**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4121976/2018**

**Held in Dundee on 14, 15, 16, 17 May, 25, 26, 27 November 2019 and 14 January 2020**

**Employment Judge I Atack**
**Tribunal Member J Torbet**
**Tribunal Member M Williams-Edgar**

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| **Ms Patricia Johnston** | **Claimant**<br>**Represented by:**<br>**Mr S Milligan**<br>**Solicitor** |
| **Diageo Scotland Limited** | **Respondent**<br>**Represented by:**<br>**Mr R Bradley**<br>**Advocate** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is:

One. That the claimant was treated unfavourably because of something arising as a consequence of her disability in terms of section 15 of the Equality Act 2010 and orders the respondent to pay to the claimant compensation, including interest, amounting to Twelve Thousand Seven Hundred and Sixty Pounds (£12,760)

Two. That the claim of victimisation under section 27 of the Equality Act 2010 is dismissed, and

Three. That the claim of a failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 is dismissed.

## REASONS

### Introduction

1. In this case the claimant brings claims that she has suffered unfavourable treatment because of something arising from her disability, contrary to section 15 of the Equality Act 2020, that the respondent failed to make reasonable adjustments contrary to sections 20 and 21 of that Act 2020 and that the respondent had victimised her under section 27 of that Act. Specifically, she alleged that she had been treated unfavourably by (i) being removed from her role as a night shift labeller and placed into an unsuitable role and (ii) by the respondent requiring her to follow a grievance process and ongoing meetings in order to attempt to secure a role that was suitable for her as a result of her disability. In respect of the alleged failure to make reasonable adjustments she alleged that the respondent applied a provision, criterion or practice, namely the utilisation by the respondent of a contractual entitlement to change the claimant's role, which put her at a substantial disadvantage in comparison with employees who were not disabled. With regard to the victimisation claim she alleged that she was treated unfavourably by her line manager as a result of bringing discrimination proceedings, giving information in connection with them or making an allegation that there had been unlawful discrimination. The respondent denied all these allegations.

2. The respondent accepted that the claimant was at all material times a disabled person within the meaning of the Equality Act 2010.

3. The tribunal heard evidence for the claimant from the claimant herself, Peter Robertson a trade union representative, Stephen Carberry who took over as a trade union representative upon the retiral of Peter Robertson,

Tracey Duffin, an employee of the respondent, Olive Brown a former employee of the respondent and from Robert Coleman, the claimant's partner. Evidence was given for the respondent by Caroline Hair an HR business partner, from Andrew Grieve who had been the claimant's team leader, Scott Marshall who had been transition manager at the respondent's site in Leven, Sharon Hamilton, who heard the claimant's formal grievance, Robert Craig who became the claimant's team leader, Gavin Brogan the respondent's site director, and from Rachel Wilson another HR business partner.

4. The parties produced a joint bundle of documents. Further documents were produced and accepted on 16 May 2019 and form pages 416-417 of the bundle. A further document was produced by the claimant on 25 November 2019. After Mr Bradley had taken instructions regarding the document it was accepted and forms page 419 of the bundle. Reference to the documents in the bundle will be by reference to the page number.

5. The parties had helpfully agreed a joint list of issues which is contained at page 37 and which we refer to later in this judgment.

6. The claimant wished the tribunal, in the event of her success in her claims, to make a recommendation in terms of section 124 (2) (c) of the Equality Act 2010. As the proposed wording of the recommendation was only disclosed to the respondent just before submissions were to be made it was agreed that in the event of the tribunal finding in favour of the claimant and deciding to make a recommendation that before doing so the parties would have a further opportunity to be heard on the matter.

7. From the evidence which we heard and the documents to which we were referred we found the following material facts to be admitted or proved.

**Material Facts**

8. The claimant is employed by the respondent and has been since 28 February 2005.

9. She is employed as a production operator in terms of her contract of employment, pages 39 – 51.

10. The claimant suffers from rheumatoid arthritis in her right wrist and left index finger.

11. The respondent accepts that the claimant is disabled in terms of section 6 of the Equality Act 2010.

12. The respondent is a major producer of alcoholic beverages. It owns and operates a bottling plant at Leven, Fife.

13. The claimant was employed as a labeller on the night shift on line 15 at the respondent's bottling plant.

14. The claimant has been a label machine operator since 2008. Her job involves putting labels on bottles.

15. The respondent has four bottling halls at their Leven site.

16. The claimant worked in hall 1 on night shift.

17. When the claimant worked overtime she received a payment of £1.83 times her basic rate of £13.63.

18. In about 2013 the claimant noticed a swelling on her right wrist and contacted her GP. She was referred to a consultant.

19. In 2015 the claimant had an operation on her right wrist due to problems with her tendons.

20. She was off work for six weeks following that operation.

21. On return to work the claimant completed a Return to Work form, pages 107-108, and was advised to work on restricted duties for a period of six weeks. She was not to do work involving manual lifting.

22. On 9 March 2016 the claimant was referred to the respondent's occupational health department by her line manager as she had recently undergone another operation on her left hand, pages 111-112.

23. The report from the occupational health department dated 14 March 2016, pages 113-114, advised that she refrain from hand packing for a couple

of weeks and then gradually building up work activities over the next 4 to 6 weeks.

24. The claimant did not perform hand packing operations after that accept when line 15 was in a quiet period.

25. Hand packing involves lifting bottles off the production line, at the end of the process into cases for shipping.

26. The claimant attended a further occupational health review on 8 April 2016, page 117.

27. On 26 May 2016 the claimant was again referred to occupational health by her manager because she was experiencing pain and could not hand pack, pages 118-118A.

28. A report dated 1 June 2016 by the occupational health department advised she should refrain from hand packing until a report had been obtained from her specialist, page 119.

29. The specialist sent a report to the respondent's occupational health department on 18 August 2016, page 120-121.

30. Following the receipt of that report the respondent's occupational health department advised that the claimant should avoid hand packing and that should be a permanent restriction upon her, as the task would be likely to aggravate her underlying condition, page 122.

31. Andrew Grieve was at that time and until February 2018 the claimant's team leader and line manager. He reported to Alex Robertson.

32. In about April 2017 the respondent commenced consultation with the relevant unions at Leven about what was described as Project Neptune.

33. Project Neptune was a project designed to deal with the loss of a number of products from Leven to plants operated by the respondent in Italy and the USA. In total 8 million cases of alcohol were being lost from the site at Leven. That was one third of the volume handled by that site.

34. The respondent wanted to keep the Leven site sustainable for the future. Project Neptune was designed to achieve that end.

35. The greatest impact caused by the loss of production was to be felt in halls 1 and 2.

36. The loss of production would result in headcount losses.

37. The respondent offered voluntary redundancy to the employees. All losses in headcount were covered by voluntary redundancy. There were no compulsory redundancies.

38. There were four shifts operating in the Leven plant prior to Project Neptune. There were to be reductions in all shifts. The night shift reduced from ten shifts to eight. It was anticipated about 50 to 56 operator's roles would be lost. The total reduction in roles was 96, page 167.

39. All staff were required to take part in what was referred to as an Aspiration Process. That was a process whereby they could indicate whether they were interested in voluntary redundancy, what roles they might wish to be considered for, what shifts they would be willing to consider, and whether they would be willing to consider roles at a lower or higher grade, page 133.

40. Following the completion of the aspiration process the respondent intended to match people to roles in line with their aspirations and capability requirements, page 135. It was the respondent's intention to deploy employees' skills in the best way.

41. The claimant completed a personal aspiration form, page 159. She indicated she wished to continue on line 15 as night shift label operator. She also indicated she would be willing to accept any skilled role in hall 3 on night shift.

42. In the bottling halls the process is that empty bottles are filled, labelled, sealed, and packed in a case ready to be shipped.

43. Line 15 is only automated until the packing stage is reached. Then all bottles must be hand packed. This involves lifting two bottles at a time into a case.

44. There were eight lines operating on the night shift before Project Neptune and six after.

45. Line 19 ceased to operate following Project Neptune. It had seven operators.

46. Line 26 in hall 2 also ceased to operate due to Project Neptune. The changes to the lines is shown at page 139.

47. Alex Robertson asked Andrew Grieve and Robert Craig to put together a “dream team” for line 15.

48. Andrew Grieve wanted to retain the best people who had been displaced from line 19. He wanted to be manager of the highest performing team.

49. There were two labelling operators on line 15 namely the claimant and Nancy Johnston. The claimant was the main labelling operator.

50. Nancy Johnston was able to hand pack.

51. The claimant was not selected for the “dream team”.

52. In selecting the “dream team” Andrew Grieve took into account attitude, attendance, and flexibility. He reported his choice to Alex Robertson.

53. When Robert Craig made up his list for the “dream team” he considered skills, teamwork, experience, attitude to change, and flexibility. He did not keep any records regarding the selection process.

54. Andrew Grieve was responsible for lines 13 and 15 and Robert Craig for lines 16, 11 and 17.

55. The claimant was not included the “dream team” because of lack of flexibility, absences and issues about teamwork.

56. It is necessary to hand pack on line 15.

57. Robert Craig did not consider moving the existing label operator on line 11. His opinion was that operator was better than the claimant.

58. It was proposed by Alex Robertson that the claimant remain on line 15 as an additional person. Andrew Grieve advised that would not work as the claimant could not hand pack.

59. Alex Robertson instructed the claimant be moved to lines 11 and 17.

60. Line 11 had automatic packing. There was no need for hand packing on that line.

61. Hand packing was occasionally required on line 17.

62. Andrew Grieve informed the claimant that she was to be moved to lines 11 and 17. She was to be a general operator on those lines. Those lines each had a label machine operator and a backup operator. The claimant would be a second back up label machine operator. The claimant was upset.

63. The claimant was to move to her new role with effect from 1 February 2018.

64. The claimant spoke to Adam Muir about her concerns. He requested Scott Marshall to speak to her about the move.

65. Scott Marshall met the claimant to hear her concerns and thereafter spoke to Andrew Grieve. He ascertained from Andrew Grieve that his reasons for moving the claimant were due to attendance and attitude.

66. Scott Marshall had a meeting with the claimant on 6 February 2018. He informed the claimant he was upholding the decision to move her.

67. Mr Marshall felt that line managers should be able to manage their teams. It was his opinion that Andrew Grieve had made a decision to get the best team for the line.

68. The alcoholic product dealt with on line 15 was not impacted by any volume reduction.

69. Once the claimant had left line 15 Andrew Grieve had little to do with her. Her line manager became Robert Craig.

70. Robert Craig referred the claimant to the respondent's occupational health department. The occupational health department report was sent to him on 7 February 2018, page 182-183. That report advised that if the claimant was to be moving into a new role as a backup machinist, which was likely to incorporate rework and hand feeding of 4.5 litre bottles the line manager should complete a risk assessment of the tasks she would be required to undertake as the activities may potentially destabilise her condition.

71. The claimant submitted a formal grievance through her union on 8 February 2018, pages 184-186. The basis of the grievance was that the move from line 15 would create a capability issue as some of the tasks on lines 11 and 17 involved extensive and repetitive use of the claimant's hands.

72. Roxanne McArdle was appointed to investigate the claimant's grievance. She interviewed various witnesses.

73. Andrew Grieve was interviewed by Roxanne McArdle on 21 February 2018. Notes of the meeting with him are contained at pages 200-205.

74. Mr Grieve gave five reasons why the claimant was moved from line 15. The first issue was her attitude to other people, operators, engineers and team leaders. The second issue was her attitude to changes driven by Manex (which was a process to standardise production techniques and improve them). The third issue was attendance. The fourth issue was due to the claimant's attitude to weekly audits and that the claimant's attendance at loss and waste meetings was poor. The fifth issue was flexibility. That issue was that the claimant was unable to hand pack.

75. Andrew Grieve's position was that due to the claimant's being unable to hand pack that meant that other operators did not get a chance to work on the labelling machine when she was there with the result that roles could not be rotated amongst the team and skills would be lost.

76. The respondent aspires to have three persons trained to provide cover for absences on each line. If they do not rotate in their roles skills could be lost.

77. Andrew Grieve kept a note of events relating to the claimant, page 173, but did not formally raise those concerns with her.

78. Another employee, Alan Di Falco who had been employed on line 19 came to line 15 as an end of line operator. He had labelling as a backup skill.

79. Another employee, Stewart Graham, was also not chosen for the "dream team". Mr Graham also had restrictions on hand packing.

80. At the time of her move from line 15 the claimant was not in any formal attendance process. Nothing was recorded regarding her attendance.

81. Andrew Grieve accepted in evidence that the claimant had not been in review in respect of her attendance. No documents were produced to substantiate comments Andrew Grieve had made regarding the claimant's attendance to Roxanne McArdle.

82. We were satisfied that flexibility paid a more than trivial part in the decision to move the claimant from line 15. She was moved because she could not hand pack. Those who could hand pack were able to be rotated on the line. Mr Grieve had claimed he did not take into account the claimant's inability to hand pack but we did not accept that assertion. Mr Craig in his investigatory interview with Roxanne McArdle, page 239, stated that one of the reasons the claimant was removed from line 15 was because she could not backup line 15 if required. He gave that as the reason why Yvonne Craig and Alan Di Falco came from line 19 to line 15. We were satisfied that the question of flexibility paid more than trivial part in the decision to remove the claimant from line 15.

83. Once Roxanne McArdle had interviewed the witnesses she prepared a report dated 27 April 2018 and sent it to Sharon Hamilton who was to hear the claimant's grievance. The report is contained at pages 255-258.

84. A grievance hearing took place on 8 May 2018. The notes of that meeting are contained at pages 262-269.

85. During the hearing Sharon Hamilton informed the claimant that it was her skills and experience that were the rationale for her move from line 15 to lines 11 and 17.

86. She suggested that there were lots of things that the respondent could find someone with the claimant's experience to do. She mentioned as a possibility the claimant being involved in reviewing and amending Standard Operating Procedures (SOP).

87. Sharon Hamilton apologised to the claimant for the way the process had been handled, page 266. She was apologising for the way in which the decision to move the claimant had been communicated to her.

88. At the end of the meeting Sharon Hamilton informed the claimant she was not upholding the grievance.

89. The claimant and her union representative, Stephen Carberry, considered the meeting had been constructive notwithstanding that the grievance was not upheld.

90. The formal decision was sent to the claimant by Sharon Hamilton on 9 May 2018, page 272-273.

91. The claimant did not appeal the decision to reject her grievance. That was because she felt her concerns could be resolved as had been mentioned at the hearing.

92. Sharon Hamilton had a further meeting with the claimant and her union representative on 17 July 2018. The notes of that meeting are contained at pages 288-291.

93. The purpose of that meeting was to hear the claimant's further concerns. The claimant's further concerns were that her skills were not being used on lines 11 and 17. She stated she did not consider that what had been offered was a reasonable adjustment for her. It was her position that such work could last only a few weeks or a few months and she would then be back in the same position. She expressed her concern that her capability issues were not taken into account and she was concerned at having skills removed from her.

94. Sharon Hamilton offered the claimant the opportunity of transferring to work on day shift and advised she would be given training for SOP work.

95. At the end of the meeting she stated she would give the claimant time to decide what she wanted to do regarding the options offered at the meeting.

96. Neither the claimant nor her Union representative went back to Sharon Hamilton regarding the matters which had been discussed at the meeting. Sharon Hamilton assumed that either the matter had been resolved or the claimant had decided not to follow the suggestion of obtaining training for SOP.

97. Robert Craig struggled to utilise the claimant on line 17.

98. Line 17 is not fully automated. Empty bottles have to be lifted on at the start of the line. That is the only manual handling operation.

99. After being removed from line 15 the claimant became a backup machinist on line 11. The respondent already had a labeller on that line and a backup with the result that the claimant became second backup.

100. Robert Craig asked for a risk assessment as had been suggested by occupational health, page 182, but that was never carried out.

101. The claimant was involved on line 11 mainly doing examining work that involved looking for missing labels and damaged caps. It could involve the lifting of bottles.

102. The role of label machine operator on line 15 was very similar to the role of label machine operator on line 11.

103. The claimant on occasion carried out cleaning operations for the whole of her shift. That was known as asset care.

104. On 26 March 2018 Mr Craig sent an email, page 419, in which he expressed concern about where he could use the claimant due to her medical condition affecting her hands.

105. On 10 May 2018 Mr Craig received a further report relating to the claimant from the respondent's occupational health department, pages 275-6. The report advised a permanent restriction from hand packing and heavy lifting as the claimant's grip strength might at times be less than optimum.

106. The claimant was again reviewed by occupational health and a further report sent to Mr Craig on 14 June 2018, pages 281-282. That report noted the claimant had expressed difficulty in performing some of the aspects of the role she was assigned namely feeding bottles onto a machine. She had reported that the continuous use of grip force especially if applied to heavier bottles produced a return to her former symptoms.

107. On 4 July 2018 the claimant advised Christine Winstanley, the respondent's occupational health nursing adviser, that she was finding the situation at work more and more stressful. She asked for an appointment with the company doctor.

108. Gavin Brogan was appointed site director at Leven in August 2018. He was advised that there was an unresolved grievance relating to the claimant in the latter part of August. He considered it to be worth trying to mediate the situation.

109. Mr Brogan held a meeting with the claimant on 7 September. The note of that meeting is contained at pages 296-297.

110. A further meeting was held on 25 September. The note is at page 299.

111. At that meeting Mr Brogan offered to consider the claimant for a role on day shift within 18 month's financial shift protection. The claimant declined that offer.

112. At the meeting the claimant outlined the roles she could not manage which were permanent hand packing; rework, and other shift patterns due to family commitments.

113. A further meeting was held on 9 October 2018. The notes are contained at page 316.

114. At that meeting Mr Brogan suggested various roles for the claimant which could be explored as possibilities. He mentioned a job in a label stores; a job as Manex coordinator; a multi-skilled cover role involving asset care, holiday cover and SOP writing. The claimant alleged in evidence that the label stores job been specified as being in halls 1 or 2 but we accepted on balance having heard Gavin Brogan and Rachel Wilson that there had been no mention of which hall it would be in at that meeting.

115. The claimant agreed to think over these options and express a preference.

116. The claimant expressed concern about her lack of computer skills for the Manex job and declined it. She could have been trained for that job by the respondent.

117. The job in a label stores was in hall 3. It is the same job as in label stores in halls 1 and 2. The claimant did not want to move to hall 3.

118. The offer of a job in label stores in hall 3 was a genuine offer. The offer of a job as Manex coordinator was a genuine offer.

119. The claimant was willing to take the label stores job had it been in halls 1 or 2.

120. The claimant did not want to move to work in hall 3 because of friendships she had in halls 1 and 2.

121. The claimant had stated in her personal aspirations form that she would be willing to consider any skilled role in hall 3 on night shift, page 159.

122. The claimant would not have struggled in the role of Manex coordinator because of anything arising from her disability.

123. The claimant went off work from 7 April 2019. She was unable to work due to tenosynovitis and stress, page 280. She has not returned to work.

124. The claimant has felt humiliated and undervalued. Her self-esteem has suffered. She has had suicidal thoughts. She has lost weight and suffered from panic attacks. Her relationship with her partner has suffered. She has become more withdrawn.

125. The claimant accepted that her claim for overtime for 67 weeks was incorrect as she did not work overtime each week whilst working as a labeller on line 15. There were quiet periods and times when the line did not run.

126. There were increased targets to be met after Project Neptune. For that reason Andrew Grieve wanted lines to operate as efficiently as possible.

**Submissions**

127. The parties helpfully produced a joint bundle of authorities and the tribunal was grateful to them for producing copies of all the authorities as well. The authorities referred to are as follows: –

***Igen v Wong*** [2005] IRLR 258 CA
***Pnaiser v NHS England*** [2016] IRLR 170
***The Southampton City College v Randall*** [2006] IRLR 18
***Ali v Torrosian and ors (t/a Bedford Hill Family Practice)*** EAT 0029/18
***Extract from EHRC Equality Act 2010 Code of Practice Chapter 9;*** Victimisation and other unlawful acts.
***Archibald v Fife Council*** (2004) UKHL 32
***Chief Constable of South Yorkshire Police v Jelic*** [2010] IRLR 744
***Extract from IDS Handbook; Discrimination at Work***, page 877
***G4S Cash Solutions (UK) Ltd v Powell*** [2016] IRLR 820
***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090
***Hensman v Ministry on Defence*** UKEAT/0067/14/DM
***Chief Constable of West Yorkshire Police and another v Homer*** [2012] ICR 704
***Project Management Institute v Latif*** [2007] IRLR 579
***EHRC Equality Act 2010 Code of Practice Chapter 6;*** Duty to make reasonable adjustments.

128. They had also agreed a list of issues which both referred to. That list is contained at page 37.

129. Both parties produced written skeletons of their submissions which they expanded upon orally.

130. We will only set out the major points of the parties' respective submissions although all that they said was carefully considered.

*Claimant*

131. Mr Milligan referred to ***Igen*** (above) and reminded us that it is for the claimant to prove facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent had discriminated against her because of her disability. He submitted that the use of "flexibility" was shorthand for not being able to hand pack. That was, he said, the real reason for moving the claimant from line 15.

132. He referred to the evidence that two of those who were not in the so-called dream team could not hand pack, namely the claimant and Stewart Graham. The claimant was moved because of something arising from her disability. She was put into a role in which she could not succeed. Mr Craig had said there was little she could do.

133. The claimant had to raise a grievance and to go through that process to try to secure a role. She was unsuccessful in that.

134. Mr Milligan referred to the case of ***Pnaiser*** (above) and reminded us that the "something" arising as a consequence of the disability may not be the sole or main reason but must have at least a significant or more than trivial influence on the unfavourable treatment.

135. It was, he said, the claimant's inability to hand pack which was a significant reason as to why she was moved. He also submitted that non-disabled persons were not required to follow a grievance procedure.

136. He submitted that the reason for the treatment was not, as alleged by the respondent, Project Neptune but because of the difficulties encountered because the claimant could not hand pack.

137. Even if the reason was Project Neptune that could not be a legitimate aim as it put performance before any consideration of disability.

138. Even if it was a legitimate aim it was not proportionate. The respondent could have chosen not to remove the claimant but someone else or moved her to some suitable role.

139. The respondent failed to consider whether a lesser or alternative measure could have achieved their legitimate aim and the tribunal should take that failure into account in considering the matter of proportionality under section 15 (1)(b) of the Equality Act.

140. With regard to the claim in respect of a failure to make reasonable adjustments Mr Milligan referred to the list of issues in which the claimant alleged that the provision criterion or practice upon which she was relying was the respondent's utilisation of a contractual entitlement to change the claimant's role. That put the claimant at a substantial disadvantage.

141. The respondent did not make reasonable adjustments and he referred to the factors which might be taken into account when deciding what is a reasonable step for an employer to take as set out at paragraph 6.28 of the EHRC Code of Practice.

142. Mr Milligan submitted that the claimant as a disabled person could be treated more favourably by the respondent than other employees and he referred the case of ***Archibald*** (above). They could have retained her in her old job or taken more steps to move her not just offer vacancies. The respondent was a large employer and could move employees about.

143. He also submitted that the respondent had not made every effort to redeploy the claimant and referred to the case of ***Chief Constable of South Yorkshire Police v Jelic*** (above) where it was held a reasonable adjustment for a police force would be to swap the role of a disabled Constable with a non-disabled colleague. He also submitted there was an unnecessary delay in redeploying.

144. With regard to the claim of victimisation, Mr Milligan submitted that the claimant had suffered less favourable treatment as a result of having raised a grievance. He submitted that the claimant felt she was being victimised because Andrew Grieve was walking down the lines trying to catch her sleeping. He referred to the claimant's evidence that Andrew

Grieve had called her “a miserable bastard”. These are the allegations of victimisation.

145. Turning to remedy, Mr Milligan referred to the schedule of loss at page 38 of the bundle. It was his position that an award for injury to feelings should be at the upper end of the ***Vento*** banding and should be £20,000 together with interest from the date of the act of discrimination.

146. With regard to the financial loss claim Mr Milligan urged the tribunal to make an award as the claimant had lost overtime as a result of the treatment she had suffered.

*Respondent*

147. Mr Bradley’s initial submission was that the agreed issues were insufficient in isolation to provide a complete framework to decide the claims.

148. He submitted that although the claimant believed there was a conspiracy against her there was simply no evidence to that effect.

149. He submitted that the claimant’s case of unfavourable treatment comprised two parts: the first being the removal from her role as a night shift labeller and being placed into an unsuitable role and the second, the respondent’s requiring the claimant to follow a grievance process and ongoing meetings.

150. Mr Bradley submitted that the claimant’s difficulty with manual handling was no more than a trivial part of the reason for her removal from line 15. Flexibility was one of the issues but the main one was her attitude.

151. The claimant was not placed in an unsuitable role as she was not asked to do anything involving manual dexterity. The respondent regarded cleaning, or asset care, as important and it was not fair to say doing such work for a shift of 10 hours made it unsuitable work.

152. The claimant was not required to follow a grievance procedure but did so voluntarily. Mr Bradley submitted that the keyword in the claimant’s case was “requiring” and the claimant was not required to follow a grievance process or attend meetings but chose to do so voluntarily. That could not

be unfavourable treatment. The claim under section 15 should not succeed. The legitimate aim the respondent was seeking was to ensure that each production line was manned with the strongest possible crew with the aim of each production line running to its full potential, performance targets being met and helping the site compete with the respondent's other sites for products. That was a perfectly legitimate aim as products had been lost to other sites both in Italy and the USA and there was concern that without further increased efficiency further products could be lost.

153. Mr Bradley submitted that the test as to whether or not this was a proportionate means of achieving the aim was an objective one taking into account the business considerations and needs. He referred to the cases of ***Hensman*** (above) and ***Chief Constable of West Yorkshire Police and another v Homer*** (above). The claimant was asked to do work that she could do and was never asked to do work that she was not able to do. It was appropriate and necessary to ask her to do alternative work.

154. The claimant had been offered alternative work in Manex and in hall 3 which she had refused.

155. With regard to the claim in respect of a failure to make reasonable adjustments Mr Bradley accepted that the provision criterion or practice relied upon by the claimant was the respondent's utilisation of a contractual entitlement to change her role. He pointed out that the claimant's case as set out at paragraph 23 of her ET1, page 19, states that the respondent failed to make reasonable adjustments for the claimant and that the reasonable adjustments she relies upon would have been (i) for the respondent to retain the claimant in the role she undertook up to February 2018 or (ii) agree to place the claimant in an equivalent role or other role suitable for her.

156. In Mr Bradley's submission the question being posed in the agreed list of issues was wrong and the correct question should have been whether the respondent failed to make reasonable adjustments.

157. It was his position that each of the alternatives in the question in the issues as to whether or not the respondent made the reasonable adjustments

maintained by the claimant in paragraph 23 were of equal status and to succeed there must be a failure on both. There was no challenge to the evidence that the roles on line 15 required operators to hand pack. The claimant had been offered a Manex role and a role in the label stores in hall 3. Both those roles were equivalent and suitable. The claimant's concern about the Manex role had nothing to do with her disability but she was not willing to undertake training. The label stores job in hall 3 was the same in all material respects as the label stores role in halls 1 and 2 but the claimant did not want to accept the job in hall 3 as she believed she would be isolated. It was Mr Bradley's submission two suitable roles were identified for the claimant and accordingly the respondent did not fail in their duty to make reasonable adjustments.

158. With regard to the claim of victimisation Mr Bradley submitted that the burden of proof was on the claimant to prove this and she had failed to do so. The evidence was competing in that the claimant alleged that Andrew Grieve had called her a miserable bastard and he had denied that. The evidence was irreconcilable and the claimant had not discharged the onus of proof. Further, the claimant did not raise a grievance about this allegation although she had every opportunity to do so.

159. With regard to the question of remedy, Mr Bradley referred to the schedule of loss. The claimant had accepted in evidence that she would not have worked overtime for all the weeks claimed in the schedule and the calculation of loss was therefore not supported. Mr Grieve's evidence had confirmed that there would be down time when the lines would not be running. The tribunal could not award anything in respect of financial loss as there was simply no evidence to make the calculation.

160. With regard to the question of injury to feelings Mr Bradley's position was that if the tribunal was minded to award anything it should be in the lower band of ***Vento***. He reminded us that awards were compensatory and not punitive.

161. With regard to any recommendation the tribunal might be prepared to make his position was that any recommendation would have to be appropriate and could only be in relation to the claimant.

**Decision**

162. The parties had helpfully set out the issues which they required the tribunal to address and these are contained at page 37 of the bundle. We will deal with the relevant issues when dealing with the different aspects of claims in this case.

*Discrimination arising from Disability*

163. Section 15 of the Equality Act provides as follows –

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

164. The issues which the parties agreed the employment tribunal required to address in respect of this aspect of the claim are as follows: –

> 1.1.1 Was the claimant treated unfavourably because of something (difficulty with manual handling) arising as a consequence of her disability? (The claimant alleges the unfavourable treatment is: (i) the removal from her role as night shift labeller and placing into an unsuitable role; and (ii) the respondent requiring the claimant to follow a grievance process and ongoing meetings in order to attempt to secure a role that is suitable for her as a result of her disability).
>
> 1.1.2 If so, what was the reason for that treatment?
>
> 1.1.3 In treating the claimant in that way what aim was the respondent seeking to achieve?
>
> 1.1.4 Was that aim the legitimate?
>
> 1.1.5 Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?

165. In this case it was accepted by the respondent that the claimant had a disability in terms of section 6 of the Act.

166. The claimant alleged that she was treated unfavourably because of her difficulty with manual handling and the unfavourable treatment was her

removal from her role as a night shift labeller machine operator and her being required to follow a grievance process and ongoing meetings in an attempt to secure a suitable role.

167. We were satisfied that the removal of the claimant from her position as a label machine operator on line 15 and transferring her to a backup role on line 11 and 17 was unfavourable treatment. She was removed from a job which she had carried out for many years into an undefined role on lines 11 and 17. Mr Craig did not know what to do with her, as is clear from his comments in the email at page 419. She was not transferred to a permanent job such as she had held. She was asked to perform tasks such as a second backup labeller on line 11 when the first backup was not available. She was asked to do examining work and reworking. She was also required to do cleaning, or asset care work, for an entire shift. We accepted that others might be asked to do cleaning work but there was no evidence that any other employee did such for an entire shift at a time. Mr Marshall, in his evidence, expressed surprise upon learning that the claimant was not carrying out labelling work but was engaged on cleaning duties. We whatever satisfied that the claimant had suffered unfavourable treatment by being removed from her role as a labelling machine operator on line 15.

168. We were satisfied that the claimant was unable to hand pack and that her inability to do so and to engage in manual handling was “something” arising from her disability.

169. We were satisfied that the reason for the unfavourable treatment was the claimant’s inability to hand pack.

170. The respondent’s plant at Leven suffered a considerable loss of production to their plants in Italy and the USA. That meant the closures of some bottling lines and a reduction in the workforce.

171. Andrew Grieve and Robert Craig were asked to put together a dream team. They did so and the claimant was not upon that team. Neither was another employee who had restrictions upon what work he could do.

172. Mr Grieve gave five reasons why the claimant was moved from line 15. These were her attitude to other people, her attitude to changes driven by Manex, her attendance, her attitude to audits, and her lack of flexibility. He explained that the claimant had issues with her wrists and hands and was unable to hand pack.

173. There was no evidence of the claimant's attitude causing a problem. Mr Grieve did not speak to the claimant about it or seek to discipline her regarding it. He produced notes which he alleged had been prepared at the time but which he did not share with the claimant or anyone else.

174. There was no evidence that her attendance was a problem. The claimant had not been in review as had been claimed by Mr Grieve.

175. Mr Grieve gave flexibility as one of his five reasons. Mr Craig also referred to flexibility as being a factor in selecting employees for the dream team. In his statement to Roxanne McArdle, page 200-204, Mr Grieve referred to the claimant's inability to hand pack which meant, in his opinion, that others on the team did not get a chance to operate the labelling machine as they could not all be rotated with the claimant. He felt this would result in a loss of skills for the others on the team. These opinions were also contained in notes which Mr Grieve produced, but did not share with the claimant, at page 173.

176. Neither Mr Grieve nor Mr Craig kept any notes as to how they had each reached their conclusion as to who should be in the dream team.

177. We concluded that flexibility was an important factor in the decisions of both Mr Grieve and Mr Craig in deciding who to select for the dream team.

178. The claimant was not able to hand pack and that impacted on the flexibility of the team. That inability to hand pack was one of the reasons for removing her and subjecting her to unfavourable treatment.

179. In ***Sheikholeslami*** (above) it was held that if the *"something*" was more than a trivial part of the reason for the unfavourable treatment that is sufficient. We concluded that the claimant's inability to hand pack was more than a trivial part of the reason for the unfavourable treatment. We

did not accept Mr Bradley's submission that it played no more than a trivial part.

180. We did not consider that the claimant was required to follow a grievance process as a result of something arising in consequence of her disability. We agreed with Mr Bradley's argument that the key word was "requiring".

181. The claimant was unhappy at being moved from her role and chose to present a grievance in line with the respondent's procedures. She was not compelled or required to do so. In our opinion she chose voluntarily to proceed down that route. We did not accept that it was unfavourable treatment to permit an employee to follow the respondent's grievance procedure.

182. The next question is: in treating the claimant in the manner in which they did what aim was the respondent seeking to achieve.

183. As a result of Project Neptune the respondent was seeking to ensure that each production line was manned with the strongest crew with the aim of running each line to its full potential to meet performance targets and ensuring that the site remained competitive.

184. We agreed with Mr Bradley that this was a legitimate aim since, if production was not maintained there would be a risk to the business at the Leven site.

185. We then had to consider if the treatment of the claimant was a proportionate response to that legitimate aim or, if there was a less discriminatory way of achieving it.

186. The approach when considering proportionality is one to be performed objectively by the employment tribunal – ***Hensman*** (above).

187. A proportionate measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

188. We accepted that the respondent had a contractual right to change the claimant's role. We also accepted that to be able to rotate all employees on line 15 to carry out each task on that line, it was necessary that all could

hand pack which the claimant could not. We considered that the respondent could have moved the claimant to another role where she could utilise her skills. She was moved to no permanent role. She was given tasks as a second backup on the line 11 labelling machine, a task which she would only carry out occasionally. On line 17 she had no fixed duties and had been given tasks involving reworking and examining. Mr Craig expressed his frustration that he did not know where the claimant could go and how he could use her. He set out his concerns in the email at page 419. He had raised those concerns at the time of her move stating that he would be extremely limited as to where he could use the claimant due to her disability.

189. In our opinion the respondent did not consider sufficiently where the claimant could be moved to prior to the time of moving her. Her complaint is not simply about her removal from line 15 it is also about placing her in an unsuitable role. The respondent appeared to us to concentrate upon her removal from line 15 to achieve their aim but paid inadequate attention to what role they would place her in. Moving an employee from a permanent post as a labelling machine operator and giving her no clear role did not provide her with a suitable role.

190. The claimant complained about her move but that was rejected after she had met Scott Marshall. She raised a formal grievance and that was also rejected, after investigation and a hearing. Possible roles were discussed with Sharon Hamilton but there were no offers of suitable alternative employment in the formal outcome letter. It was not until Mr Brogan became involved that any suitable role was actually offered to her.

191. Viewed objectively, we considered that the respondent could have offered the claimant a role suitable to her capability at a much earlier stage. They could even have treated her more favourably than other employees by considering moving another employee to provide the claimant with a role such as, for example, the principal labelling machine operator on line 11. There was a person in that role but the respondent did not consider offering the claimant that person's role to accommodate the restrictions imposed upon the claimant as a result of her disability.

192. They could, at a much earlier stage, have offered the claimant the roles which Mr Brogan subsequently offered.

193. Whilst we accepted it was appropriate to move the claimant from line 15 to achieve the respondent's aim, we did not consider it was appropriate to ask her to do tasks such as cleaning for a full shift. There was no evidence any other employee did cleaning for a full shift.

194. We did not consider the means by which the respondent endeavoured to deal with their legitimate aim was proportionate. Accordingly, the claim under section 15 succeeds.

*Reasonable Adjustments*

195. The Equality Act 2010 imposes a duty to make reasonable adjustments where a provision criterion or practice of the respondent's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid that disadvantage.

196. The issue set out by the parties in respect of this aspect the claim is as follows –

> 1.1.6 Did the respondent apply a provision criterion or practice ("PCP")? (The claimant alleges the PCP is the respondent's criterion of a contractual entitlement to change the claimant's role).
> 1.1.7 If so, did that PCP place the claimant at a substantial disadvantage in comparison with employees who are not disabled?
> 1.1.8 Did the respondent make reasonable adjustments?

197. There is no dispute that the respondent did have a contractual entitlement to change the claimant's role. As Mr Bradley pointed out the claimant's case as set out in the ET1, page 19 paragraph 23, is that "The reasonable adjustments in this instance would have been (i) for the respondent to retain the claimant in the role she undertook up to February 2018; or (ii) agree to place the claimant in an equivalent role or other role suitable for the claimant". That is to say her case is that the respondent failed to make either of the reasonable adjustments proposed.

198. We agreed with Mr Bradley that the correct question the employment tribunal has to ask is: did the respondent fail to make reasonable adjustments as identified by the claimant? In ***Project Management Institute v Latif*** (above) it was stated at paragraph 53 *"It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given his own particular circumstances."*

199. We did not consider that it would have been a reasonable adjustment for the respondent to retain the claimant in her role on line 15. Lots of people were displaced as a result of Project Neptune and as we have stated above it was a legitimate aim to wish each line to run to its full potential. We considered that moving the claimant was reasonable but the problem was that she was not moved to a suitable role, as we believe she could have been, at the outset if the matter had been properly considered.

200. It was only after Mr Brogan took up his new post in Leven and became involved with the claimant's case that a real attempt was made to resolve the problem.

201. After discussion Mr Brogan offered the claimant a role as Manex coordinator or a role in the label stores in hall 3. The claimant declined the Manex role as she did not consider she would be able to do it. The respondent disagreed and offered training. The claimant did not accept that role. Her refusal had nothing to do with her disability or something arising from it: it was her concern about her perceived lack of skills.

202. The role offered in label stores in hall 3 is essentially the same role as in the label stores in halls 1 and 2, but situated in hall 3. We noted that in her personal aspiration form, page 159, the claimant had indicated a willingness to take any skilled role in hall 3 on night shift. We found that the only reason she did not want to move to hall 3, when the job was

offered by Mr Brogan, was because she did not know people there and her relationships were in halls 1 and 2. We did not accept the claimant's assertion that hall 3 was a location where the respondent placed persons regarded as troublemakers. We were satisfied that was not Mr Brogan's intention.

203. We considered that the roles offered by Mr Brogan were suitable roles and were offered in a genuine attempt to resolve the situation. In our judgment the claimant was offered reasonable adjustments, albeit slightly late in the day. The claim in respect of reasonable adjustments is dismissed.

*Victimisation*

204. Section 27 of the Equality Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

205. A claimant seeking to establish that she has been victimised must show two things: firstly, that she has been subjected to a detriment; and secondly that she was subjected to that detriment because of a protected act.

206. In this case the issue for the tribunal is as follows: –

> 1.1.9 Has the claimant done or does she intend to, or is she suspected of having done or intending to do, a protected act (i.e bringing discrimination proceedings, giving information in connection with them or making an allegation that there has been unlawful discrimination)?
> 1.1.10 If so, was she treated less favourably as a result?

207. The claimant has set out her complaint of victimisation more fully in her ET1 at paragraphs 17 and 24 on page 19 of the bundle. Specifically, she alleges that Andrew Grieve singled her out in his treatment of her. She alleged in evidence that Mr Grieve walked up and down the lines trying to catch her sleeping and had called her "a miserable bastard".

208. It is the claimant's position that the treatment she complained about arose after she had raised a grievance. That was in 8 February 2018. By that time the claimant's manager was Robert Craig and not Andrew Grieve.

209. The onus is upon the claimant to prove the allegation and in our judgment she has failed to do so. We accepted that by making her complaint by way of a formal grievance that was a protected act in terms of the Equality Act. The evidence was directly contradictory as Mr Grieve denied the allegations. In the absence of any further evidence we could not accept that if Andrew Grieve was walking up and down the production lines that that was with a view to trying to catch the claimant sleeping and subjecting her to a detriment.

210. From the evidence we heard we considered it was more likely than not that there was use of what is sometimes, coyly, referred to as "industrial language" in the workplace as a whole but there was no evidence to suggest that Mr Grieve had used any such language towards the claimant nor had done so because she had done a protected act.

211. We concluded that the claimant had not established that she had suffered a detriment as alleged. It therefore follows that she could not have been treated less favourably as a result of doing a protected act. Accordingly, the claim in respect of victimisation is dismissed.

*Remedy*

212. The claimant produced a schedule of loss which is contained at page 38. That seeks payments in respect of both financial loss and injury to feelings.

213. The claim in respect of financial loss is for the loss of two hours' overtime per week from 1 February 2018 until 13 May 2019, a period of 67 weeks in the sum of £1670.98. In her evidence the claimant conceded that she would not have worked overtime every week and there were also periods when the line was down. Mr Bradley argued that the claimant had failed to prove her loss and nothing should be awarded under this heading. We agree with that submission. We have no information as to what overtime the claimant might reasonably have been expected to earn had she not been moved from line 15. Mr Grieve confirmed that there would be periods when the line was down and no overtime being earned. The schedule of loss is prepared on the basis of the claimant seeking payment for every week in respect of overtime. But she conceded that she would not in fact

have been working overtime every week. There was no evidence as to when she might have worked overtime and accordingly no basis upon which we could properly assess any loss. In the circumstances having no information as to what might be expected we can make no award in respect of financial loss.

214. Turning now to the question of injury to feelings, we were satisfied that the claimant had suffered as a result of the discrimination arising from her disability. We heard no medical evidence but we had the evidence of the claimant herself and of her partner as to the effect of the treatment upon her. We did not consider that either the claimant nor her partner, Mr Coleman, were exaggerating the symptoms which they described.

215. In the case of ***Vento v Chief Constable of West Yorkshire Police (No.2)*** [2003] IRLR 102 the Court of Appeal identified three broad bands of compensation for injury to feelings awards, as distinct from compensation for awards for psychiatric or similar personal injury. The lower band applied in less serious cases. The middle band applied in serious cases that did not merit an award in the upper bound. The upper bound applied in the most serious cases. Since ***Vento*** was decided the awards in each band have been updated. Presidential Guidance was issued by the Presidents of the Employment Tribunals in England and Wales and in Scotland respectively dated 5 September 2017. That Guidance was updated on 23 March 2018 in respect of claims presented on or after 6 April 2018. In respect of such claims the ***Vento*** bands are as follows: a lower band of £900 to £8,600, a middle band of £8,600 to £25,700 and an upper bound of £25,700 to £42,900. In this case the claim was submitted on 25 October 2018 and accordingly it is the Presidential Guidance of 23 March 2018 which applies.

216. We took into account that awards for injury to feelings are designed to compensate the injured party and not to punish the guilty. We accepted that the claimant had felt humiliated and undervalued and that she had suicidal thoughts as a result of the treatment she had undergone and that the treatment had affected her relationship with her partner. She has still not been able to return to work and we considered, taking all matters into account, that this case fell in the middle band of ***Vento***. We agreed with

Mr Milligan's submission regarding the appropriate band. We did not accept Mr Bradley's submission that if an award was to be made it should be in the lowest band.

217. We did not consider that this case could be described as a less serious case meriting an award in the lower band as the discrimination arising from the claimant's disability has continued for a length of time. We did not consider it fell within the highest band as that is reserved for the most serious cases. We concluded that this case fell within the middle band.

218. We considered that the award should be in the lower to middle range of the middle band, taking into account the effect the unfavourable treatment had upon the claimant and the fact that she had refused the jobs offered ultimately by Mr Brogan.

219. We were not persuaded by Mr Milligan's submission that the award should be in the sum of £20,000. We considered that an appropriate award to compensate the claimant for the discrimination she had suffered would be £11,000.

220. We have understood that the claimant was transferred from line 15 on 1 February 2018. Mr Milligan asked on behalf of the claimant for interest on any award in respect of injury to feelings to be made. Interest runs at the rate of 8% from the date of the discrimination which was 1 February 2018. Accordingly, the interest from 1 February 2018 until 31 January 2020 being the date of calculation is £1,760. the total award made to the claimant including interest is therefore £12,760.

221. Mr Milligan indicated that he wished the tribunal to make a recommendation in terms of section 124 of the Equality Act. The scope of recommendations has been reduced since 2015 by an amendment to the Equality Act 2010 and now the employment tribunal may only make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate. Whilst we might have been prepared to have made a recommendation under the pre-2015 law we did not consider it appropriate to make a recommendation under the current law. We did not consider that a

recommendation would be likely to obviate or reduce the adverse effect on the claimant of the discrimination she has already suffered. It is therefore not necessary for us to require the parties to return to address us on this issue.

**Employment Judge:** **Iain Atack**
**Date of Judgment:** **04 February 2020**
**Date sent to parties:** **06 February 2020**