufficiently staffed during operational hours.

103 We rejected that submission. It seemed to us that if, as Mr Laurence suggested, the service station could be run without the Claimant working any hours it was perfectly capable of offering him shifts that he was able to undertake.

104 We are therefore unanimous in concluding that the Respondents have discriminated against the Claimant contrary to section 15 Equality Act 2010 in the manner set out above.

Failure to make reasonable adjustments

First adjustment

> 21.Did R1 apply a provision, criterion or practice ("PCP") of telephoning employees at/around midnight to discuss work-related matters (in this case, on 27 June 2017)?
>
> 22.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C had a greater need for rest and/or to conserve energy levels?
>
> 23.Was R1 aware, or ought R1 to have been aware, that this was the case?
>
> 24.Did R1 take all steps that it was reasonable to take, namely holding work-related conversations during day time?

105 We were unanimous in concluding that the phone call the Second Respondent made to the Claimant on 27 June 2017 did not amount to a "provision, criterion or practice". This was a singular event, with no continuing consequences. There was no evidence it had happened before or after this event.

106 We were also unanimous in finding that there was no substantial disadvantage to the Claimant in receiving that call. It was, at worst, a minor inconvenience.

107 In the above circumstances we have concluded that the First Respondent was not subject to a duty to take steps to make adjustments.

108 Second adjustment

> 25.Did R1 apply a provision, criterion or practice ("PCP") of requiring employees to work:

a. As part of a rota which included shifts of 7am–3pm, 3pm–11pm and 11pm-7am;
b. Frequent shifts of 3pm-11pm and/or 11pm-7am.
26.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that it exacerbated his back pain and interfered with C's increased need for rest?
27.Was R1 aware, or ought R1 to have been aware, that this was the case?
28.Did R1 take all steps that it was reasonable to take in connection with avoiding and/or reducing night work? In particular:
a. Not requiring C to work later than 9pm;
b. Allocating C a fixed shift of 7am–3pm;
c. Allowing C to alternate between shifts of 7am–3pm and 3pm–11pm;
d. Allocating an even spread of shifts.

109 It is clear from our above findings of fact that the First Respondent did expect staff to work as part of a three shift rota system.

110 The evidence as to the frequency with which different staff worked different shifts was not analysed and presented to us in a meaningful way. It is clear that some staff effectively worked fixed shifts, in particular Mrs Funnell and a member of staff, "James" who was diabetic. The Second Respondent largely worked a day shift when he attended. As noted above, some staff were accommodated for their travel needs.

111 Whilst we accept that the First Respondent required the afternoon and night shifts to be covered on a daily basis this was no more frequent than the early shift.

112 In the above circumstances we are quite unable to find that staff were required to work "frequent" shifts in the afternoon or night.

113 We have given careful consideration as to whether the first PCP placed the Claimant at a substantial disadvantage compared to non-disabled employees? We thought the following matters to be particularly relevant:-

113.1 The Claimant had worked fixed night shifts for the first year of his employment without complaint.

113.2 The Claimant had worked fixed shifts from 2 pm to 10 pm throughout the period prior to the TUPE transfer without complaint.

113.3 After the TUPE transfer the vast majority of the Claimant's shifts were 3 pm to 11 pm. We refer to our above findings in this respect.

113.4 It appeared clear to us that in the period following his receipt of the Med3 dated 25 May 2017 the Second Respondent endeavoured to ensure that the Claimant was very largely assigned the 3 pm to 11 pm shift.

113.5 We noted Mr Hilton's specific evidence was that, whilst he had every sympathy for the Claimant and endeavoured to assist him, he also made it clear to the Claimant that when needs must the Claimant would have to carry out shifts and/or duties that he was less than happy with.

114 On balance we accepted that the Claimant had established on the balance of probabilities that if he was required to work a Rota in which he had to regularly

rotate between one shift and another that would place him at a substantial disadvantage compared with non-disabled people, even though this is not the PCP alleged.

115 We have no doubt that the Respondents were aware that that was the case as a consequence of the information they received from the Claimant and, via the Med3 of 25 May 2017, from his GP.

116 To that extent, therefore, the First Respondent was subject to a duty to take such steps as were reasonable to avoid that PCP having that effect.

117 We accepted the Respondent's evidence that there was a reluctance amongst the staff to work the night shift. The business, however, was open 24/7. Whilst it was open to the First Respondent to take disciplinary action against employees who did not honour their obligations to work contractual hours we can understand a reluctance on the part of the Respondents to go down that route.

118 In light of all our above findings we are unanimous in concluding that the First Respondent took reasonable steps in accordance with its duties:-

118.1 It frequently assigned the Claimant to a shift that was directly comparable with those he had worked under the previous management.

118.2 It only assigned him to an early shift occasionally.

118.3 It only assigned him to a night shift when there was no other person available.

119 We are therefore unanimous in concluding that, in respect of this PCP, the First Respondent has not discriminated against the Claimant contrary to section 21 Equality Act 2010.

> Third adjustment
>
> 29.Did R1 apply a provision, criterion or practice ("PCP") of requiring employees to take one 20-minute break or 4x 5-minute breaks?
>
> 30.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C required greater and more frequent rests as a result of pain?
>
> 31.Was R1 aware, or ought R1 to have been aware, that this was the case?
>
> 32.Did R1 take all steps that it was reasonable to take, namely allowing C to take up to 6 additional breaks of 5 minutes each during each shift?

120 The evidence before us on this issue was to the effect that each employee was entitled to a minimum of a 20 minute break on each normal shift. There was no evidence that the First Respondent permitted staff to take 4 five minute breaks in place of a 20 minute break. In any event, under the Working Time Regulations every employee would be entitled to a at least a 20 minute break during one of the normal shifts.

121 Strictly speaking, therefore we are quite unable to find that the PCP alleged was applied. However, as above, we accept that we should not be too rigid in interpreting the PCP relied on in cases of this nature.

122 In that context, we remind ourselves that the Claimant did not give evidence to the effect that he was unable to take any other breaks, was refused breaks if he asked for them or was told to return to work if he took any additional breaks. We

have also borne in mind that it was common ground that the early shift was by far the busiest. The afternoon/evening shift was much quieter, and the nightshift even more so.

123 In light of the shifts the Claimant was assigned to, therefore, we are unanimous in concluding that there was no PCP that prevented the Claimant from taking more than a single 20 minute break in the course of any of the shifts he worked.

124 We are therefore unanimous in concluding that, in respect of the alleged or alternative PCPs, the First Respondent has not discriminated against the Claimant contrary to section 21 Equality Act 2010.

Fourth adjustment

33.Did R1 apply a provision, criteria or practice ("PCP") of requiring employees to:

a. Lift and move 18 litre containers of milk.

b. Lift and move piles of newspapers in and out of the service station shop;

c. Lift items of stock and place them onto shelves, including above elbow height;

d. Sweep and mop floors

34.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C was less able to lift, reach, sweep and mop due to pain?

35.Was R1 aware, or ought R1 to have been aware, that this was the case?

36.Did R1 take all steps that it was reasonable to take, namely reallocating those duties, or reducing the frequency with which C was expected to undertake them?

125 We thought the evidence on this issue to be unsatisfactory. The identified tasks were among those expected of staff on their shifts, but there was no clear evidence that the Claimant, or any other member of staff, was required to carry out any of those specific duties on specific occasions.

126 We accepted that prior to TUPE taking effect the Claimant was able to avoid, or obtain assistance in, carrying out such of those duties that were required on the shifts he worked. However, the Claimant gave no clear evidence of any occasion on which he was required to carry out any of those specific tasks. The only occasion on which he stated he had been specifically required to carry out cleaning duties was the incident identified above, following an attempted robbery of the cashpoint. That does not seem to fall within the alleged PCP and was a single event.

127 On the basis of all the evidence we have heard we have concluded that even if a PCP could be constructed in appropriate terms to meet the actual facts of the case (which are themselves unclear) the extent to which it might have placed the Claimant at a disadvantage is moot.

128 In light of all the evidence we have heard, we are also satisfied that the Claimant was only very occasionally asked to try and work beyond his expressed capabilities. To that extent, therefore, we take the view, the Respondent did take reasonable steps to make adjustments for the Claimant's benefit.

Fifth adjustment

37.Did R1 apply a provision, criterion or practice ("PCP") of requiring employees to stand for 6-8 hours per shift in order to operate the till?

38.Did the PCP place C at a substantial disadvantage compared to non-disabled employees in that C was less able to stand for long periods due to pain?

39.Was R1 aware, or ought R1 to have been aware, that this was the case

40.Did R1 take all steps that it was reasonable to take, namely varying C's duties such that he was no longer required to stand continuously for more than 1 hour at a time.

129 We are unanimous in our conclusion that no such PCP was applied by the First Respondent. Whilst employees might be on shift for eight hours, or occasionally up to 12 hours, there was no evidence before us that any employee was ever required to stand at a till continuously for a long period of time.

130 It is clear from the evidence we heard, and our above findings of fact, that there were a great many other tasks to be performed in the course of a shift other than standing at the till. Bearing in mind that there were normally at least two members of staff on duty, as a minimum, on each shift it seems highly unlikely that any member of staff would be continuously on a till for the whole (or the large part of) a shift.

131 We are therefore unanimous in finding that the Respondent has not failed to comply with a duty to make reasonable adjustments, contrary to section 15 Equality Act 2010.

Section 38 Employment Act 2002

Did R fail to provide C with a statement pursuant to s. 1 and/or s. 4 ERA 1996?

132 The Claimant's complaint is that following the tube the transfer. The First Respondent failed to issue him with a statement setting out the changes to his contract of employment. There is no issue as to the accuracy of all the other particulars that were previously issued to him by Mr Hilton's business.

133 We asked the Claimant's representative, in the course of submissions, whether the identity of the First Respondent had been set out on the payslips received by the Claimant from June 2017. His response was noncommittal.

134 We have concluded, in the absence of disclosure of those payslips, that the Claimant has failed to discharge the burden on him of establishing, on the balance of probabilities, that he did not receive such a statement.

Remedy

135 We received a detailed updated schedule of loss on behalf of the Claimant. Save for the points we have set out above, the Respondent did not take issue with the figures there set out, save as to the Vento award that ought to be made. We make the following awards.

136 Each of the relevant awards has been uplifted by a factor of 25% pursuant to section 207A Trade Union and Labour Relations Consolidation Act 1992. The First Respondent's failures to comply with the ACAS Code of Practice were flagrant and repeated. It followed no procedure at all in respect of the written warnings and dismissal. It only held a grievance hearing at the Claimant's

solicitor's insistence. In reality, it did not offer an appeal against the grievance finding. In all the circumstances of the case it is just and equitable to make a 25% uplift.

Breach of contract

137 The Claimant was clearly entitled to 3 weeks notice, or pay in lieu of thereof. We award him the sum of £850.29 as compensation for breach of contract.

Unfair dismissal

138 We make a basic award of £39.72 in light of the redundancy payment that was paid to the Claimant in his last payslip.

139 We calculate the compensatory award as follows: –

139.1 Taking into account the award for breach of contract, we calculate the Claimant's loss of earnings to the date of the hearing as extending to 55.3 weeks at a rate of £283.43 per week, totalling £15,673.68.

139.2 We award the Claimant the sum of £300.00 for loss of his statutory rights.

139.3 We accepted the Claimant's figures for future loss in the sum of £16,270.86

140 The total compensatory award is therefore £29,244.54 which, with the uplift, totals £36,555.66.

141 However, that award is subject to the statutory cap equal to one year's gross earnings which, in this case, reduces the total compensatory award to £16,848.00.

Disability Discrimination

142 We have given careful consideration to recent authority and guidance on *Vento* awards. This discrimination took place over a fairly short period, and was not of the most serious nature. It was not malicious, but largely arose from ignorance. Against that it did result in the Claimant's dismissal and caused him considerable distress and actual pain.

143 Having regard to all the circumstances of the case we take the view that the Claimant will be fully compensated for injury to feelings by an award in the sum of £15,000.

144 To that we add:-

144.1 Interest at 8% for 204 days in the sum of £670.68

144.2 An uplift of 25%, being £3,750

making a total award in this respect of £19,420.68

_____

Employment Judge Kurrein

12 September 2018