Appeal No. UKEAT/0078/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 June 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MISS I BROMA — APPELLANT

BAKKAVOR FOODS LTD t/a BAKKAVOR DESSERTS HIGHBRIDGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS INNA BROMA (The Appellant in Person)
For the Respondent	MR SIMON HARDING (of Counsel) Instructed by: SAS Daniels LLP 30 Greek Street Stockport Cheshire SK3 8AD

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was a Latvian national with a limited command of English. At the trial of her claims of unfair dismissal and disability discrimination she acted in person, assisted by an interpreter. The Employment Tribunal ("ET") dismissed her claims. The Claimant appealed on various grounds including two relating to the discrimination claim under section 20 of the **Equality Act 2010** and a complaint that she had been given insufficient time to cross-examine the main witness for the Respondent.

At the Rule 3(10) Hearing, the Judge allowed the two section 20 grounds (as contained in an Amended Notice of Appeal signed by counsel then acting for the Claimant) to proceed to a Full Hearing and stayed the appeal on the cross-examination ground (not contained in the Amended Notice of Appeal) pending the ET's response to the allegation. The ET provided its response, to which the Claimant replied.

At the Full Hearing, the EAT resolved the ambiguity in the Rule 3(10) Order in favour of the Claimant; lifted the stay on the ground relating to the cross-examination and treated it as if contained in the Amended Notice of Appeal. The ET's account of the time afforded for cross-examination was preferred. The EAT was satisfied that there was no basis to challenge the case management decision as to the allocation of time.

As to the section 20 appeal, there was no basis to challenge the ET's conclusion of fact: **Noor v Foreign & Commonwealth Office** [2011] ICR 695, **General Dynamics Information**

Technology Ltd v Carranza [2015] ICR 169, **Code of Practice Employment** [2011] Chapter 6, considered.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant (Miss Broma) against the Decision of the Employment Tribunal ("ET") at Bristol (Employment Judge ("EJ") Mulvaney and Members) sent to the parties on 2 June 2017, dismissing the Claimant's claims against the Respondent employer of unfair dismissal and disability discrimination under sections 13, 15 and 20 of the **Equality Act 2010** ("EqA").

2. I must first deal with a procedural question as to the ambit of the appeal. Following the Rule 3(10) Hearing on 7 March 2018, Her Honour Judge Tucker made an Order which by paragraph 4 allowed two grounds of appeal on the claim under section 20 to go forward to this Full Hearing subject to reconsideration by Counsel then appearing for the Claimant as to the precise terms of one of those grounds. Counsel's subsequent Amended Notice of Appeal was limited to those two grounds as revised. The Order then gave leave to amend in those terms and continued "all other grounds of appeal having been dismissed."

3. However, paragraph 2 of the Order of 7 March made provision in respect of a further and wider ground of appeal, namely that the ET had given her insufficient time to cross-examine the witnesses for the Respondent.

4. Paragraph 3 of the Order requested a response from the ET "*if practicable within 28 days*." Paragraph 4 ordered the appeal to be set down "*for a full hearing on the Amended Ground of Appeal only*" on the first available date after 35 days.

5. In accordance with HHJ Tucker's request, the ET on 1 May 2018 provided a detailed response to the question posed. The Claimant then set out her observations in two documents, respectively dated 8 and 14 May 2018, each headed "*Appeal to EAT for the purpose of resolving disagreement*."

6. Thus, on the face of the Order of 7 March there is ambiguity as to the status of the further ground. However, HHJ Tucker's reasons for allowing the appeal to proceed to a Full Hearing identified two exceptions to her conclusion that there were no reasonable grounds for appeal, namely the section 20 grounds and the cross-examination ground. In the circumstances, counsel for the Respondent today rightly conceded that the ambiguity in the Order should be construed in favour of the Claimant, namely on the basis that permission was given to pursue the appeal on the further ground.

7. The Respondent is a food manufacturer producing desserts for major retailers. It employs 500 people at its Highbridge site on a rolling four-shift programme, approximately 35 of whom work on the night shift. The Claimant was employed as a night shift Production Operative reporting to Mr Jordan House, the Night Manager, from February 2011 until her dismissal on grounds of capability on 2 November 2015. She has unfortunately suffered from back pain early on in her employment and the condition deteriorated during her employment.

8. By her ET1 dated 19 February 2016 she brought claims of unfair dismissal and disability discrimination. The Respondent conceded that the Claimant's back condition is a disability as defined under the **EqA**, but denied liability on any basis.

9. In respect of the claim for reasonable adjustments, the Claimant asserted that the Respondent applied seven provisions, criteria or practices ("PCPs") including:

(a) the requirement to stand while working,

(b) no rotation of machinery, and

(c) no chairs were permitted on the factory floor.

10. She further contended that these requirements placed her at a substantial disadvantage because of her disability, causing her to be unable to work and leading to her dismissal. She identified six adjustments that could have been made, including sitting during the work and having a chair on the shop floor.

11. The Tribunal made the following relevant findings of fact. The Claimant is of Latvian origin and has limited spoken English. Her primary languages are Latvian and Russian. She required an interpreter at the hearing; here, Russian, and below, Latvian. I am most grateful for the assistance provided by the interpreter today.

12. The Claimant worked on the night shift production line in its "low risk" area from the commencement of her employment. There were four production lines on that night shift. On average five operatives worked on each line, standing next to it. All lines bar one, the Rademaker line, required operators to work standing next to the line in relatively static positions throughout their shifts. The Claimant worked a 12-hour shift from 6pm to 6am, generally with two 30-minute breaks, and additional short breaks for bathroom visits and to get a drink.

13. Until February 2012 she had generally worked on the Rademaker line, which allowed her some flexibility of movement, but she was then moved to the manual line. On 12 March 2012 the Claimant wrote to the Respondent about the adverse impact of this move on her back pain. The Judgment then records a lengthy history of referrals to the Respondent's Occupational Health Department and consequential assessment reports; reports from her GP including recommendations for dealing with the problem of work; and meetings and discussions between the Claimant and Respondent as to whether and if so how her condition could be accommodated.

14. For a period, she worked again on the Rademaker line and found that that particular line provided sufficient variety of movement to avoid back pain. The Claimant had successive absences of work because of her back pain, including a week in July 2012, 25 September 2013 until 17 January 2014, and finally from 1 December 2014 until her dismissal on 25 September 2015. This termination was the culmination of the various stages of the Respondent's long-term absence procedure.

15. The possibility of the provision of a chair was first raised in December 2013 by Orthopaedic Physiotherapy Practitioner Mr Gill, giving the results of an MRI scan. He stated that:

> **"it would be appropriate if her work were able to support her with better seating to allow her to sit in a more upright position ideally with regular breaks so she is able to stand and move around without having to sit statically for more than 20-30 minutes at a time, even if this is just a 1-2 minute movement based break until physiotherapy and the root block hopefully address some of her symptoms." (See paragraph 30 of the Judgment)**

16. The Respondent had previously in February 2013 carried out a risk assessment as to whether Production Operatives could be allowed to sit whilst doing their work on the lines. The conclusion was that the introduction of chairs into the production areas would cause

congestion, increasing the risk of accidents and blocking emergency escape routes. Furthermore, many tasks on the line would not be compatible with sitting down. In the light of this assessment, the Respondent did not consider that seating could be provided for the Claimant in the production area. Furthermore, Mr Gill's report indicated that remaining seated for extended periods caused her as much back pain as remaining standing for long periods, so the provision of a chair "*even if it had been possible, would therefore not have been a complete solution*" (see paragraph 31 of the Judgment).

17. The Tribunal found that in 2014 adjustments were made to accommodate the Claimant in her role, namely a period of working reduced hours; provision of an extra extended break and further short breaks to ease her back; and rotation around tasks on the production lines to the extent this was possible without disrupting the process. However, the Tribunal noted that "*whilst such adjustments were feasible in the short term, the claimant's condition was long term*" (see paragraph 35).

18. The Tribunal accepted the evidence that in 2014 the loss of major contracts with Sainsbury's and the Co-Op had led to a downturn in profitability and consequent reductions in numbers of staff working on the lines. This in turn impeded the adjustment of rotation of tasks. Thus, all staff on the line had to be in place to keep the line going; so that the line would have to be stopped if an operative took a break. As to the Rademaker line, staff on that line had to be able to do all of the tasks which it required. These included tasks the Claimant could not do, for example crumb scooping and stamping.

19. The Tribunal found that "*the respondent allowed such movement on the production line as was compatible with not causing undue interruption to the production process and within the limitations on the claimant's capacity to lift*" (see paragraph 36).

20. Returning to the issue of a chair, on 20 March 2015 the HR Manager, Sue Cox, wrote to the Claimant that it could not accommodate adjustments recommended by her GP for reasons which included "*We are not able to provide seats within the manufacturing areas due to health and safety and hygiene concerns*" (see paragraph 43).

21. The decision to terminate the Claimant's employment was made by the Respondent's Operations Manager, Mr Anthony Ward. His letter of termination referred to the adjustments which had been made; and to those which had been considered but were not feasible. As to a chair, "*We are unable to accommodate your request to have a chair on the production line as this is in breach of health and safety and the food hygiene standards*."

22. In his evidence to the Tribunal in this case, Mr Ward said that:

> **"53. … he had considered in his own mind whether it would be possible to allow one chair into the production area and had concluded that it would not. The gaps between the four production lines were narrow and were required to accommodate people walking and large tubs of ingredients being wheeled up and down them. A chair would obstruct that flow of movement and obstruct emergency exits. Additionally the production lines had no space under them so that being seated next to them with legs against the line would mean that the work on the line would be difficult to reach. The height of the lines varied but most lines were of kitchen worktop height so an ordinary chair would not be the correct height. Most of the work on the line required some movement to fetch goods so that being seated for extended lengths of time was not feasible. …"**

23. The Tribunal accepted this evidence and concluded, in the same paragraph: "*We found as a fact that provision of seating at the production line was not consistent with health and safety or with the efficient running of the line*."

24. The Tribunal set out the relevant provisions of section 20, namely the duty on an employer:

> **(3)…** ***where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it [is] reasonable to take to avoid the disadvantage*****."**

25. In paragraph 59 the Judgment identified the PCPs including those lettered (a) to (c) and already cited. It held that these, but not the other identified PCPs, put the Claimant at a substantial disadvantage. As to (a) and (c), concerning standing and no chairs, this was:

> **"61. … because she was unable to stand continuously for periods of more than one hour and could not take seated breaks in the manufacturing area or work in a seated position. Ultimately this meant that the claimant could no longer work for the respondent and led to her dismissal."**

26. As to (b), concerning the absence of rotation, namely a provision that Production Operatives remain working on one production line without rotation, it found there to be a disadvantage but concluded that increasing the level of rotation offered to the Claimant was not a reasonable adjustment that could have been made by the Respondent. There was no appeal from that decision.

27. The remaining question was therefore whether it was reasonable for the Respondent to take the following steps to avoid disadvantage, namely sitting during work and having a chair on the shop floor. As to this, the Tribunal concluded:

> **"67. We considered whether the respondent should reasonably have allowed the claimant to sit whilst doing her work. We concluded that such an adjustment would not have been practical in the production line environment where the claimant worked. There was limited gangway space between the production lines along which operatives had to be able to walk and to push large wheeled tubs. A chair would have obstructed the flow of movement. This would have impacted on production and on health and safety creating trip hazards and obstructing access to fire doors as identified in the risk assessment. In addition, there was no space for legs under the production lines which would have meant that the claimant would have been awkwardly positioned against the line having to stretch her arms across her legs to reach the line. The lines were not all the same height so one chair would not have suited all lines and in order to accommodate the claimant's need for rotation, the chair would have to have been moved from line to line.**
>
> **68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not**

> **remain seated for more than an hour without suffering severe pain. She would then need to stand for an hour at which point the chair would have been superfluous and in the way. The claimant's impact statement indicated that movement whilst in a seated position could also cause back pain and we were not satisfied that this adjustment would have enabled the claimant to carry out her duties on a 12 hour shift.**
>
> **…**
>
> **72. We the considered whether a chair could have been provided on the shop floor. We have considered this as a separate adjustment to that of allowing the claimant to sit whilst working and have considered whether the claimant could have been with a chair to rest on for an hour after having worked standing for an hour. We concluded that even if it had been feasible to put a chair on the shop floor where it would not cause an obstruction, it was not economically viable for the respondent to pay the claimant for a 12 hour shift for which she only worked 6 hours. It would have had to fill the claimant's place on the production line with another paid operative but it would not have been possible to engage someone to work on a one hour off one hour on basis. We concluded that this was not an adjustment that would have been reasonable for the respondent to have made."**

28. Having dealt with and rejected the other proposed reasonable adjustments the Tribunal concluded:

> **"73. The respondent had made a number of adjustments for the claimant. It had allowed some rotation on the production lines, it had allowed the claimant an additional break during her shift; it had considered alternative employment; it had allowed her to work reduced hours. Adjustments were required by the claimant on an ongoing basis. This was not a question of making a short-term adjustment to enable the claimant's back condition to improve. She had been off work for 10 months and her condition had deteriorated. The prognosis was for there to be no improvement in the foreseeable future. In those circumstances we found that there was no failure by the Respondent to make reasonable adjustments and the claimant's claim did not succeed."**

29. I will start with the wider appeal concerning cross-examination. As HHJ Tucker's Order relates, the Claimant's central contention is that her cross-examination of the Night Manager, Mr House was limited to 2½ hours. In its response, the Tribunal stated that this cross-examination time was 4½ hours. The Tribunal stated that the time allocated for the Liability Hearing was four days. There were two witnesses for the Respondent and two for the Claimant. The timetable was discussed with the parties at the beginning of the hearing at 2pm on day 1. The intention was to complete evidence by the end of day 3 to allow time for deliberations and judgment. In the event the evidence was not completed until midday on day 4, with the consequence that judgment was reserved. Cross-examination of the Claimant by the Respondent's representative took longer than anticipated, namely 5½ hours in total, until the

A end of day 2. The Tribunal said that this was due to the Claimant's lengthy answers which strayed onto matters not relevant to the pleaded case.

B 30. The Tribunal stated that the Claimant's cross-examination of Mr House began at 10.15am on day 3. The Claimant had a sheet of questions prepared for her by solicitors who were not representing her at the hearing. However, the Claimant apparently departed from that, asking questions about matters not arising in the pleadings, and making observations and C statements which did not result in a question. The EJ intervened to remind her of the issues in the case and of the need to focus. On the morning of day 3, she told the Claimant that the cross-examination must be completed by mid-afternoon. Prior to the lunch adjournment, the D Judge pointed out the issues not yet covered in cross-examination and advised her to use the lunch adjournment to focus on those points. The Claimant was told that she could have 2 hours after the adjournment, i.e. until 4pm, to complete her cross-examination of Mr House. The E afternoon cross-examination again strayed off the relevant points. After a final reminder 15 minutes earlier, the Judge stopped the cross-examination at 4.05pm. Thus, the total time of the cross-examination was of the order of 4½ hours not 2½ hours.

F 31. The Claimant then said that her cross-examination of the Respondent's second witness, Mr Ward, on day 4 would require 1 hour. In fact, it took 2 hours. Thus, the total time of her cross-examination was 6½ hours in contrast to the 5½ hours of the cross-examination of G Claimant's witnesses.

32. The Tribunal acknowledged that the need for an interpreter at all stages inevitably added H to the length of time of the hearing, but that this had been factored into the time allocation agreed at listing. The Tribunal had taken account of her lack of representation and the fact that

English was not her first language, and tried to assist her to focus on the points in issue. However, that guidance had not been heeded and ultimately it had been necessary to bring the cross-examination to an end.

33. The Claimant states that the cross-examination of her and her witness took about 5½ or 6 hours in total. To that extent there is some agreement. However, she disagrees about the course of events of her own cross-examination of the Respondent witnesses. In her skeleton argument, she states that at the beginning of day 3, the Judge told her that more time had been spent than expected on the Claimant's case, and that therefore cross-examination would be finished by 2pm that day. She agrees that she had a sheet of questions prepared for her by her solicitor, but also had a sheet of her own questions. Between 10.30am and 11.30am she was sent to the public waiting room in order to place all her questions chronologically. This she did. Thus, her cross-examination of Mr House began at 11.30am. She was repeatedly reminded that cross-examination was to finish by 2pm. The cross-examination continued without a break until 2pm and was then completed. In consequence, the cross-examination time was 2½ hours. The afternoon was then used for planning for day 4, on which day her cross-examination of Mr Ward took place.

34. In oral submissions, the Claimant was notably less confident about the timing of these events, suggesting that there was an extended lunch break of about 1 ½ hours with the parties returning at about 2.30pm. However, she was adamant that there was no cross-examination after the lunch break. This would mean that the cross-examination had lasted only about 1½ hours. The discussion after the lunch adjournment had been of the order of 20 minutes, and so the day had ended early.

35. On 30 April 2018, she requested the Tribunal to provide a transcript of the proceedings in order to resolve the matter. The reply, dated 8 May, was that there was currently no requirement for an ET hearing to be recorded and that this hearing had not been recorded. On 8 and 14 May 2018, the Claimant applied to the Registrar of the EAT for the EJ's notes to be supplied, but this application was refused.

36. In any event, the Claimant submits that her cross-examination of Mr House was unfairly limited. In consequence, she was unable to ask any more than half of the questions which had been prepared by the solicitor and all of which were relevant.

37. Mr Harding, who appeared below, was not able to assist from his notes or recollection of the hearing but submitted that the Tribunal's response included time details evidently reflecting their own notes; that it was inherently unlikely that a busy and efficient Tribunal would have finished a day early; and that if it had he would have called his next witness Mr Ward that day rather than on the following day 4. He submits that this was all a matter for the case management discretion of the Judge; and there was no basis to conclude that he had gone outside the generous ambit of his discretion. On the contrary, the Judge had given the Claimant every opportunity to focus her answers and her questions and had afforded her ample time to do so.

38. In considering this ground I have taken full account of the Claimant's lack of representation at the hearing and restricted command of English. Cross-examination is a highly skilled art and it is commonplace and understandable that unrepresented parties have difficulty in focusing their questions on the submission and often lapse into further statements of their

A case. In such a case, the EJ has a demanding task in providing some guidance and advice to the unrepresented parties without conducting or appearing to conduct the case on their behalf.

B 39. It is of course unfortunate that there is a dispute over the length of time to which the Claimant cross-examined Mr House. However, I am quite satisfied that the Claimant's recollection is at fault, and that for the reasons identified by Mr Harding the cross-examination must have continued until just after 4pm on the third day. Given the pressures of conducting her case it is not surprising or a matter of criticism that the Claimant has recalled a shorter period. I see no reason to make any further enquiry of the Tribunal.

C

D 40. In any event, there is no possible challenge to the conduct of the hearing by the Tribunal. The Tribunal, principally through the EJ when sitting with Lay Members, is rightly afforded a broad range of discretion in the management of the trial. Having heard the Claimant in this appeal I have no doubt that she did have difficulty in focusing on the relevant points and that the EJ did all she could to try and assist. I see no basis to conclude that there was any unfairness to the Claimant or that the Judge in any way went outside the generous ambit of her discretion in the management of a demanding hearing. Accordingly, this ground of appeal is dismissed.

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41. I turn to the grounds concerning reasonable adjustments. Ground 1 in the Amended Notice of Appeal states:

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> **"The Employment Tribunal erred at paragraph 67 of the Reasons in considering whether the provision of a chair for the Claimant alone amounted to a reasonable adjustment because it failed to consider objectively whether the provision of the chair was reasonable in light of the evidence before it as to the practical consequences of the chair being provided. It is not clear on the evidence how, objectively, the ET concluded that provision of a chair was not practicable (i.e. that there was limited gangway space and the chair would have obstructed the flow of movement etc.)."**

H

42. The Claimant's skeleton argument submits that there was:

> **"No objective evidence before the Tribunal (by way of photographs of the factory floor or an independent risk assessment as to working from a chair on the factory floor) to enable it to determine whether the requested adjustment was practicable."**

and that the Tribunal's conclusion was "*impermissibly subjective*." She points to photographs from the Respondent's own documentation which were before the Tribunal in black and white copies, and submits that this shows "*space to place chairs by the production line and that various employees sat on chairs*." Thus:

> **"The photographic evidence indicated the Respondent's evidence that the provision of a chair was not practicable (i.e. that there was limited gangway space and a chair would have obstructed the flow of movement etc) in the production area was entirely false."**

She submits that the photograph copies were of poor quality, and that the Tribunal wrongly refused to look at colour copies offered by her. In any event it was plain from the black and white copies that the gaps were wide and that there was plenty of space for a chair. The Tribunal had made no reference to the photographs in the Judgment.

43. The Claimant also referred to paragraph 92 of the Judgment which states:

> **"92. We were also concerned that there was no documentary evidence to indicate that the respondent applied its mind prior to dismissal to the question of whether a chair could be provided for the claimant in the manufacturing area. We nevertheless accepted Mr Ward's evidence that he considered the point prior to dismissal and concluded that it would not be possible to put a chair on the production area for the reasons set out at para 53."**

She submitted that in the absence of such documentary evidence there was no basis for the Tribunal to accept the oral evidence of Mr Ward. All in all, there was no objective basis for the Tribunal's conclusion or for its acceptance of the Respondent's evidence.

44. On behalf of the Respondent, Mr Harding submits that the question of whether this was a reasonable adjustment was a pure question of fact for the Tribunal; and that its conclusion that

it was, was based on its acceptance of Mr Ward's evidence on that point (see paragraph 53). There was no basis to conclude that the Tribunal's finding was perverse. On the contrary, it was an unimpeachable finding of fact. The photographs were not a distinct ground of appeal. In any event, they were before the Tribunal; there was no need for a Tribunal to refer to every piece of evidence before it; and they provided no basis to challenge the conclusion in light of all of the evidence. As to paragraph 92 of the Judgment, the Tribunal was entitled to accept oral evidence, notwithstanding the absence of relevant documentary evidence.

45. I turn to the linked ground of appeal, 2. This ground states: "*The ET erred in applying the wrong legal test, considering that a reasonable adjustment has to be "wholly effective in removing the disadvantage"*." The Claimant's argument focuses on paragraph 68 of the Judgment, where the Tribunal stated:

> **"68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not remain seated for more than an hour without suffering severe pain. …"**

46. The Claimant points to the decision in **Noor v Foreign & Commonwealth Office** [2011] ICR 695 cited by her former counsel before HHJ Tucker. In that case, His Honour Judge Richardson stated that:

> **"33. … Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective. …"**

In that case, the Judge was considering the provisions of the **Disability Discrimination Act 1995**. Section 4A(1) of that Act included terms similar to those in section 20(3). However, section 18B(1) provided:

> **"(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -**
>
> > **(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**

...”

47. I drew attention to the fact that the provision in section 18B is not repeated in the **EqA**, and that the guidance is now contained in the statutory **Code of Practice on Employment** [2011]. This includes, in respect of reasonable adjustments:

> **“6.28. The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> ...”

The first identified factor is “*whether taking any particular steps would be effective in preventing the substantial disadvantage*.” *Harvey* observes that the matters listed in sections 18A and B of the **1995 Act** are “*largely reproduced*” in Chapter 6 of the **Code** (see paragraph 399.01). Furthermore, in **General Dynamics Information Technology v Carranza** [2015] ICR 169 His Honour Judge Richardson contrasted section 18B and the **Code** and stated, “*... I have no doubt that the same approach applies to the **Equality Act 2010***” (see paragraph 36).

48. The Claimant submits that the Tribunal’s conclusion on this point was vitiated by its conclusion that the provision of a chair “*would not have been wholly effective in removing the disadvantage*.” In response, Mr Harding in accordance with his duty first pointed in favour of the defendant that the language of the **Code** says “*effective*” rather than “*wholly effective*.” He submits that the Tribunal set out the correct test - i.e. from section 20(3) of the **EqA** - and that the reference in paragraph 68 of the Judgment to “*wholly effective*” is not the application of a legal test but an observation. The paragraph must be read as a whole and in the context of the other paragraphs of the Judgment relating to this issue (see in particular paragraphs 67 and 62). If, which was not accepted, the reference to “*wholly effective*” was the wrong test, the error was immaterial. There was a full and sufficient consideration of the overall question of whether or

not this would have been a reasonable adjustment. That was a question of fact. There was no basis to challenge the Tribunal's decision.

49. I am not persuaded that the Tribunal fell into error on either ground. As to ground 1, the Tribunal's conclusion reflected the evidence which it had heard and accepted (see in particular paragraph 53). That was a question of fact, and there is no basis to conclude that it was perverse.

50. As to the photographs, they were before the Tribunal. It does not follow from the absence of reference they were not taken into account. In any event they provide no basis to challenge the Tribunal's conclusion. As to paragraph 92, the absence of documentary evidence is no bar to its acceptance of the Respondent's oral evidence.

51. As to ground 2, the question for the Tribunal, once satisfied that a PCP put the Claimant at a substantial disadvantage, is whether the employer has failed to take such steps as is reasonable to have to take to avoid the disadvantage (see section 20(3)). As the **Code of Practice** makes clear, the **Act** does not specify any particular factors that should be taken into account; and what is a reasonable step will depend on all the circumstances of the individual case (see paragraphs 6.22 and 6.29). Examples of factors that the **Code** provides (paragraph 6.28), include "*whether taking any particular steps would be effective in preventing the substantial disadvantage*." As a matter of language, that is not quite the same as the former provision of section 18B(1)(a), namely "*the extent to which taking the step would prevent the effect in relation to which the duty is imposed*." However, in the case where the Appellant is unrepresented and the point is being taken by the Appellate Tribunal rather than the Respondent and without full argument, I do not decide the appeal on the basis of that textual distinction.

52. In my judgment, the Tribunal was fully entitled to take the factor of ineffectiveness as but one factor in its overall and multifactorial assessment. That overall assessment involved consideration of a range of factors including both the practicability and the economic viability of the proposed adjustment (see paragraphs 67 to 72). The evidence which it had accepted from the Respondent's witnesses provided an ample basis for its overall conclusion, which in turn was properly set against the broad test of section 20(3).

53. This was all a matter for the Tribunal, as industrial jury, to assess. In my judgment its conclusion is unimpeachable. For all these reasons the appeal must be dismissed.

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Technology Ltd v Carranza [2015] ICR 169, **Code of Practice Employment** [2011] Chapter 6, considered.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant (Miss Broma) against the Decision of the Employment Tribunal ("ET") at Bristol (Employment Judge ("EJ") Mulvaney and Members) sent to the parties on 2 June 2017, dismissing the Claimant's claims against the Respondent employer of unfair dismissal and disability discrimination under sections 13, 15 and 20 of the **Equality Act 2010** ("EqA").

2. I must first deal with a procedural question as to the ambit of the appeal. Following the Rule 3(10) Hearing on 7 March 2018, Her Honour Judge Tucker made an Order which by paragraph 4 allowed two grounds of appeal on the claim under section 20 to go forward to this Full Hearing subject to reconsideration by Counsel then appearing for the Claimant as to the precise terms of one of those grounds. Counsel's subsequent Amended Notice of Appeal was limited to those two grounds as revised. The Order then gave leave to amend in those terms and continued "all other grounds of appeal having been dismissed."

3. However, paragraph 2 of the Order of 7 March made provision in respect of a further and wider ground of appeal, namely that the ET had given her insufficient time to cross-examine the witnesses for the Respondent.

4. Paragraph 3 of the Order requested a response from the ET "*if practicable within 28 days*." Paragraph 4 ordered the appeal to be set down "*for a full hearing on the Amended Ground of Appeal only*" on the first available date after 35 days.

5. In accordance with HHJ Tucker's request, the ET on 1 May 2018 provided a detailed response to the question posed. The Claimant then set out her observations in two documents, respectively dated 8 and 14 May 2018, each headed "*Appeal to EAT for the purpose of resolving disagreement*."

6. Thus, on the face of the Order of 7 March there is ambiguity as to the status of the further ground. However, HHJ Tucker's reasons for allowing the appeal to proceed to a Full Hearing identified two exceptions to her conclusion that there were no reasonable grounds for appeal, namely the section 20 grounds and the cross-examination ground. In the circumstances, counsel for the Respondent today rightly conceded that the ambiguity in the Order should be construed in favour of the Claimant, namely on the basis that permission was given to pursue the appeal on the further ground.

7. The Respondent is a food manufacturer producing desserts for major retailers. It employs 500 people at its Highbridge site on a rolling four-shift programme, approximately 35 of whom work on the night shift. The Claimant was employed as a night shift Production Operative reporting to Mr Jordan House, the Night Manager, from February 2011 until her dismissal on grounds of capability on 2 November 2015. She has unfortunately suffered from back pain early on in her employment and the condition deteriorated during her employment.

8. By her ET1 dated 19 February 2016 she brought claims of unfair dismissal and disability discrimination. The Respondent conceded that the Claimant's back condition is a disability as defined under the **EqA**, but denied liability on any basis.

9. In respect of the claim for reasonable adjustments, the Claimant asserted that the Respondent applied seven provisions, criteria or practices ("PCPs") including:

(a) the requirement to stand while working,

(b) no rotation of machinery, and

(c) no chairs were permitted on the factory floor.

10. She further contended that these requirements placed her at a substantial disadvantage because of her disability, causing her to be unable to work and leading to her dismissal. She identified six adjustments that could have been made, including sitting during the work and having a chair on the shop floor.

11. The Tribunal made the following relevant findings of fact. The Claimant is of Latvian origin and has limited spoken English. Her primary languages are Latvian and Russian. She required an interpreter at the hearing; here, Russian, and below, Latvian. I am most grateful for the assistance provided by the interpreter today.

12. The Claimant worked on the night shift production line in its "low risk" area from the commencement of her employment. There were four production lines on that night shift. On average five operatives worked on each line, standing next to it. All lines bar one, the Rademaker line, required operators to work standing next to the line in relatively static positions throughout their shifts. The Claimant worked a 12-hour shift from 6pm to 6am, generally with two 30-minute breaks, and additional short breaks for bathroom visits and to get a drink.

13. Until February 2012 she had generally worked on the Rademaker line, which allowed her some flexibility of movement, but she was then moved to the manual line. On 12 March 2012 the Claimant wrote to the Respondent about the adverse impact of this move on her back pain. The Judgment then records a lengthy history of referrals to the Respondent's Occupational Health Department and consequential assessment reports; reports from her GP including recommendations for dealing with the problem of work; and meetings and discussions between the Claimant and Respondent as to whether and if so how her condition could be accommodated.

14. For a period, she worked again on the Rademaker line and found that that particular line provided sufficient variety of movement to avoid back pain. The Claimant had successive absences of work because of her back pain, including a week in July 2012, 25 September 2013 until 17 January 2014, and finally from 1 December 2014 until her dismissal on 25 September 2015. This termination was the culmination of the various stages of the Respondent's long-term absence procedure.

15. The possibility of the provision of a chair was first raised in December 2013 by Orthopaedic Physiotherapy Practitioner Mr Gill, giving the results of an MRI scan. He stated that:

> **"it would be appropriate if her work were able to support her with better seating to allow her to sit in a more upright position ideally with regular breaks so she is able to stand and move around without having to sit statically for more than 20-30 minutes at a time, even if this is just a 1-2 minute movement based break until physiotherapy and the root block hopefully address some of her symptoms." (See paragraph 30 of the Judgment)**

16. The Respondent had previously in February 2013 carried out a risk assessment as to whether Production Operatives could be allowed to sit whilst doing their work on the lines. The conclusion was that the introduction of chairs into the production areas would cause

congestion, increasing the risk of accidents and blocking emergency escape routes. Furthermore, many tasks on the line would not be compatible with sitting down. In the light of this assessment, the Respondent did not consider that seating could be provided for the Claimant in the production area. Furthermore, Mr Gill's report indicated that remaining seated for extended periods caused her as much back pain as remaining standing for long periods, so the provision of a chair "*even if it had been possible, would therefore not have been a complete solution*" (see paragraph 31 of the Judgment).

17. The Tribunal found that in 2014 adjustments were made to accommodate the Claimant in her role, namely a period of working reduced hours; provision of an extra extended break and further short breaks to ease her back; and rotation around tasks on the production lines to the extent this was possible without disrupting the process. However, the Tribunal noted that "*whilst such adjustments were feasible in the short term, the claimant's condition was long term*" (see paragraph 35).

18. The Tribunal accepted the evidence that in 2014 the loss of major contracts with Sainsbury's and the Co-Op had led to a downturn in profitability and consequent reductions in numbers of staff working on the lines. This in turn impeded the adjustment of rotation of tasks. Thus, all staff on the line had to be in place to keep the line going; so that the line would have to be stopped if an operative took a break. As to the Rademaker line, staff on that line had to be able to do all of the tasks which it required. These included tasks the Claimant could not do, for example crumb scooping and stamping.

19. The Tribunal found that "*the respondent allowed such movement on the production line as was compatible with not causing undue interruption to the production process and within the limitations on the claimant's capacity to lift*" (see paragraph 36).

20. Returning to the issue of a chair, on 20 March 2015 the HR Manager, Sue Cox, wrote to the Claimant that it could not accommodate adjustments recommended by her GP for reasons which included "*We are not able to provide seats within the manufacturing areas due to health and safety and hygiene concerns*" (see paragraph 43).

21. The decision to terminate the Claimant's employment was made by the Respondent's Operations Manager, Mr Anthony Ward. His letter of termination referred to the adjustments which had been made; and to those which had been considered but were not feasible. As to a chair, "*We are unable to accommodate your request to have a chair on the production line as this is in breach of health and safety and the food hygiene standards*."

22. In his evidence to the Tribunal in this case, Mr Ward said that:

> **"53. … he had considered in his own mind whether it would be possible to allow one chair into the production area and had concluded that it would not. The gaps between the four production lines were narrow and were required to accommodate people walking and large tubs of ingredients being wheeled up and down them. A chair would obstruct that flow of movement and obstruct emergency exits. Additionally the production lines had no space under them so that being seated next to them with legs against the line would mean that the work on the line would be difficult to reach. The height of the lines varied but most lines were of kitchen worktop height so an ordinary chair would not be the correct height. Most of the work on the line required some movement to fetch goods so that being seated for extended lengths of time was not feasible. …"**

23. The Tribunal accepted this evidence and concluded, in the same paragraph: "*We found as a fact that provision of seating at the production line was not consistent with health and safety or with the efficient running of the line*."

24. The Tribunal set out the relevant provisions of section 20, namely the duty on an employer:

> **(3)…** ***where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it [is] reasonable to take to avoid the disadvantage*****."**

25. In paragraph 59 the Judgment identified the PCPs including those lettered (a) to (c) and already cited. It held that these, but not the other identified PCPs, put the Claimant at a substantial disadvantage. As to (a) and (c), concerning standing and no chairs, this was:

> **"61. … because she was unable to stand continuously for periods of more than one hour and could not take seated breaks in the manufacturing area or work in a seated position. Ultimately this meant that the claimant could no longer work for the respondent and led to her dismissal."**

26. As to (b), concerning the absence of rotation, namely a provision that Production Operatives remain working on one production line without rotation, it found there to be a disadvantage but concluded that increasing the level of rotation offered to the Claimant was not a reasonable adjustment that could have been made by the Respondent. There was no appeal from that decision.

27. The remaining question was therefore whether it was reasonable for the Respondent to take the following steps to avoid disadvantage, namely sitting during work and having a chair on the shop floor. As to this, the Tribunal concluded:

> **"67. We considered whether the respondent should reasonably have allowed the claimant to sit whilst doing her work. We concluded that such an adjustment would not have been practical in the production line environment where the claimant worked. There was limited gangway space between the production lines along which operatives had to be able to walk and to push large wheeled tubs. A chair would have obstructed the flow of movement. This would have impacted on production and on health and safety creating trip hazards and obstructing access to fire doors as identified in the risk assessment. In addition, there was no space for legs under the production lines which would have meant that the claimant would have been awkwardly positioned against the line having to stretch her arms across her legs to reach the line. The lines were not all the same height so one chair would not have suited all lines and in order to accommodate the claimant's need for rotation, the chair would have to have been moved from line to line.**
>
> **68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not**

> **remain seated for more than an hour without suffering severe pain. She would then need to stand for an hour at which point the chair would have been superfluous and in the way. The claimant's impact statement indicated that movement whilst in a seated position could also cause back pain and we were not satisfied that this adjustment would have enabled the claimant to carry out her duties on a 12 hour shift.**
>
> **…**
>
> **72. We the considered whether a chair could have been provided on the shop floor. We have considered this as a separate adjustment to that of allowing the claimant to sit whilst working and have considered whether the claimant could have been with a chair to rest on for an hour after having worked standing for an hour. We concluded that even if it had been feasible to put a chair on the shop floor where it would not cause an obstruction, it was not economically viable for the respondent to pay the claimant for a 12 hour shift for which she only worked 6 hours. It would have had to fill the claimant's place on the production line with another paid operative but it would not have been possible to engage someone to work on a one hour off one hour on basis. We concluded that this was not an adjustment that would have been reasonable for the respondent to have made."**

28. Having dealt with and rejected the other proposed reasonable adjustments the Tribunal concluded:

> **"73. The respondent had made a number of adjustments for the claimant. It had allowed some rotation on the production lines, it had allowed the claimant an additional break during her shift; it had considered alternative employment; it had allowed her to work reduced hours. Adjustments were required by the claimant on an ongoing basis. This was not a question of making a short-term adjustment to enable the claimant's back condition to improve. She had been off work for 10 months and her condition had deteriorated. The prognosis was for there to be no improvement in the foreseeable future. In those circumstances we found that there was no failure by the Respondent to make reasonable adjustments and the claimant's claim did not succeed."**

29. I will start with the wider appeal concerning cross-examination. As HHJ Tucker's Order relates, the Claimant's central contention is that her cross-examination of the Night Manager, Mr House was limited to 2½ hours. In its response, the Tribunal stated that this cross-examination time was 4½ hours. The Tribunal stated that the time allocated for the Liability Hearing was four days. There were two witnesses for the Respondent and two for the Claimant. The timetable was discussed with the parties at the beginning of the hearing at 2pm on day 1. The intention was to complete evidence by the end of day 3 to allow time for deliberations and judgment. In the event the evidence was not completed until midday on day 4, with the consequence that judgment was reserved. Cross-examination of the Claimant by the Respondent's representative took longer than anticipated, namely 5½ hours in total, until the

A end of day 2. The Tribunal said that this was due to the Claimant's lengthy answers which strayed onto matters not relevant to the pleaded case.

B 30. The Tribunal stated that the Claimant's cross-examination of Mr House began at 10.15am on day 3. The Claimant had a sheet of questions prepared for her by solicitors who were not representing her at the hearing. However, the Claimant apparently departed from that, asking questions about matters not arising in the pleadings, and making observations and C statements which did not result in a question. The EJ intervened to remind her of the issues in the case and of the need to focus. On the morning of day 3, she told the Claimant that the cross-examination must be completed by mid-afternoon. Prior to the lunch adjournment, the D Judge pointed out the issues not yet covered in cross-examination and advised her to use the lunch adjournment to focus on those points. The Claimant was told that she could have 2 hours after the adjournment, i.e. until 4pm, to complete her cross-examination of Mr House. The E afternoon cross-examination again strayed off the relevant points. After a final reminder 15 minutes earlier, the Judge stopped the cross-examination at 4.05pm. Thus, the total time of the cross-examination was of the order of 4½ hours not 2½ hours.

F 31. The Claimant then said that her cross-examination of the Respondent's second witness, Mr Ward, on day 4 would require 1 hour. In fact, it took 2 hours. Thus, the total time of her cross-examination was 6½ hours in contrast to the 5½ hours of the cross-examination of G Claimant's witnesses.

32. The Tribunal acknowledged that the need for an interpreter at all stages inevitably added H to the length of time of the hearing, but that this had been factored into the time allocation agreed at listing. The Tribunal had taken account of her lack of representation and the fact that

English was not her first language, and tried to assist her to focus on the points in issue. However, that guidance had not been heeded and ultimately it had been necessary to bring the cross-examination to an end.

33. The Claimant states that the cross-examination of her and her witness took about 5½ or 6 hours in total. To that extent there is some agreement. However, she disagrees about the course of events of her own cross-examination of the Respondent witnesses. In her skeleton argument, she states that at the beginning of day 3, the Judge told her that more time had been spent than expected on the Claimant's case, and that therefore cross-examination would be finished by 2pm that day. She agrees that she had a sheet of questions prepared for her by her solicitor, but also had a sheet of her own questions. Between 10.30am and 11.30am she was sent to the public waiting room in order to place all her questions chronologically. This she did. Thus, her cross-examination of Mr House began at 11.30am. She was repeatedly reminded that cross-examination was to finish by 2pm. The cross-examination continued without a break until 2pm and was then completed. In consequence, the cross-examination time was 2½ hours. The afternoon was then used for planning for day 4, on which day her cross-examination of Mr Ward took place.

34. In oral submissions, the Claimant was notably less confident about the timing of these events, suggesting that there was an extended lunch break of about 1 ½ hours with the parties returning at about 2.30pm. However, she was adamant that there was no cross-examination after the lunch break. This would mean that the cross-examination had lasted only about 1½ hours. The discussion after the lunch adjournment had been of the order of 20 minutes, and so the day had ended early.

35. On 30 April 2018, she requested the Tribunal to provide a transcript of the proceedings in order to resolve the matter. The reply, dated 8 May, was that there was currently no requirement for an ET hearing to be recorded and that this hearing had not been recorded. On 8 and 14 May 2018, the Claimant applied to the Registrar of the EAT for the EJ's notes to be supplied, but this application was refused.

36. In any event, the Claimant submits that her cross-examination of Mr House was unfairly limited. In consequence, she was unable to ask any more than half of the questions which had been prepared by the solicitor and all of which were relevant.

37. Mr Harding, who appeared below, was not able to assist from his notes or recollection of the hearing but submitted that the Tribunal's response included time details evidently reflecting their own notes; that it was inherently unlikely that a busy and efficient Tribunal would have finished a day early; and that if it had he would have called his next witness Mr Ward that day rather than on the following day 4. He submits that this was all a matter for the case management discretion of the Judge; and there was no basis to conclude that he had gone outside the generous ambit of his discretion. On the contrary, the Judge had given the Claimant every opportunity to focus her answers and her questions and had afforded her ample time to do so.

38. In considering this ground I have taken full account of the Claimant's lack of representation at the hearing and restricted command of English. Cross-examination is a highly skilled art and it is commonplace and understandable that unrepresented parties have difficulty in focusing their questions on the submission and often lapse into further statements of their

A case. In such a case, the EJ has a demanding task in providing some guidance and advice to the unrepresented parties without conducting or appearing to conduct the case on their behalf.

B 39. It is of course unfortunate that there is a dispute over the length of time to which the Claimant cross-examined Mr House. However, I am quite satisfied that the Claimant's recollection is at fault, and that for the reasons identified by Mr Harding the cross-examination must have continued until just after 4pm on the third day. Given the pressures of conducting her case it is not surprising or a matter of criticism that the Claimant has recalled a shorter period. I see no reason to make any further enquiry of the Tribunal.

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D 40. In any event, there is no possible challenge to the conduct of the hearing by the Tribunal. The Tribunal, principally through the EJ when sitting with Lay Members, is rightly afforded a broad range of discretion in the management of the trial. Having heard the Claimant in this appeal I have no doubt that she did have difficulty in focusing on the relevant points and that the EJ did all she could to try and assist. I see no basis to conclude that there was any unfairness to the Claimant or that the Judge in any way went outside the generous ambit of her discretion in the management of a demanding hearing. Accordingly, this ground of appeal is dismissed.

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41. I turn to the grounds concerning reasonable adjustments. Ground 1 in the Amended Notice of Appeal states:

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> **"The Employment Tribunal erred at paragraph 67 of the Reasons in considering whether the provision of a chair for the Claimant alone amounted to a reasonable adjustment because it failed to consider objectively whether the provision of the chair was reasonable in light of the evidence before it as to the practical consequences of the chair being provided. It is not clear on the evidence how, objectively, the ET concluded that provision of a chair was not practicable (i.e. that there was limited gangway space and the chair would have obstructed the flow of movement etc.)."**

H

42. The Claimant's skeleton argument submits that there was:

> **"No objective evidence before the Tribunal (by way of photographs of the factory floor or an independent risk assessment as to working from a chair on the factory floor) to enable it to determine whether the requested adjustment was practicable."**

and that the Tribunal's conclusion was "*impermissibly subjective*." She points to photographs from the Respondent's own documentation which were before the Tribunal in black and white copies, and submits that this shows "*space to place chairs by the production line and that various employees sat on chairs*." Thus:

> **"The photographic evidence indicated the Respondent's evidence that the provision of a chair was not practicable (i.e. that there was limited gangway space and a chair would have obstructed the flow of movement etc) in the production area was entirely false."**

She submits that the photograph copies were of poor quality, and that the Tribunal wrongly refused to look at colour copies offered by her. In any event it was plain from the black and white copies that the gaps were wide and that there was plenty of space for a chair. The Tribunal had made no reference to the photographs in the Judgment.

43. The Claimant also referred to paragraph 92 of the Judgment which states:

> **"92. We were also concerned that there was no documentary evidence to indicate that the respondent applied its mind prior to dismissal to the question of whether a chair could be provided for the claimant in the manufacturing area. We nevertheless accepted Mr Ward's evidence that he considered the point prior to dismissal and concluded that it would not be possible to put a chair on the production area for the reasons set out at para 53."**

She submitted that in the absence of such documentary evidence there was no basis for the Tribunal to accept the oral evidence of Mr Ward. All in all, there was no objective basis for the Tribunal's conclusion or for its acceptance of the Respondent's evidence.

44. On behalf of the Respondent, Mr Harding submits that the question of whether this was a reasonable adjustment was a pure question of fact for the Tribunal; and that its conclusion that

it was, was based on its acceptance of Mr Ward's evidence on that point (see paragraph 53). There was no basis to conclude that the Tribunal's finding was perverse. On the contrary, it was an unimpeachable finding of fact. The photographs were not a distinct ground of appeal. In any event, they were before the Tribunal; there was no need for a Tribunal to refer to every piece of evidence before it; and they provided no basis to challenge the conclusion in light of all of the evidence. As to paragraph 92 of the Judgment, the Tribunal was entitled to accept oral evidence, notwithstanding the absence of relevant documentary evidence.

45. I turn to the linked ground of appeal, 2. This ground states: "*The ET erred in applying the wrong legal test, considering that a reasonable adjustment has to be "wholly effective in removing the disadvantage"*." The Claimant's argument focuses on paragraph 68 of the Judgment, where the Tribunal stated:

> **"68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not remain seated for more than an hour without suffering severe pain. …"**

46. The Claimant points to the decision in **Noor v Foreign & Commonwealth Office** [2011] ICR 695 cited by her former counsel before HHJ Tucker. In that case, His Honour Judge Richardson stated that:

> **"33. … Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective. …"**

In that case, the Judge was considering the provisions of the **Disability Discrimination Act 1995**. Section 4A(1) of that Act included terms similar to those in section 20(3). However, section 18B(1) provided:

> **"(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -**
>
> > **(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**

...”

47. I drew attention to the fact that the provision in section 18B is not repeated in the **EqA**, and that the guidance is now contained in the statutory **Code of Practice on Employment** [2011]. This includes, in respect of reasonable adjustments:

> **“6.28. The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> ...”

The first identified factor is “*whether taking any particular steps would be effective in preventing the substantial disadvantage*.” *Harvey* observes that the matters listed in sections 18A and B of the **1995 Act** are “*largely reproduced*” in Chapter 6 of the **Code** (see paragraph 399.01). Furthermore, in **General Dynamics Information Technology v Carranza** [2015] ICR 169 His Honour Judge Richardson contrasted section 18B and the **Code** and stated, “*... I have no doubt that the same approach applies to the **Equality Act 2010***” (see paragraph 36).

48. The Claimant submits that the Tribunal’s conclusion on this point was vitiated by its conclusion that the provision of a chair “*would not have been wholly effective in removing the disadvantage*.” In response, Mr Harding in accordance with his duty first pointed in favour of the defendant that the language of the **Code** says “*effective*” rather than “*wholly effective*.” He submits that the Tribunal set out the correct test - i.e. from section 20(3) of the **EqA** - and that the reference in paragraph 68 of the Judgment to “*wholly effective*” is not the application of a legal test but an observation. The paragraph must be read as a whole and in the context of the other paragraphs of the Judgment relating to this issue (see in particular paragraphs 67 and 62). If, which was not accepted, the reference to “*wholly effective*” was the wrong test, the error was immaterial. There was a full and sufficient consideration of the overall question of whether or

not this would have been a reasonable adjustment. That was a question of fact. There was no basis to challenge the Tribunal's decision.

49. I am not persuaded that the Tribunal fell into error on either ground. As to ground 1, the Tribunal's conclusion reflected the evidence which it had heard and accepted (see in particular paragraph 53). That was a question of fact, and there is no basis to conclude that it was perverse.

50. As to the photographs, they were before the Tribunal. It does not follow from the absence of reference they were not taken into account. In any event they provide no basis to challenge the Tribunal's conclusion. As to paragraph 92, the absence of documentary evidence is no bar to its acceptance of the Respondent's oral evidence.

51. As to ground 2, the question for the Tribunal, once satisfied that a PCP put the Claimant at a substantial disadvantage, is whether the employer has failed to take such steps as is reasonable to have to take to avoid the disadvantage (see section 20(3)). As the **Code of Practice** makes clear, the **Act** does not specify any particular factors that should be taken into account; and what is a reasonable step will depend on all the circumstances of the individual case (see paragraphs 6.22 and 6.29). Examples of factors that the **Code** provides (paragraph 6.28), include "*whether taking any particular steps would be effective in preventing the substantial disadvantage*." As a matter of language, that is not quite the same as the former provision of section 18B(1)(a), namely "*the extent to which taking the step would prevent the effect in relation to which the duty is imposed*." However, in the case where the Appellant is unrepresented and the point is being taken by the Appellate Tribunal rather than the Respondent and without full argument, I do not decide the appeal on the basis of that textual distinction.

52. In my judgment, the Tribunal was fully entitled to take the factor of ineffectiveness as but one factor in its overall and multifactorial assessment. That overall assessment involved consideration of a range of factors including both the practicability and the economic viability of the proposed adjustment (see paragraphs 67 to 72). The evidence which it had accepted from the Respondent's witnesses provided an ample basis for its overall conclusion, which in turn was properly set against the broad test of section 20(3).

53. This was all a matter for the Tribunal, as industrial jury, to assess. In my judgment its conclusion is unimpeachable. For all these reasons the appeal must be dismissed.

Appeal No. UKEAT/0078/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 June 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MISS I BROMA — APPELLANT

BAKKAVOR FOODS LTD t/a BAKKAVOR DESSERTS HIGHBRIDGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS INNA BROMA (The Appellant in Person)
For the Respondent	MR SIMON HARDING (of Counsel) Instructed by: SAS Daniels LLP 30 Greek Street Stockport Cheshire SK3 8AD

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was a Latvian national with a limited command of English. At the trial of her claims of unfair dismissal and disability discrimination she acted in person, assisted by an interpreter. The Employment Tribunal ("ET") dismissed her claims. The Claimant appealed on various grounds including two relating to the discrimination claim under section 20 of the **Equality Act 2010** and a complaint that she had been given insufficient time to cross-examine the main witness for the Respondent.

At the Rule 3(10) Hearing, the Judge allowed the two section 20 grounds (as contained in an Amended Notice of Appeal signed by counsel then acting for the Claimant) to proceed to a Full Hearing and stayed the appeal on the cross-examination ground (not contained in the Amended Notice of Appeal) pending the ET's response to the allegation. The ET provided its response, to which the Claimant replied.

At the Full Hearing, the EAT resolved the ambiguity in the Rule 3(10) Order in favour of the Claimant; lifted the stay on the ground relating to the cross-examination and treated it as if contained in the Amended Notice of Appeal. The ET's account of the time afforded for cross-examination was preferred. The EAT was satisfied that there was no basis to challenge the case management decision as to the allocation of time.

As to the section 20 appeal, there was no basis to challenge the ET's conclusion of fact: **Noor v Foreign & Commonwealth Office** [2011] ICR 695, **General Dynamics Information**

Technology Ltd v Carranza [2015] ICR 169, **Code of Practice Employment** [2011] Chapter 6, considered.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant (Miss Broma) against the Decision of the Employment Tribunal ("ET") at Bristol (Employment Judge ("EJ") Mulvaney and Members) sent to the parties on 2 June 2017, dismissing the Claimant's claims against the Respondent employer of unfair dismissal and disability discrimination under sections 13, 15 and 20 of the **Equality Act 2010** ("EqA").

2. I must first deal with a procedural question as to the ambit of the appeal. Following the Rule 3(10) Hearing on 7 March 2018, Her Honour Judge Tucker made an Order which by paragraph 4 allowed two grounds of appeal on the claim under section 20 to go forward to this Full Hearing subject to reconsideration by Counsel then appearing for the Claimant as to the precise terms of one of those grounds. Counsel's subsequent Amended Notice of Appeal was limited to those two grounds as revised. The Order then gave leave to amend in those terms and continued "all other grounds of appeal having been dismissed."

3. However, paragraph 2 of the Order of 7 March made provision in respect of a further and wider ground of appeal, namely that the ET had given her insufficient time to cross-examine the witnesses for the Respondent.

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6. Thus, on the face of the Order of 7 March there is ambiguity as to the status of the further ground. However, HHJ Tucker's reasons for allowing the appeal to proceed to a Full Hearing identified two exceptions to her conclusion that there were no reasonable grounds for appeal, namely the section 20 grounds and the cross-examination ground. In the circumstances, counsel for the Respondent today rightly conceded that the ambiguity in the Order should be construed in favour of the Claimant, namely on the basis that permission was given to pursue the appeal on the further ground.

7. The Respondent is a food manufacturer producing desserts for major retailers. It employs 500 people at its Highbridge site on a rolling four-shift programme, approximately 35 of whom work on the night shift. The Claimant was employed as a night shift Production Operative reporting to Mr Jordan House, the Night Manager, from February 2011 until her dismissal on grounds of capability on 2 November 2015. She has unfortunately suffered from back pain early on in her employment and the condition deteriorated during her employment.

8. By her ET1 dated 19 February 2016 she brought claims of unfair dismissal and disability discrimination. The Respondent conceded that the Claimant's back condition is a disability as defined under the **EqA**, but denied liability on any basis.

9. In respect of the claim for reasonable adjustments, the Claimant asserted that the Respondent applied seven provisions, criteria or practices ("PCPs") including:

(a) the requirement to stand while working,

(b) no rotation of machinery, and

(c) no chairs were permitted on the factory floor.

10. She further contended that these requirements placed her at a substantial disadvantage because of her disability, causing her to be unable to work and leading to her dismissal. She identified six adjustments that could have been made, including sitting during the work and having a chair on the shop floor.

11. The Tribunal made the following relevant findings of fact. The Claimant is of Latvian origin and has limited spoken English. Her primary languages are Latvian and Russian. She required an interpreter at the hearing; here, Russian, and below, Latvian. I am most grateful for the assistance provided by the interpreter today.

12. The Claimant worked on the night shift production line in its "low risk" area from the commencement of her employment. There were four production lines on that night shift. On average five operatives worked on each line, standing next to it. All lines bar one, the Rademaker line, required operators to work standing next to the line in relatively static positions throughout their shifts. The Claimant worked a 12-hour shift from 6pm to 6am, generally with two 30-minute breaks, and additional short breaks for bathroom visits and to get a drink.

13. Until February 2012 she had generally worked on the Rademaker line, which allowed her some flexibility of movement, but she was then moved to the manual line. On 12 March 2012 the Claimant wrote to the Respondent about the adverse impact of this move on her back pain. The Judgment then records a lengthy history of referrals to the Respondent's Occupational Health Department and consequential assessment reports; reports from her GP including recommendations for dealing with the problem of work; and meetings and discussions between the Claimant and Respondent as to whether and if so how her condition could be accommodated.

14. For a period, she worked again on the Rademaker line and found that that particular line provided sufficient variety of movement to avoid back pain. The Claimant had successive absences of work because of her back pain, including a week in July 2012, 25 September 2013 until 17 January 2014, and finally from 1 December 2014 until her dismissal on 25 September 2015. This termination was the culmination of the various stages of the Respondent's long-term absence procedure.

15. The possibility of the provision of a chair was first raised in December 2013 by Orthopaedic Physiotherapy Practitioner Mr Gill, giving the results of an MRI scan. He stated that:

> **"it would be appropriate if her work were able to support her with better seating to allow her to sit in a more upright position ideally with regular breaks so she is able to stand and move around without having to sit statically for more than 20-30 minutes at a time, even if this is just a 1-2 minute movement based break until physiotherapy and the root block hopefully address some of her symptoms." (See paragraph 30 of the Judgment)**

16. The Respondent had previously in February 2013 carried out a risk assessment as to whether Production Operatives could be allowed to sit whilst doing their work on the lines. The conclusion was that the introduction of chairs into the production areas would cause

congestion, increasing the risk of accidents and blocking emergency escape routes. Furthermore, many tasks on the line would not be compatible with sitting down. In the light of this assessment, the Respondent did not consider that seating could be provided for the Claimant in the production area. Furthermore, Mr Gill's report indicated that remaining seated for extended periods caused her as much back pain as remaining standing for long periods, so the provision of a chair "*even if it had been possible, would therefore not have been a complete solution*" (see paragraph 31 of the Judgment).

17. The Tribunal found that in 2014 adjustments were made to accommodate the Claimant in her role, namely a period of working reduced hours; provision of an extra extended break and further short breaks to ease her back; and rotation around tasks on the production lines to the extent this was possible without disrupting the process. However, the Tribunal noted that "*whilst such adjustments were feasible in the short term, the claimant's condition was long term*" (see paragraph 35).

18. The Tribunal accepted the evidence that in 2014 the loss of major contracts with Sainsbury's and the Co-Op had led to a downturn in profitability and consequent reductions in numbers of staff working on the lines. This in turn impeded the adjustment of rotation of tasks. Thus, all staff on the line had to be in place to keep the line going; so that the line would have to be stopped if an operative took a break. As to the Rademaker line, staff on that line had to be able to do all of the tasks which it required. These included tasks the Claimant could not do, for example crumb scooping and stamping.

19. The Tribunal found that "*the respondent allowed such movement on the production line as was compatible with not causing undue interruption to the production process and within the limitations on the claimant's capacity to lift*" (see paragraph 36).

20. Returning to the issue of a chair, on 20 March 2015 the HR Manager, Sue Cox, wrote to the Claimant that it could not accommodate adjustments recommended by her GP for reasons which included "*We are not able to provide seats within the manufacturing areas due to health and safety and hygiene concerns*" (see paragraph 43).

21. The decision to terminate the Claimant's employment was made by the Respondent's Operations Manager, Mr Anthony Ward. His letter of termination referred to the adjustments which had been made; and to those which had been considered but were not feasible. As to a chair, "*We are unable to accommodate your request to have a chair on the production line as this is in breach of health and safety and the food hygiene standards*."

22. In his evidence to the Tribunal in this case, Mr Ward said that:

> **"53. … he had considered in his own mind whether it would be possible to allow one chair into the production area and had concluded that it would not. The gaps between the four production lines were narrow and were required to accommodate people walking and large tubs of ingredients being wheeled up and down them. A chair would obstruct that flow of movement and obstruct emergency exits. Additionally the production lines had no space under them so that being seated next to them with legs against the line would mean that the work on the line would be difficult to reach. The height of the lines varied but most lines were of kitchen worktop height so an ordinary chair would not be the correct height. Most of the work on the line required some movement to fetch goods so that being seated for extended lengths of time was not feasible. …"**

23. The Tribunal accepted this evidence and concluded, in the same paragraph: "*We found as a fact that provision of seating at the production line was not consistent with health and safety or with the efficient running of the line*."

24. The Tribunal set out the relevant provisions of section 20, namely the duty on an employer:

> **(3)…** ***where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it [is] reasonable to take to avoid the disadvantage*****."**

25. In paragraph 59 the Judgment identified the PCPs including those lettered (a) to (c) and already cited. It held that these, but not the other identified PCPs, put the Claimant at a substantial disadvantage. As to (a) and (c), concerning standing and no chairs, this was:

> **"61. … because she was unable to stand continuously for periods of more than one hour and could not take seated breaks in the manufacturing area or work in a seated position. Ultimately this meant that the claimant could no longer work for the respondent and led to her dismissal."**

26. As to (b), concerning the absence of rotation, namely a provision that Production Operatives remain working on one production line without rotation, it found there to be a disadvantage but concluded that increasing the level of rotation offered to the Claimant was not a reasonable adjustment that could have been made by the Respondent. There was no appeal from that decision.

27. The remaining question was therefore whether it was reasonable for the Respondent to take the following steps to avoid disadvantage, namely sitting during work and having a chair on the shop floor. As to this, the Tribunal concluded:

> **"67. We considered whether the respondent should reasonably have allowed the claimant to sit whilst doing her work. We concluded that such an adjustment would not have been practical in the production line environment where the claimant worked. There was limited gangway space between the production lines along which operatives had to be able to walk and to push large wheeled tubs. A chair would have obstructed the flow of movement. This would have impacted on production and on health and safety creating trip hazards and obstructing access to fire doors as identified in the risk assessment. In addition, there was no space for legs under the production lines which would have meant that the claimant would have been awkwardly positioned against the line having to stretch her arms across her legs to reach the line. The lines were not all the same height so one chair would not have suited all lines and in order to accommodate the claimant's need for rotation, the chair would have to have been moved from line to line.**
>
> **68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not**

> **remain seated for more than an hour without suffering severe pain. She would then need to stand for an hour at which point the chair would have been superfluous and in the way. The claimant's impact statement indicated that movement whilst in a seated position could also cause back pain and we were not satisfied that this adjustment would have enabled the claimant to carry out her duties on a 12 hour shift.**
>
> **…**
>
> **72. We the considered whether a chair could have been provided on the shop floor. We have considered this as a separate adjustment to that of allowing the claimant to sit whilst working and have considered whether the claimant could have been with a chair to rest on for an hour after having worked standing for an hour. We concluded that even if it had been feasible to put a chair on the shop floor where it would not cause an obstruction, it was not economically viable for the respondent to pay the claimant for a 12 hour shift for which she only worked 6 hours. It would have had to fill the claimant's place on the production line with another paid operative but it would not have been possible to engage someone to work on a one hour off one hour on basis. We concluded that this was not an adjustment that would have been reasonable for the respondent to have made."**

28. Having dealt with and rejected the other proposed reasonable adjustments the Tribunal concluded:

> **"73. The respondent had made a number of adjustments for the claimant. It had allowed some rotation on the production lines, it had allowed the claimant an additional break during her shift; it had considered alternative employment; it had allowed her to work reduced hours. Adjustments were required by the claimant on an ongoing basis. This was not a question of making a short-term adjustment to enable the claimant's back condition to improve. She had been off work for 10 months and her condition had deteriorated. The prognosis was for there to be no improvement in the foreseeable future. In those circumstances we found that there was no failure by the Respondent to make reasonable adjustments and the claimant's claim did not succeed."**

29. I will start with the wider appeal concerning cross-examination. As HHJ Tucker's Order relates, the Claimant's central contention is that her cross-examination of the Night Manager, Mr House was limited to 2½ hours. In its response, the Tribunal stated that this cross-examination time was 4½ hours. The Tribunal stated that the time allocated for the Liability Hearing was four days. There were two witnesses for the Respondent and two for the Claimant. The timetable was discussed with the parties at the beginning of the hearing at 2pm on day 1. The intention was to complete evidence by the end of day 3 to allow time for deliberations and judgment. In the event the evidence was not completed until midday on day 4, with the consequence that judgment was reserved. Cross-examination of the Claimant by the Respondent's representative took longer than anticipated, namely 5½ hours in total, until the

A end of day 2. The Tribunal said that this was due to the Claimant's lengthy answers which strayed onto matters not relevant to the pleaded case.

B 30. The Tribunal stated that the Claimant's cross-examination of Mr House began at 10.15am on day 3. The Claimant had a sheet of questions prepared for her by solicitors who were not representing her at the hearing. However, the Claimant apparently departed from that, asking questions about matters not arising in the pleadings, and making observations and C statements which did not result in a question. The EJ intervened to remind her of the issues in the case and of the need to focus. On the morning of day 3, she told the Claimant that the cross-examination must be completed by mid-afternoon. Prior to the lunch adjournment, the D Judge pointed out the issues not yet covered in cross-examination and advised her to use the lunch adjournment to focus on those points. The Claimant was told that she could have 2 hours after the adjournment, i.e. until 4pm, to complete her cross-examination of Mr House. The E afternoon cross-examination again strayed off the relevant points. After a final reminder 15 minutes earlier, the Judge stopped the cross-examination at 4.05pm. Thus, the total time of the cross-examination was of the order of 4½ hours not 2½ hours.

F 31. The Claimant then said that her cross-examination of the Respondent's second witness, Mr Ward, on day 4 would require 1 hour. In fact, it took 2 hours. Thus, the total time of her cross-examination was 6½ hours in contrast to the 5½ hours of the cross-examination of G Claimant's witnesses.

32. The Tribunal acknowledged that the need for an interpreter at all stages inevitably added H to the length of time of the hearing, but that this had been factored into the time allocation agreed at listing. The Tribunal had taken account of her lack of representation and the fact that

English was not her first language, and tried to assist her to focus on the points in issue. However, that guidance had not been heeded and ultimately it had been necessary to bring the cross-examination to an end.

33. The Claimant states that the cross-examination of her and her witness took about 5½ or 6 hours in total. To that extent there is some agreement. However, she disagrees about the course of events of her own cross-examination of the Respondent witnesses. In her skeleton argument, she states that at the beginning of day 3, the Judge told her that more time had been spent than expected on the Claimant's case, and that therefore cross-examination would be finished by 2pm that day. She agrees that she had a sheet of questions prepared for her by her solicitor, but also had a sheet of her own questions. Between 10.30am and 11.30am she was sent to the public waiting room in order to place all her questions chronologically. This she did. Thus, her cross-examination of Mr House began at 11.30am. She was repeatedly reminded that cross-examination was to finish by 2pm. The cross-examination continued without a break until 2pm and was then completed. In consequence, the cross-examination time was 2½ hours. The afternoon was then used for planning for day 4, on which day her cross-examination of Mr Ward took place.

34. In oral submissions, the Claimant was notably less confident about the timing of these events, suggesting that there was an extended lunch break of about 1 ½ hours with the parties returning at about 2.30pm. However, she was adamant that there was no cross-examination after the lunch break. This would mean that the cross-examination had lasted only about 1½ hours. The discussion after the lunch adjournment had been of the order of 20 minutes, and so the day had ended early.

35. On 30 April 2018, she requested the Tribunal to provide a transcript of the proceedings in order to resolve the matter. The reply, dated 8 May, was that there was currently no requirement for an ET hearing to be recorded and that this hearing had not been recorded. On 8 and 14 May 2018, the Claimant applied to the Registrar of the EAT for the EJ's notes to be supplied, but this application was refused.

36. In any event, the Claimant submits that her cross-examination of Mr House was unfairly limited. In consequence, she was unable to ask any more than half of the questions which had been prepared by the solicitor and all of which were relevant.

37. Mr Harding, who appeared below, was not able to assist from his notes or recollection of the hearing but submitted that the Tribunal's response included time details evidently reflecting their own notes; that it was inherently unlikely that a busy and efficient Tribunal would have finished a day early; and that if it had he would have called his next witness Mr Ward that day rather than on the following day 4. He submits that this was all a matter for the case management discretion of the Judge; and there was no basis to conclude that he had gone outside the generous ambit of his discretion. On the contrary, the Judge had given the Claimant every opportunity to focus her answers and her questions and had afforded her ample time to do so.

38. In considering this ground I have taken full account of the Claimant's lack of representation at the hearing and restricted command of English. Cross-examination is a highly skilled art and it is commonplace and understandable that unrepresented parties have difficulty in focusing their questions on the submission and often lapse into further statements of their

A case. In such a case, the EJ has a demanding task in providing some guidance and advice to the unrepresented parties without conducting or appearing to conduct the case on their behalf.

B 39. It is of course unfortunate that there is a dispute over the length of time to which the Claimant cross-examined Mr House. However, I am quite satisfied that the Claimant's recollection is at fault, and that for the reasons identified by Mr Harding the cross-examination must have continued until just after 4pm on the third day. Given the pressures of conducting her case it is not surprising or a matter of criticism that the Claimant has recalled a shorter period. I see no reason to make any further enquiry of the Tribunal.

C

D 40. In any event, there is no possible challenge to the conduct of the hearing by the Tribunal. The Tribunal, principally through the EJ when sitting with Lay Members, is rightly afforded a broad range of discretion in the management of the trial. Having heard the Claimant in this appeal I have no doubt that she did have difficulty in focusing on the relevant points and that the EJ did all she could to try and assist. I see no basis to conclude that there was any unfairness to the Claimant or that the Judge in any way went outside the generous ambit of her discretion in the management of a demanding hearing. Accordingly, this ground of appeal is dismissed.

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41. I turn to the grounds concerning reasonable adjustments. Ground 1 in the Amended Notice of Appeal states:

G

> **"The Employment Tribunal erred at paragraph 67 of the Reasons in considering whether the provision of a chair for the Claimant alone amounted to a reasonable adjustment because it failed to consider objectively whether the provision of the chair was reasonable in light of the evidence before it as to the practical consequences of the chair being provided. It is not clear on the evidence how, objectively, the ET concluded that provision of a chair was not practicable (i.e. that there was limited gangway space and the chair would have obstructed the flow of movement etc.)."**

H

42. The Claimant's skeleton argument submits that there was:

> **"No objective evidence before the Tribunal (by way of photographs of the factory floor or an independent risk assessment as to working from a chair on the factory floor) to enable it to determine whether the requested adjustment was practicable."**

and that the Tribunal's conclusion was "*impermissibly subjective*." She points to photographs from the Respondent's own documentation which were before the Tribunal in black and white copies, and submits that this shows "*space to place chairs by the production line and that various employees sat on chairs*." Thus:

> **"The photographic evidence indicated the Respondent's evidence that the provision of a chair was not practicable (i.e. that there was limited gangway space and a chair would have obstructed the flow of movement etc) in the production area was entirely false."**

She submits that the photograph copies were of poor quality, and that the Tribunal wrongly refused to look at colour copies offered by her. In any event it was plain from the black and white copies that the gaps were wide and that there was plenty of space for a chair. The Tribunal had made no reference to the photographs in the Judgment.

43. The Claimant also referred to paragraph 92 of the Judgment which states:

> **"92. We were also concerned that there was no documentary evidence to indicate that the respondent applied its mind prior to dismissal to the question of whether a chair could be provided for the claimant in the manufacturing area. We nevertheless accepted Mr Ward's evidence that he considered the point prior to dismissal and concluded that it would not be possible to put a chair on the production area for the reasons set out at para 53."**

She submitted that in the absence of such documentary evidence there was no basis for the Tribunal to accept the oral evidence of Mr Ward. All in all, there was no objective basis for the Tribunal's conclusion or for its acceptance of the Respondent's evidence.

44. On behalf of the Respondent, Mr Harding submits that the question of whether this was a reasonable adjustment was a pure question of fact for the Tribunal; and that its conclusion that

it was, was based on its acceptance of Mr Ward's evidence on that point (see paragraph 53). There was no basis to conclude that the Tribunal's finding was perverse. On the contrary, it was an unimpeachable finding of fact. The photographs were not a distinct ground of appeal. In any event, they were before the Tribunal; there was no need for a Tribunal to refer to every piece of evidence before it; and they provided no basis to challenge the conclusion in light of all of the evidence. As to paragraph 92 of the Judgment, the Tribunal was entitled to accept oral evidence, notwithstanding the absence of relevant documentary evidence.

45. I turn to the linked ground of appeal, 2. This ground states: "*The ET erred in applying the wrong legal test, considering that a reasonable adjustment has to be "wholly effective in removing the disadvantage"*." The Claimant's argument focuses on paragraph 68 of the Judgment, where the Tribunal stated:

> **"68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not remain seated for more than an hour without suffering severe pain. …"**

46. The Claimant points to the decision in **Noor v Foreign & Commonwealth Office** [2011] ICR 695 cited by her former counsel before HHJ Tucker. In that case, His Honour Judge Richardson stated that:

> **"33. … Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective. …"**

In that case, the Judge was considering the provisions of the **Disability Discrimination Act 1995**. Section 4A(1) of that Act included terms similar to those in section 20(3). However, section 18B(1) provided:

> **"(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -**
>
> > **(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**

...”

47. I drew attention to the fact that the provision in section 18B is not repeated in the **EqA**, and that the guidance is now contained in the statutory **Code of Practice on Employment** [2011]. This includes, in respect of reasonable adjustments:

> **“6.28. The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> ...”

The first identified factor is “*whether taking any particular steps would be effective in preventing the substantial disadvantage*.” *Harvey* observes that the matters listed in sections 18A and B of the **1995 Act** are “*largely reproduced*” in Chapter 6 of the **Code** (see paragraph 399.01). Furthermore, in **General Dynamics Information Technology v Carranza** [2015] ICR 169 His Honour Judge Richardson contrasted section 18B and the **Code** and stated, “*... I have no doubt that the same approach applies to the **Equality Act 2010***” (see paragraph 36).

48. The Claimant submits that the Tribunal’s conclusion on this point was vitiated by its conclusion that the provision of a chair “*would not have been wholly effective in removing the disadvantage*.” In response, Mr Harding in accordance with his duty first pointed in favour of the defendant that the language of the **Code** says “*effective*” rather than “*wholly effective*.” He submits that the Tribunal set out the correct test - i.e. from section 20(3) of the **EqA** - and that the reference in paragraph 68 of the Judgment to “*wholly effective*” is not the application of a legal test but an observation. The paragraph must be read as a whole and in the context of the other paragraphs of the Judgment relating to this issue (see in particular paragraphs 67 and 62). If, which was not accepted, the reference to “*wholly effective*” was the wrong test, the error was immaterial. There was a full and sufficient consideration of the overall question of whether or

not this would have been a reasonable adjustment. That was a question of fact. There was no basis to challenge the Tribunal's decision.

49. I am not persuaded that the Tribunal fell into error on either ground. As to ground 1, the Tribunal's conclusion reflected the evidence which it had heard and accepted (see in particular paragraph 53). That was a question of fact, and there is no basis to conclude that it was perverse.

50. As to the photographs, they were before the Tribunal. It does not follow from the absence of reference they were not taken into account. In any event they provide no basis to challenge the Tribunal's conclusion. As to paragraph 92, the absence of documentary evidence is no bar to its acceptance of the Respondent's oral evidence.

51. As to ground 2, the question for the Tribunal, once satisfied that a PCP put the Claimant at a substantial disadvantage, is whether the employer has failed to take such steps as is reasonable to have to take to avoid the disadvantage (see section 20(3)). As the **Code of Practice** makes clear, the **Act** does not specify any particular factors that should be taken into account; and what is a reasonable step will depend on all the circumstances of the individual case (see paragraphs 6.22 and 6.29). Examples of factors that the **Code** provides (paragraph 6.28), include "*whether taking any particular steps would be effective in preventing the substantial disadvantage*." As a matter of language, that is not quite the same as the former provision of section 18B(1)(a), namely "*the extent to which taking the step would prevent the effect in relation to which the duty is imposed*." However, in the case where the Appellant is unrepresented and the point is being taken by the Appellate Tribunal rather than the Respondent and without full argument, I do not decide the appeal on the basis of that textual distinction.

52. In my judgment, the Tribunal was fully entitled to take the factor of ineffectiveness as but one factor in its overall and multifactorial assessment. That overall assessment involved consideration of a range of factors including both the practicability and the economic viability of the proposed adjustment (see paragraphs 67 to 72). The evidence which it had accepted from the Respondent's witnesses provided an ample basis for its overall conclusion, which in turn was properly set against the broad test of section 20(3).

53. This was all a matter for the Tribunal, as industrial jury, to assess. In my judgment its conclusion is unimpeachable. For all these reasons the appeal must be dismissed.

Appeal No. UKEAT/0078/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 June 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MISS I BROMA — APPELLANT

BAKKAVOR FOODS LTD t/a BAKKAVOR DESSERTS HIGHBRIDGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS INNA BROMA (The Appellant in Person)
For the Respondent	MR SIMON HARDING (of Counsel) Instructed by: SAS Daniels LLP 30 Greek Street Stockport Cheshire SK3 8AD

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was a Latvian national with a limited command of English. At the trial of her claims of unfair dismissal and disability discrimination she acted in person, assisted by an interpreter. The Employment Tribunal ("ET") dismissed her claims. The Claimant appealed on various grounds including two relating to the discrimination claim under section 20 of the **Equality Act 2010** and a complaint that she had been given insufficient time to cross-examine the main witness for the Respondent.

At the Rule 3(10) Hearing, the Judge allowed the two section 20 grounds (as contained in an Amended Notice of Appeal signed by counsel then acting for the Claimant) to proceed to a Full Hearing and stayed the appeal on the cross-examination ground (not contained in the Amended Notice of Appeal) pending the ET's response to the allegation. The ET provided its response, to which the Claimant replied.

At the Full Hearing, the EAT resolved the ambiguity in the Rule 3(10) Order in favour of the Claimant; lifted the stay on the ground relating to the cross-examination and treated it as if contained in the Amended Notice of Appeal. The ET's account of the time afforded for cross-examination was preferred. The EAT was satisfied that there was no basis to challenge the case management decision as to the allocation of time.

As to the section 20 appeal, there was no basis to challenge the ET's conclusion of fact: **Noor v Foreign & Commonwealth Office** [2011] ICR 695, **General Dynamics Information**

Technology Ltd v Carranza [2015] ICR 169, **Code of Practice Employment** [2011] Chapter 6, considered.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant (Miss Broma) against the Decision of the Employment Tribunal ("ET") at Bristol (Employment Judge ("EJ") Mulvaney and Members) sent to the parties on 2 June 2017, dismissing the Claimant's claims against the Respondent employer of unfair dismissal and disability discrimination under sections 13, 15 and 20 of the **Equality Act 2010** ("EqA").

2. I must first deal with a procedural question as to the ambit of the appeal. Following the Rule 3(10) Hearing on 7 March 2018, Her Honour Judge Tucker made an Order which by paragraph 4 allowed two grounds of appeal on the claim under section 20 to go forward to this Full Hearing subject to reconsideration by Counsel then appearing for the Claimant as to the precise terms of one of those grounds. Counsel's subsequent Amended Notice of Appeal was limited to those two grounds as revised. The Order then gave leave to amend in those terms and continued "all other grounds of appeal having been dismissed."

3. However, paragraph 2 of the Order of 7 March made provision in respect of a further and wider ground of appeal, namely that the ET had given her insufficient time to cross-examine the witnesses for the Respondent.

4. Paragraph 3 of the Order requested a response from the ET "*if practicable within 28 days*." Paragraph 4 ordered the appeal to be set down "*for a full hearing on the Amended Ground of Appeal only*" on the first available date after 35 days.

5. In accordance with HHJ Tucker's request, the ET on 1 May 2018 provided a detailed response to the question posed. The Claimant then set out her observations in two documents, respectively dated 8 and 14 May 2018, each headed "*Appeal to EAT for the purpose of resolving disagreement*."

6. Thus, on the face of the Order of 7 March there is ambiguity as to the status of the further ground. However, HHJ Tucker's reasons for allowing the appeal to proceed to a Full Hearing identified two exceptions to her conclusion that there were no reasonable grounds for appeal, namely the section 20 grounds and the cross-examination ground. In the circumstances, counsel for the Respondent today rightly conceded that the ambiguity in the Order should be construed in favour of the Claimant, namely on the basis that permission was given to pursue the appeal on the further ground.

7. The Respondent is a food manufacturer producing desserts for major retailers. It employs 500 people at its Highbridge site on a rolling four-shift programme, approximately 35 of whom work on the night shift. The Claimant was employed as a night shift Production Operative reporting to Mr Jordan House, the Night Manager, from February 2011 until her dismissal on grounds of capability on 2 November 2015. She has unfortunately suffered from back pain early on in her employment and the condition deteriorated during her employment.

8. By her ET1 dated 19 February 2016 she brought claims of unfair dismissal and disability discrimination. The Respondent conceded that the Claimant's back condition is a disability as defined under the **EqA**, but denied liability on any basis.

9. In respect of the claim for reasonable adjustments, the Claimant asserted that the Respondent applied seven provisions, criteria or practices ("PCPs") including:

(a) the requirement to stand while working,

(b) no rotation of machinery, and

(c) no chairs were permitted on the factory floor.

10. She further contended that these requirements placed her at a substantial disadvantage because of her disability, causing her to be unable to work and leading to her dismissal. She identified six adjustments that could have been made, including sitting during the work and having a chair on the shop floor.

11. The Tribunal made the following relevant findings of fact. The Claimant is of Latvian origin and has limited spoken English. Her primary languages are Latvian and Russian. She required an interpreter at the hearing; here, Russian, and below, Latvian. I am most grateful for the assistance provided by the interpreter today.

12. The Claimant worked on the night shift production line in its "low risk" area from the commencement of her employment. There were four production lines on that night shift. On average five operatives worked on each line, standing next to it. All lines bar one, the Rademaker line, required operators to work standing next to the line in relatively static positions throughout their shifts. The Claimant worked a 12-hour shift from 6pm to 6am, generally with two 30-minute breaks, and additional short breaks for bathroom visits and to get a drink.

13. Until February 2012 she had generally worked on the Rademaker line, which allowed her some flexibility of movement, but she was then moved to the manual line. On 12 March 2012 the Claimant wrote to the Respondent about the adverse impact of this move on her back pain. The Judgment then records a lengthy history of referrals to the Respondent's Occupational Health Department and consequential assessment reports; reports from her GP including recommendations for dealing with the problem of work; and meetings and discussions between the Claimant and Respondent as to whether and if so how her condition could be accommodated.

14. For a period, she worked again on the Rademaker line and found that that particular line provided sufficient variety of movement to avoid back pain. The Claimant had successive absences of work because of her back pain, including a week in July 2012, 25 September 2013 until 17 January 2014, and finally from 1 December 2014 until her dismissal on 25 September 2015. This termination was the culmination of the various stages of the Respondent's long-term absence procedure.

15. The possibility of the provision of a chair was first raised in December 2013 by Orthopaedic Physiotherapy Practitioner Mr Gill, giving the results of an MRI scan. He stated that:

> **"it would be appropriate if her work were able to support her with better seating to allow her to sit in a more upright position ideally with regular breaks so she is able to stand and move around without having to sit statically for more than 20-30 minutes at a time, even if this is just a 1-2 minute movement based break until physiotherapy and the root block hopefully address some of her symptoms." (See paragraph 30 of the Judgment)**

16. The Respondent had previously in February 2013 carried out a risk assessment as to whether Production Operatives could be allowed to sit whilst doing their work on the lines. The conclusion was that the introduction of chairs into the production areas would cause

congestion, increasing the risk of accidents and blocking emergency escape routes. Furthermore, many tasks on the line would not be compatible with sitting down. In the light of this assessment, the Respondent did not consider that seating could be provided for the Claimant in the production area. Furthermore, Mr Gill's report indicated that remaining seated for extended periods caused her as much back pain as remaining standing for long periods, so the provision of a chair "*even if it had been possible, would therefore not have been a complete solution*" (see paragraph 31 of the Judgment).

17. The Tribunal found that in 2014 adjustments were made to accommodate the Claimant in her role, namely a period of working reduced hours; provision of an extra extended break and further short breaks to ease her back; and rotation around tasks on the production lines to the extent this was possible without disrupting the process. However, the Tribunal noted that "*whilst such adjustments were feasible in the short term, the claimant's condition was long term*" (see paragraph 35).

18. The Tribunal accepted the evidence that in 2014 the loss of major contracts with Sainsbury's and the Co-Op had led to a downturn in profitability and consequent reductions in numbers of staff working on the lines. This in turn impeded the adjustment of rotation of tasks. Thus, all staff on the line had to be in place to keep the line going; so that the line would have to be stopped if an operative took a break. As to the Rademaker line, staff on that line had to be able to do all of the tasks which it required. These included tasks the Claimant could not do, for example crumb scooping and stamping.

19. The Tribunal found that "*the respondent allowed such movement on the production line as was compatible with not causing undue interruption to the production process and within the limitations on the claimant's capacity to lift*" (see paragraph 36).

20. Returning to the issue of a chair, on 20 March 2015 the HR Manager, Sue Cox, wrote to the Claimant that it could not accommodate adjustments recommended by her GP for reasons which included "*We are not able to provide seats within the manufacturing areas due to health and safety and hygiene concerns*" (see paragraph 43).

21. The decision to terminate the Claimant's employment was made by the Respondent's Operations Manager, Mr Anthony Ward. His letter of termination referred to the adjustments which had been made; and to those which had been considered but were not feasible. As to a chair, "*We are unable to accommodate your request to have a chair on the production line as this is in breach of health and safety and the food hygiene standards*."

22. In his evidence to the Tribunal in this case, Mr Ward said that:

> **"53. … he had considered in his own mind whether it would be possible to allow one chair into the production area and had concluded that it would not. The gaps between the four production lines were narrow and were required to accommodate people walking and large tubs of ingredients being wheeled up and down them. A chair would obstruct that flow of movement and obstruct emergency exits. Additionally the production lines had no space under them so that being seated next to them with legs against the line would mean that the work on the line would be difficult to reach. The height of the lines varied but most lines were of kitchen worktop height so an ordinary chair would not be the correct height. Most of the work on the line required some movement to fetch goods so that being seated for extended lengths of time was not feasible. …"**

23. The Tribunal accepted this evidence and concluded, in the same paragraph: "*We found as a fact that provision of seating at the production line was not consistent with health and safety or with the efficient running of the line*."

24. The Tribunal set out the relevant provisions of section 20, namely the duty on an employer:

> **(3)…** ***where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it [is] reasonable to take to avoid the disadvantage*****."**

25. In paragraph 59 the Judgment identified the PCPs including those lettered (a) to (c) and already cited. It held that these, but not the other identified PCPs, put the Claimant at a substantial disadvantage. As to (a) and (c), concerning standing and no chairs, this was:

> **"61. … because she was unable to stand continuously for periods of more than one hour and could not take seated breaks in the manufacturing area or work in a seated position. Ultimately this meant that the claimant could no longer work for the respondent and led to her dismissal."**

26. As to (b), concerning the absence of rotation, namely a provision that Production Operatives remain working on one production line without rotation, it found there to be a disadvantage but concluded that increasing the level of rotation offered to the Claimant was not a reasonable adjustment that could have been made by the Respondent. There was no appeal from that decision.

27. The remaining question was therefore whether it was reasonable for the Respondent to take the following steps to avoid disadvantage, namely sitting during work and having a chair on the shop floor. As to this, the Tribunal concluded:

> **"67. We considered whether the respondent should reasonably have allowed the claimant to sit whilst doing her work. We concluded that such an adjustment would not have been practical in the production line environment where the claimant worked. There was limited gangway space between the production lines along which operatives had to be able to walk and to push large wheeled tubs. A chair would have obstructed the flow of movement. This would have impacted on production and on health and safety creating trip hazards and obstructing access to fire doors as identified in the risk assessment. In addition, there was no space for legs under the production lines which would have meant that the claimant would have been awkwardly positioned against the line having to stretch her arms across her legs to reach the line. The lines were not all the same height so one chair would not have suited all lines and in order to accommodate the claimant's need for rotation, the chair would have to have been moved from line to line.**
>
> **68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not**

> **remain seated for more than an hour without suffering severe pain. She would then need to stand for an hour at which point the chair would have been superfluous and in the way. The claimant's impact statement indicated that movement whilst in a seated position could also cause back pain and we were not satisfied that this adjustment would have enabled the claimant to carry out her duties on a 12 hour shift.**
>
> **…**
>
> **72. We the considered whether a chair could have been provided on the shop floor. We have considered this as a separate adjustment to that of allowing the claimant to sit whilst working and have considered whether the claimant could have been with a chair to rest on for an hour after having worked standing for an hour. We concluded that even if it had been feasible to put a chair on the shop floor where it would not cause an obstruction, it was not economically viable for the respondent to pay the claimant for a 12 hour shift for which she only worked 6 hours. It would have had to fill the claimant's place on the production line with another paid operative but it would not have been possible to engage someone to work on a one hour off one hour on basis. We concluded that this was not an adjustment that would have been reasonable for the respondent to have made."**

28. Having dealt with and rejected the other proposed reasonable adjustments the Tribunal concluded:

> **"73. The respondent had made a number of adjustments for the claimant. It had allowed some rotation on the production lines, it had allowed the claimant an additional break during her shift; it had considered alternative employment; it had allowed her to work reduced hours. Adjustments were required by the claimant on an ongoing basis. This was not a question of making a short-term adjustment to enable the claimant's back condition to improve. She had been off work for 10 months and her condition had deteriorated. The prognosis was for there to be no improvement in the foreseeable future. In those circumstances we found that there was no failure by the Respondent to make reasonable adjustments and the claimant's claim did not succeed."**

29. I will start with the wider appeal concerning cross-examination. As HHJ Tucker's Order relates, the Claimant's central contention is that her cross-examination of the Night Manager, Mr House was limited to 2½ hours. In its response, the Tribunal stated that this cross-examination time was 4½ hours. The Tribunal stated that the time allocated for the Liability Hearing was four days. There were two witnesses for the Respondent and two for the Claimant. The timetable was discussed with the parties at the beginning of the hearing at 2pm on day 1. The intention was to complete evidence by the end of day 3 to allow time for deliberations and judgment. In the event the evidence was not completed until midday on day 4, with the consequence that judgment was reserved. Cross-examination of the Claimant by the Respondent's representative took longer than anticipated, namely 5½ hours in total, until the

A end of day 2. The Tribunal said that this was due to the Claimant's lengthy answers which strayed onto matters not relevant to the pleaded case.

B 30. The Tribunal stated that the Claimant's cross-examination of Mr House began at 10.15am on day 3. The Claimant had a sheet of questions prepared for her by solicitors who were not representing her at the hearing. However, the Claimant apparently departed from that, asking questions about matters not arising in the pleadings, and making observations and C statements which did not result in a question. The EJ intervened to remind her of the issues in the case and of the need to focus. On the morning of day 3, she told the Claimant that the cross-examination must be completed by mid-afternoon. Prior to the lunch adjournment, the D Judge pointed out the issues not yet covered in cross-examination and advised her to use the lunch adjournment to focus on those points. The Claimant was told that she could have 2 hours after the adjournment, i.e. until 4pm, to complete her cross-examination of Mr House. The E afternoon cross-examination again strayed off the relevant points. After a final reminder 15 minutes earlier, the Judge stopped the cross-examination at 4.05pm. Thus, the total time of the cross-examination was of the order of 4½ hours not 2½ hours.

F 31. The Claimant then said that her cross-examination of the Respondent's second witness, Mr Ward, on day 4 would require 1 hour. In fact, it took 2 hours. Thus, the total time of her cross-examination was 6½ hours in contrast to the 5½ hours of the cross-examination of G Claimant's witnesses.

32. The Tribunal acknowledged that the need for an interpreter at all stages inevitably added H to the length of time of the hearing, but that this had been factored into the time allocation agreed at listing. The Tribunal had taken account of her lack of representation and the fact that

English was not her first language, and tried to assist her to focus on the points in issue. However, that guidance had not been heeded and ultimately it had been necessary to bring the cross-examination to an end.

33. The Claimant states that the cross-examination of her and her witness took about 5½ or 6 hours in total. To that extent there is some agreement. However, she disagrees about the course of events of her own cross-examination of the Respondent witnesses. In her skeleton argument, she states that at the beginning of day 3, the Judge told her that more time had been spent than expected on the Claimant's case, and that therefore cross-examination would be finished by 2pm that day. She agrees that she had a sheet of questions prepared for her by her solicitor, but also had a sheet of her own questions. Between 10.30am and 11.30am she was sent to the public waiting room in order to place all her questions chronologically. This she did. Thus, her cross-examination of Mr House began at 11.30am. She was repeatedly reminded that cross-examination was to finish by 2pm. The cross-examination continued without a break until 2pm and was then completed. In consequence, the cross-examination time was 2½ hours. The afternoon was then used for planning for day 4, on which day her cross-examination of Mr Ward took place.

34. In oral submissions, the Claimant was notably less confident about the timing of these events, suggesting that there was an extended lunch break of about 1 ½ hours with the parties returning at about 2.30pm. However, she was adamant that there was no cross-examination after the lunch break. This would mean that the cross-examination had lasted only about 1½ hours. The discussion after the lunch adjournment had been of the order of 20 minutes, and so the day had ended early.

35. On 30 April 2018, she requested the Tribunal to provide a transcript of the proceedings in order to resolve the matter. The reply, dated 8 May, was that there was currently no requirement for an ET hearing to be recorded and that this hearing had not been recorded. On 8 and 14 May 2018, the Claimant applied to the Registrar of the EAT for the EJ's notes to be supplied, but this application was refused.

36. In any event, the Claimant submits that her cross-examination of Mr House was unfairly limited. In consequence, she was unable to ask any more than half of the questions which had been prepared by the solicitor and all of which were relevant.

37. Mr Harding, who appeared below, was not able to assist from his notes or recollection of the hearing but submitted that the Tribunal's response included time details evidently reflecting their own notes; that it was inherently unlikely that a busy and efficient Tribunal would have finished a day early; and that if it had he would have called his next witness Mr Ward that day rather than on the following day 4. He submits that this was all a matter for the case management discretion of the Judge; and there was no basis to conclude that he had gone outside the generous ambit of his discretion. On the contrary, the Judge had given the Claimant every opportunity to focus her answers and her questions and had afforded her ample time to do so.

38. In considering this ground I have taken full account of the Claimant's lack of representation at the hearing and restricted command of English. Cross-examination is a highly skilled art and it is commonplace and understandable that unrepresented parties have difficulty in focusing their questions on the submission and often lapse into further statements of their

A case. In such a case, the EJ has a demanding task in providing some guidance and advice to the unrepresented parties without conducting or appearing to conduct the case on their behalf.

B 39. It is of course unfortunate that there is a dispute over the length of time to which the Claimant cross-examined Mr House. However, I am quite satisfied that the Claimant's recollection is at fault, and that for the reasons identified by Mr Harding the cross-examination must have continued until just after 4pm on the third day. Given the pressures of conducting her case it is not surprising or a matter of criticism that the Claimant has recalled a shorter period. I see no reason to make any further enquiry of the Tribunal.

C

D 40. In any event, there is no possible challenge to the conduct of the hearing by the Tribunal. The Tribunal, principally through the EJ when sitting with Lay Members, is rightly afforded a broad range of discretion in the management of the trial. Having heard the Claimant in this appeal I have no doubt that she did have difficulty in focusing on the relevant points and that the EJ did all she could to try and assist. I see no basis to conclude that there was any unfairness to the Claimant or that the Judge in any way went outside the generous ambit of her discretion in the management of a demanding hearing. Accordingly, this ground of appeal is dismissed.

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41. I turn to the grounds concerning reasonable adjustments. Ground 1 in the Amended Notice of Appeal states:

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> **"The Employment Tribunal erred at paragraph 67 of the Reasons in considering whether the provision of a chair for the Claimant alone amounted to a reasonable adjustment because it failed to consider objectively whether the provision of the chair was reasonable in light of the evidence before it as to the practical consequences of the chair being provided. It is not clear on the evidence how, objectively, the ET concluded that provision of a chair was not practicable (i.e. that there was limited gangway space and the chair would have obstructed the flow of movement etc.)."**

H

42. The Claimant's skeleton argument submits that there was:

> **"No objective evidence before the Tribunal (by way of photographs of the factory floor or an independent risk assessment as to working from a chair on the factory floor) to enable it to determine whether the requested adjustment was practicable."**

and that the Tribunal's conclusion was "*impermissibly subjective*." She points to photographs from the Respondent's own documentation which were before the Tribunal in black and white copies, and submits that this shows "*space to place chairs by the production line and that various employees sat on chairs*." Thus:

> **"The photographic evidence indicated the Respondent's evidence that the provision of a chair was not practicable (i.e. that there was limited gangway space and a chair would have obstructed the flow of movement etc) in the production area was entirely false."**

She submits that the photograph copies were of poor quality, and that the Tribunal wrongly refused to look at colour copies offered by her. In any event it was plain from the black and white copies that the gaps were wide and that there was plenty of space for a chair. The Tribunal had made no reference to the photographs in the Judgment.

43. The Claimant also referred to paragraph 92 of the Judgment which states:

> **"92. We were also concerned that there was no documentary evidence to indicate that the respondent applied its mind prior to dismissal to the question of whether a chair could be provided for the claimant in the manufacturing area. We nevertheless accepted Mr Ward's evidence that he considered the point prior to dismissal and concluded that it would not be possible to put a chair on the production area for the reasons set out at para 53."**

She submitted that in the absence of such documentary evidence there was no basis for the Tribunal to accept the oral evidence of Mr Ward. All in all, there was no objective basis for the Tribunal's conclusion or for its acceptance of the Respondent's evidence.

44. On behalf of the Respondent, Mr Harding submits that the question of whether this was a reasonable adjustment was a pure question of fact for the Tribunal; and that its conclusion that

it was, was based on its acceptance of Mr Ward's evidence on that point (see paragraph 53). There was no basis to conclude that the Tribunal's finding was perverse. On the contrary, it was an unimpeachable finding of fact. The photographs were not a distinct ground of appeal. In any event, they were before the Tribunal; there was no need for a Tribunal to refer to every piece of evidence before it; and they provided no basis to challenge the conclusion in light of all of the evidence. As to paragraph 92 of the Judgment, the Tribunal was entitled to accept oral evidence, notwithstanding the absence of relevant documentary evidence.

45. I turn to the linked ground of appeal, 2. This ground states: "*The ET erred in applying the wrong legal test, considering that a reasonable adjustment has to be "wholly effective in removing the disadvantage"*." The Claimant's argument focuses on paragraph 68 of the Judgment, where the Tribunal stated:

> **"68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not remain seated for more than an hour without suffering severe pain. …"**

46. The Claimant points to the decision in **Noor v Foreign & Commonwealth Office** [2011] ICR 695 cited by her former counsel before HHJ Tucker. In that case, His Honour Judge Richardson stated that:

> **"33. … Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective. …"**

In that case, the Judge was considering the provisions of the **Disability Discrimination Act 1995**. Section 4A(1) of that Act included terms similar to those in section 20(3). However, section 18B(1) provided:

> **"(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -**
>
> > **(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**

...”

47. I drew attention to the fact that the provision in section 18B is not repeated in the **EqA**, and that the guidance is now contained in the statutory **Code of Practice on Employment** [2011]. This includes, in respect of reasonable adjustments:

> **“6.28. The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> ...”

The first identified factor is “*whether taking any particular steps would be effective in preventing the substantial disadvantage*.” *Harvey* observes that the matters listed in sections 18A and B of the **1995 Act** are “*largely reproduced*” in Chapter 6 of the **Code** (see paragraph 399.01). Furthermore, in **General Dynamics Information Technology v Carranza** [2015] ICR 169 His Honour Judge Richardson contrasted section 18B and the **Code** and stated, “*... I have no doubt that the same approach applies to the **Equality Act 2010***” (see paragraph 36).

48. The Claimant submits that the Tribunal’s conclusion on this point was vitiated by its conclusion that the provision of a chair “*would not have been wholly effective in removing the disadvantage*.” In response, Mr Harding in accordance with his duty first pointed in favour of the defendant that the language of the **Code** says “*effective*” rather than “*wholly effective*.” He submits that the Tribunal set out the correct test - i.e. from section 20(3) of the **EqA** - and that the reference in paragraph 68 of the Judgment to “*wholly effective*” is not the application of a legal test but an observation. The paragraph must be read as a whole and in the context of the other paragraphs of the Judgment relating to this issue (see in particular paragraphs 67 and 62). If, which was not accepted, the reference to “*wholly effective*” was the wrong test, the error was immaterial. There was a full and sufficient consideration of the overall question of whether or

not this would have been a reasonable adjustment. That was a question of fact. There was no basis to challenge the Tribunal's decision.

49. I am not persuaded that the Tribunal fell into error on either ground. As to ground 1, the Tribunal's conclusion reflected the evidence which it had heard and accepted (see in particular paragraph 53). That was a question of fact, and there is no basis to conclude that it was perverse.

50. As to the photographs, they were before the Tribunal. It does not follow from the absence of reference they were not taken into account. In any event they provide no basis to challenge the Tribunal's conclusion. As to paragraph 92, the absence of documentary evidence is no bar to its acceptance of the Respondent's oral evidence.

51. As to ground 2, the question for the Tribunal, once satisfied that a PCP put the Claimant at a substantial disadvantage, is whether the employer has failed to take such steps as is reasonable to have to take to avoid the disadvantage (see section 20(3)). As the **Code of Practice** makes clear, the **Act** does not specify any particular factors that should be taken into account; and what is a reasonable step will depend on all the circumstances of the individual case (see paragraphs 6.22 and 6.29). Examples of factors that the **Code** provides (paragraph 6.28), include "*whether taking any particular steps would be effective in preventing the substantial disadvantage*." As a matter of language, that is not quite the same as the former provision of section 18B(1)(a), namely "*the extent to which taking the step would prevent the effect in relation to which the duty is imposed*." However, in the case where the Appellant is unrepresented and the point is being taken by the Appellate Tribunal rather than the Respondent and without full argument, I do not decide the appeal on the basis of that textual distinction.

52. In my judgment, the Tribunal was fully entitled to take the factor of ineffectiveness as but one factor in its overall and multifactorial assessment. That overall assessment involved consideration of a range of factors including both the practicability and the economic viability of the proposed adjustment (see paragraphs 67 to 72). The evidence which it had accepted from the Respondent's witnesses provided an ample basis for its overall conclusion, which in turn was properly set against the broad test of section 20(3).

53. This was all a matter for the Tribunal, as industrial jury, to assess. In my judgment its conclusion is unimpeachable. For all these reasons the appeal must be dismissed.