EMPLOYMENT TRIBUNALS

Claimant: Mr B J Jimenez

Respondent: Firmdale Hotels plc

Heard at: London Central (in private) **On: 29, 30 and 31 March and 1 April 2021**

Before: Employment Judge Joffe
Ms J Cameron
Mr M Reuby

Appearances
For the claimant: In person
For the respondent: Mr K Wilson, counsel

JUDGMENT

1. The claims of failure to comply with the duty to make reasonable adjustments contrary to section 21 Equality Act 2010 are not upheld and are dismissed.
2. The claim of unfavorable treatment contrary to section 15 Equality Act 2010 is not upheld and is dismissed.
3. The claim for breach of the right to be accompanied pursuant to sections 10 and 11 Employment Relations Act 1999 is not upheld and is dismissed.
4. The claim for unlawful deductions from wages pursuant to section 13 Employment Rights Act 1996 is not upheld and is dismissed.
5. The claim that the respondent refused to allow the claimant to exercise his right to annual leave (regulations 13, 13A and 30 of the Working Time Regulations 1998) is not upheld and is dismissed.

RESERVED REASONS

Claims and issues

1. The claimant brought claims of disability discrimination, unlawful deductions from wages, denial of the right to be accompanied and in respect of annual leave. It had been difficult to set out a list of issues at earlier case management

hearings because the claimant had no representation. The respondent had prepared a draft list for the full merits hearing and we discussed and amended that list at the hearing. The issues it was agreed we should determine were as follows:

Disability Discrimination – s.39 EqA 2010

Disability

(i) The respondent accepts that the claimant was disabled at the relevant time by virtue of upper back and right upper limb tendonitis.

Jurisdiction

(ii) Were each of the claimant's discrimination claims brought within three months of the act complained of (s.123 EqA 2010)?

(iii) If not, was each of the claimant's claims presented within such other period as the employment tribunal considers just and equitable (s.123 EqA 2010)?

Failure to make reasonable adjustments (s.21 EqA 2010)

(iv) Did the respondent impose the provision, criterion or practice of:
  a) Requiring luggage porters to carry out the manual handling tasks in the luggage porter job description
  b) Requiring employees to attend meetings at the respondent's premises

(v) Did these provisions, criteria or practices put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

(vi) If so, did the respondent know (or ought it reasonably to have been expected to know) that the claimant was likely to be placed at the substantial disadvantage caused by the PCP?

(vii) Did the respondent take such steps as it is reasonable to have to take to avoid the disadvantage? The claimant asserts that the respondent should have made the following reasonable adjustments:

  a) Placing the claimant in an alternative role – either a concierge role with a seat or another vacancy - to enable him to return to work for the period 9 - 31 October 2017;
  b) Placing the claimant in an alternative role to enable him to return to work for the period 22 November 2017 – 31 January 2018 – either a switchboard operator role or another role without heavy lifting
  c) Preparing an action plan/facilitating the claimant's return to work during the periods of time set out above. This would be a plan for the claimant to return to work in alternative role, including the adjustments required

d) Facilitating meetings by offering to carry out meetings by telephone or video conference or to send a taxi.

Discrimination arising from disability (s.15 EqA 2010)

(viii) Did the respondent treat the claimant unfavourably by not providing him with a role when he was fit for work?

(ix) If so, was this because of something arising in consequence of the claimant's disability? The something arising relied on is the claimant's inability to carry out luggage porter duties.

(x) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Breach of right to be accompanied (s.11 ERA 1999)

(xi) In respect of the claimant's grievance hearing on 27 March 2018 and grievance appeal hearing on 12 June 2018:
a. Did the claimant reasonably request to be accompanied by a trade union official or colleague?
b. Did the respondent fail to permit the claimant to be accompanied in circumstances which contravened the claimant's right in s.10 ERA 1999?

Unlawful deduction from wages (salary) (s.13 ERA 1996)

(xii) Was the claimant entitled to be paid his salary during the periods in which his GP had certified that he may be fit for work (subject to adjustments) i.e. 9-31 October 2017 and 22 November 2017 to 31 January 2018?

(xiii) To the extent that the claimant was entitled to be paid his salary during the periods at paragraph xii), what sums (if any) are owed by the respondent to the claimant?

Breach of Working Time Regulations (regulations 13, 13A and 30 Working Time Regulations 1998)

(xiv) Did the respondent refuse to allow the claimant to exercise his right to annual leave between 9 and 31 January 2018?

Findings of fact

The hearing

2. The hearing was a remote hearing via Cloud Video Platform. The Tribunal is not able to hold in person hearings at present and the parties did not object to a remote hearing. There were no significant technical issues.

3. We had an agreed bundle of some 402 pages and we read the documents the parties directed us to. We heard evidence from the claimant on his own behalf. For the respondent we heard evidence from Sandra Petit, group health and safety manager, Julia Murrell, director of people and development, and Julie Le Sauvage-Barry, general manager of the respondent's Charlotte Street Hotel. We had a witness statement from Charlotte Oberg, formerly deputy manager at the Soho Hotel. Ms Oberg has left the respondent's employment and did not attend to give evidence, but there were few disputed facts in this case and much of Ms Oberg's statement was supported by contemporaneous documentation.

4. The claimant was assisted by an interpreter, Mr Moore, and we were very grateful for Mr Moore's attendance. The claimant's understanding of English was good and he only occasionally required Mr Moore's help. We are grateful to the parties for the way in which they conducted the proceedings, especially the claimant, whom we could see was in discomfort at times during the hearing and who remained good natured and helpful throughout.

Amendment to add reasonable adjustment of paying the claimant for periods when his GP said he was fit for work with adjustments

5. In the course of submissions the claimant sought to add a claim that it would have been a reasonable adjustment to pay him for the periods when it was said the might be fit for work with adjustments.

6. In considering whether to allow the claim form and issues to be amended to add this adjustment, we bore in mind that Project Management Limited v Latif [2007] IRLR 579, EAT acknowledges that potential adjustments may arise during the hearing itself.

7. We concluded that we would not allow an amendment for the following reasons:

   - We had taken care to clarify the issues at the outset of the hearing and the adjustment was not put forward by the claimant at that stage;
   - It was not an adjustment which arose from the evidence which we heard nor one which would not necessarily have occurred to the parties earlier. There were a number of opportunities throughout the prolonged proceedings when the claimant could have advanced this as a reasonable adjustment;
   - The respondent had not had an opportunity to call any evidence on the issue;
   - The claim seemed to us to be inherently without merit. The case law makes it clear that the purpose of reasonable adjustments in these circumstances is to facilitate an employee's return to work. There may be exceptional

circumstances in which paying an employee who is absent due to disability and has run out of the sick pay provided under contract or statute would be a reasonable adjustment but the claimant had put forward no evidence which suggested to us that such exceptional circumstances existed in this case.

Facts in the case

8. The respondent is a hotel group which has a number of hotels internationally. There are eight hotels in London including the Soho Hotel. The hotels are expensive and their clients expect a high standard of service. The respondent employs 1400 people in the UK mostly in operational roles. There are some 140 employees in the head office doing desk based roles.

9. Across the London hotels, there are three switchboard operators, one based in the Soho Hotel. Switchboard operators take incoming calls and direct them to the appropriate department. Switchboard operators also do some typing and other administrative tasks. The role can be quite pressured, with large numbers of calls. We were told by Ms Petit and accepted that the role required someone who was confident about their level of English.

10. The Soho Hotel also employed concierges. There was a head concierge and a deputy concierge for the day shift. The day shift concierges would remain behind the desk carrying out administrative tasks and, for example, making reservations for customers. During the day luggage porters would assist guests to their rooms and carry luggage. There were also night concierges. At night the concierge would have to perform luggage porter duties. From time to time the Hotel would have a development role of junior concierge – a luggage porter who showed promise would cover the concierge role when the day concierges were on leave but would continue with luggage porter duties the remainder of the time.

11. The claimant has had a varied career, including roles in engineering, fitness and the hospitality industry. His first language is Spanish.

12. On 4 January 2016, the claimant commenced employment with the respondent as a luggage porter. His duties included welcoming guests and assisting with their luggage, taking guests to their rooms and noting restaurant and car bookings.

13. The claimant's contract of employment provided that if he was absent due to sickness and complied with absence notification requirements, he would receive Statutory Sick Pay.

14. The claimant at times covered the concierge role during the annual leave of the post-holders.

15. On 4 April 2017 the claimant injured his left shoulder in an accident at work. The respondent has accepted some level of liability for the injury but we were not provided with any significant further detail about the accident.

16. The claimant was then off work and initially self certifying. On 13 April 2017 he provided a Statement of Fitness for Work which indicated that he was not fit for work.

17. The claimant received full pay for his first month of absence; this was an exercise of a discretion by the respondent and not a contractual entitlement, and thereafter the claimant was paid SSP.

18. On 5 May 2017, there was a meeting between the claimant, Charlotte Oberg, deputy manager at the Soho Hotel, and Sandra Petit, Group H and S manager regarding the claimant's injury and potential return to work. Nadine Van Aalst, people and development manager, attended to take notes.

19. This meeting was led by Ms Petit and the focus was on the claimant's accident and injury. It was clear that the medical situation was still unfolding and under investigation, and there was no question of the claimant being fit for work at the time.

20. On 11 May 2017 the claimant's Statement of Fitness for Work indicated that he was not fit for work. The claimant told Ms Oberg he was waiting for an MRI scan during this period in email correspondence between the two.

21. On 2 June 2017 the claimant's Statement of Fitness for Work indicated that he was not fit for work. The claimant said that he was still waiting for the MRI scan. Ms Oberg emailed the claimant that day, sympathising and saying that they would need to see what the MRI scan showed before identifying what amended duties or alternative role he could undertake.

22. We noted that there was never a threat to the claimant's employment and no absence management procedures were commenced. The communications with the claimant focussed on his health and when he could get back to work. There was a frank discussion about what medical investigations the claimant was having; both sides seemed engaged and there appeared at least at this stage to be trust and transparency.

23. On 30 June 2017 the claimant's Statement of Fitness for Work again indicated that he was not fit for work. The same was true of his 21 July 2017 and 11 August 2017 Statements.

24. The claimant was having further medical investigations and Ms Oberg kept in touch via email and telephone. There seemed to us to be regular, friendly and transparent contact.

25. After a 1 September 2017 Statement of Fitness for Work which said that the claimant was still not fit for work, the respondent decided it was time to get occupational health involvement in order to better understand the claimant's

condition and what support he could be offered. The claimant had had his MRI scan by this point.

26. 14 September 2017, Ms Oberg sent the claimant an invitation to a meeting to discuss his long term sickness absence. The invitation said that the meeting was to discuss the claimant's health and wellbeing and identify ways the respondent could support him. Again, there was no threat to the claimant's continued employment contained in the letter.

27. On 19 September 2017 there was a meeting between the claimant and Ms Oberg to discuss the claimant's long term sickness absence. Ms van Aalst took notes.

28. Ms Oberg explained that the respondent wished to obtain an occupational health report. The claimant did not object to the report and provided consent forms; he was keen to return to work.

29. We saw the 27 September 2017 occupational health referral. It included a job description for the claimant and questions for the doctor about what adjustments could be made to the claimant's role to enable him to resume work.

30. On 27 September 2017 the occupational health report was completed but was not provided immediately to the respondent. Dr Khan's view was that the claimant was unfit for his role as a luggage porter for the foreseeable future and would only be able to return to work if an alternative role could be found. A desk based role was proposed. with breaks and appropriate equipment.

31. On 29 September 2017 the claimant received a Statement of Fitness for Work which indicated that he was not fit for work until 6 October 2017.

32. On 9 October 2017, the claimant received and sent to the respondent a Statement of Fitness for Work which for the first time indicated that he was potentially fit for work with adjustments: *"no carrying/handling as cannot tolerate heavy weights on the left shoulder and arm"*.

33. On 16 October 2017, the occupational health report was received by the respondent from Nuffield Health.

34. On 17 October 2017, Ms Oberg sent the claimant an invitation to an occupational health review meeting with the respondent. She asked the claimant to be ready to discuss the report and any adjustments the respondent might be able to accommodate.

35. On 20 October 2017, the Occupational Health review meeting was held. Ms Oberg and Ms Petit attended with Ms van Aalst again taking notes. The claimant reported that his pain had worsened and there was a discussion about upcoming treatment and further investigations. The claimant said he had cried when he read the OH report. He agreed that he could not do his job as a luggage porter. There was a discussion of possible roles. The claimant expressed the view that his English was not at the right level for a reservations role. He described his skills and past experience.

36. There was a discussion about how the process of considering vacancies would be conducted and there is a dispute between the parties as to what was agreed. The respondent said that Ms Petit told the claimant that he would be sent the list of vacancies and asked to indicate which might be of interest to him. He would be sent login details for the respondent's list of vacancies – the Talent Toolbox. The doorman and host roles were discussed and the claimant expressed uncertainty about whether he could stand for long periods. The respondent's account is consistent with Ms van Aalst's notes.

37. The claimant's evidence was that there was a discussion about the doorman role and he said that he could not do that role. He said that there was a discussion about assisting the concierge at the front desk using a chair or taking breaks. The claimant said that it was agreed that Ms Oberg and Ms Petit would evaluate the possible vacancies and that he should look at the roles in the group himself. He should have a chat with Ms Oberg about his interests.

38. We accepted that the respondent's account was closer to what was discussed. It may well be that the claimant had misunderstood the plan. It would make no sense for the respondent to conduct the first trawl of possible roles since Ms Oberg and Ms Petit would have less idea than the claimant what he might be interested in and qualified for. The respondent's account was consistent with the notes and evidence from Ms Petit which we accepted that she would want to bring an employee back in a role he was comfortable to do.

39. We note that the respondent was faced at this point with medical advice which was not consistent and the claimant saying that his pain had been worsening and indicating that he was not sure what he was physically capable of.

40. Later on 20 October 2017 Ms Van Aalst sent the claimant the log in details to the Talent Toolbox. That would enable the claimant to access current vacancies in the respondent hotel group.

41. On 27 October 2017, the claimant emailed Ms Oberg, stating he had not been sent a list of suitable jobs he could perform. He said that as he was fit for work and no job had been provided for him, the respondent should now medically suspend him until a role was found. The claimant had taken some advice from Acas but he was mistaken in thinking that the respondent was obliged to medically suspend him in the circumstances he found himself in.

42. On 27 October 2017 Jason Phillips, Soho Hotel manager, emailed the claimant as Ms Oberg was absent that day. He said that the respondent was currently considering positions in the group which would be suitable. He said that the claimant had also been asked to consider what positions he would be interested in and would feel able to do and asked the claimant if he had been able to access the vacancy list. The claimant's email in response to Mr Phillips requiring a list of vacancy options, reflects the claimant's (mis) understanding that he would receive a list of possible positions to discuss with Ms Oberg.

43. On 6 November 2017, the respondent received a Statement of Fitness for Work of 3 November which was backdated to 31 October 2017 and indicated that the claimant was not fit for work until 24 November 2017.

44. In the mean time on 2 November 2017, Ms Oberg emailed the claimant saying that vacancies were listed on Talent Toolbox and attaching the current Talent Toolbox list. She said that her expectation after the meeting was that the claimant would contact the respondent about positions he was interested in and felt he was able to do, having regard to his skill set. She asked him to update the respondent on his wellbeing and provide a current certificate and asked about the outcome of his recent medical appointment.

45. On 2 November 2017 the claimant sent Ms Oberg an email listing vacancies the claimant considered potentially appropriate. He asked if Ms Oberg could tell him more about them. He said he had had a further steroid injection in his shoulder and been told that surgery might be an option. He had a GP appointment scheduled for Monday and would provide a further fit note at that point.

46. On 6 November 2017, Ms Oberg emailed the claimant answering some queries he raised about SSP. She asked the claimant if he would attend a meeting with herself, Ms van Aalst and Dan Solomon, recruitment manager, early the following week. She said that Mr Solomon would be able to talk the claimant through the vacancies.

47. On 10 November 2017, Ms Oberg sent the claimant a chaser email asking about whether he was able to meet. That same day the claimant wrote back to Ms Oberg asking if the meeting could be with just one person as he had found the last meeting 'so uncomfortable'.

48. On 13 November 2017, Ms Oberg emailed the claimant. She said that it was important that the claimant felt comfortable; everyone attending was doing so in order to assist the claimant in finding a role. She proposed meeting on 16 November with just herself and Ms van Aalst present but with Mr Solomon joining to answer questions and provide details of current vacancies.

49. On 14 November 2017, the claimant emailed Ms Oberg to say that it was fine for him to meet on the 16th but it should just be with one person of Ms Oberg's choice.

50. On 15 November 2017, Ms Oberg tried to telephone the claimant and followed up with an email asking him to call her that day.

51. On 16 November 2017 the claimant did not attend the meeting which had been arranged. Ms Oberg emailed him to ask him if he was OK and whether he wanted to meet so that they could discuss finding him a suitable alternative role. The claimant emailed Ms Oberg to say that the meeting had not been agreed as Ms Oberg had not confirmed that it would be a meeting with just one person.

52. On 17 November 2017, Ms Oberg emailed the claimant explaining that she had tried to telephone him to discuss the meeting. She said that only she and Ms

van Aalst would be in any future meeting. She asked if he could attend a meeting on 21 November.

53. On 20 November 2017 the claimant emailed Ms Oberg to say that he could not attend the following day but could do the day after: 'just bring whoever you think will be best'. On 21 November 2017 Ms Oberg and the claimant agreed that the claimant would meet with Ms Oberg and Ms van Aalst on 22 November.

54. At the 22 November 2017 absence review meeting, there was a discussion of the claimant's condition and his current fit certificate, which said that he was not fit until 24 November. Ms Oberg looked with the claimant at the current list of vacancies in preparation for the claimant being fit.

55. The claimant asked about a number of available roles including kitchen porter and chef de partie, both of which had unsuitable physical demands. He said that he was not qualified for the vacant group reservation manager role as he did not have the qualifications and his English level was 'not ready'. He asked about and was told about the duties of the switchboard operator role. He said that perhaps he could trial that role.

56. Ms Petit told us that the claimant had not seemed confident about his English and that the switchboard role was quite demanding and stressful. There could be an overwhelming number of calls. She gave evidence about the efforts which the respondent makes to try and make adjustments for employees with health considerations; she said that there were many successful stories including cases of redeployment. So far as the claimant was concerned she wanted to find a role he could return to which he was comfortable with and would feel valued in.

57. They discussed the night auditor role but the claimant said that he would have to discuss working nights with his partner. He said that he could do office work but the limitation was his English: ‘maybe not good for hotel for money if it is not perfect English. For me I don't mind.'

58. Ms Oberg said that they would be open to discussing anything within the claimant's capability taking into account what the claimant was interested in.

59. The meeting finished with the claimant saying he would contact the respondent after visits to his GP and specialist the following week.

60. The claimant’s evidence was that at this meeting it was agreed that he would fill a switchboard operator vacancy. That was not consistent with the notes of the meeting. Whilst it was unfortunate and not good practice that the claimant was not provided with copies of these and other meeting notes, we accepted that they were broadly accurate. Given that the claimant sometimes seems to have misunderstood what was said at meetings it was particularly unfortunate in his case that notes were not provided. We did not accept that the claimant was told that he would be placed in a switchboard operator role; it would have made no sense for such an offer to be made at this stage given that the claimant had

not indicated that he was confident that his English was adequate for the role and given the uncertainty about his medical situation.

61. On 29 November 2017 the claimant emailed Ms Oberg to say that he would probably require shoulder surgery but that his specialist would review him at the beginning of January. He had an appointment that day with his GP to get a fit note but he was with his fiancé in hospital so might not be able to attend.

62. On 30 November 2017 Ms Oberg emailed the claimant to say that it sounded like he had bigger priorities with his fiancé and he should send a fit note when he could.

63. On 4 December 2017 Ms Oberg emailed the claimant saying she hoped that the claimant and his fiancé were well and asking if the claimant had been able to see his GP. That day the claimant emailed Ms Oberg to say that he was just home from hospital with his fiancé, who had been operated on for his appendix. The claimant would be seeing his GP that day or the following day and he had an appointment on 8 January 2018 to set a date for his shoulder operation.

64. On 6 December 2017, Ms Oberg email the claimant to ask if he had a new fit note. The claimant received that day a Statement of Fitness for Work which indicated that he was potentially fit for work: *"Under specialist review who states able to work but no heavy lifting duties".* The fit note was backdated to 24 November 2017 for the period until 8 January 2018. It was received by the respondent on 7 December 2017 under cover of an email from the claimant which asked: 'So what is the next step now?'

65. On 13 December 2017, there was a meeting between Ms Oberg, Ms Petit, and the claimant. Ms Petit asked about the length of the certificate. The claimant agreed with Ms Petit that he could do no lifting. They discussed standing; the claimant said that he could not see himself doing a lot of standing. Ms Petit asked if he could see himself doing the door. The claimant said it depended on the number of hours. They discussed a possible phased return. Ms Petit proposed a doorman role with no touching of luggage. The minutes of the meeting refer to opening the door and taxi doors. Ms Petit's oral evidence was that only opening car doors was intended to be part of the claimants' role, not opening the heavy hotel door. Ms Petit told the Tribunal that the claimant's first day back at work would have been largely taken up with a risk assessment. She told us that the proposal was for the claimant to be supernumerary and that the other doorman on duty would do manual handling tasks. Ms Petit asked when the claimant wanted to return and the claimant said he wanted to talk to his GP to maybe get a different certificate.

66. There was then a discussion about the holiday and sickness policy and the claimant said he wished to take holiday over the Christmas period. The claimant was to get in touch when had his holiday dates.

67. It appeared to us that the claimant would have been left with the impression that the proposed doorman role would involve handling the hotel door.

68. On 15 December 2017 the claimant sent an email to Mr Phillips saying would take his holiday from 19 - 26 December 2017 inclusive. Also on 15 December 2017 there was an email to the claimant from Ms van Aalst to arrange an occupational health appointment for the claimant on 27 December 2017. In the occupational health referral of the same date, the doctor was asked to review additional information about the doorman position and confirm if the claimant could perform that role. It was not suggested that the claimant would have to handle the heavy hotel door in the referral.

69. The claimant attended his occupational health appointment and Dr Ahmed reported that she understood the hotel door was heavy and she continued to recommend light duties for him – a non-manual handling desk-based job. We derived from that evidence that the claimant must have conveyed to her the impression he took from the meeting that he would be required to open the heavy hotel door.

70. On 8 January 2018, the claimant sent an email to Mr Phillips and Ms Oberg to say that he wished to take 9 - 31 January 2018 as annual leave. He would update them after his consultant's appointment.

71. On 9 January 2018, the claimant sent an email to Ms Oberg and Mr Phillips to inform them that his consultant said they should proceed with the surgery, probably around February. He was chasing about his holidays and whether the respondent had received the occupational health report.

72. On 11 January 2018, the respondent received the occupational health report although the report itself was dated 27 December 2017.

73. On 19 January 2018 Mr Phillips sent an email to the claimant to say that the respondent had received the occupational health report and would like to schedule a follow up meeting. He said that he was aware the claimant was on holiday and asked if he would like to meet during his holiday or wait.

74. On 30 January 2018, the claimant received a Statement of Fitness for Work which said that the claimant was not fit for work between 30 January 2018 and 2 March 2018 because of foot surgery.

75. On 31 January 2018 the claimant was sent an invitation to a meeting to discuss the occupational health report.

76. On 1 February 2018 the claimant replied to say that he could not attend the meeting as he had just had surgery on his foot. The foot surgery was for bunions and was unrelated to the claimant's disability. The claimant said that he would not be able to walk for two weeks but could do a video conference. He forwarded his most recent Statement of Fitness for Work to Ms Oberg.

77. On 2 February 2018 Ms Oberg emailed the claimant to say that she would reschedule the meeting to allow the claimant to be able to attend in person. She proposed 26 February 2018. The claimant replied the same day to agree that date.

78. On 12 February 2018 the respondent sent the claimant an invitation to the rearranged meeting to discuss the occupational health report.

79. On 20 February 2018, the claimant emailed to say that he would attend the meeting. If something changed after his medical appointment, he would let Ms Oberg know. He could not walk long distances but would catch a taxi.

80. On 26 and 27 February 2018, there were emails between the claimant and Ms Oberg. The claimant wanted to move the meeting time as he had a medical appointment. Ms Oberg said that they could not move the time as there was an interpreter booked for the claimant. The claimant was not sure why an interpreter was needed as he said his fiancé or a friend could attend. Ms Oberg said that the interpreter needed to be impartial. She attempted unsuccessfully to telephone the claimant to discuss the matter. The claimant continued to query the need for an interpreter and said that he needed the meeting to be held online or for a taxi to be provided for him.

81. On 28 February 2018, Ms Oberg email the claimant saying that they had hoped to have a meeting with the claimant prior to his shoulder surgery. She explained why the respondent used interpreters 'when we feel that there are some more detailed discussions to have and English is not [the employee's] first language'. She asked him to propose a time and date for the meeting.

82. On 28 February 2018 the claimant submitted a grievance saying that he was disabled and the respondent had failed to make reasonable adjustments for him. He also wrote to Ms Oberg to say that he could not afford a taxi and could not walk. He said that he wished to have a meeting but Ms Oberg had not agreed to holding it online. He could either have the meeting before his shoulder surgery the following week or once he had recovered from surgery. On 28 February 2018 the claimant received another Statement of Fitness for Work stating that he was not fit for work due to foot surgery.

83. On 2 March 2018, the claimant was invited to a grievance hearing to be held on 5 March 201,8 by Lili Iliescu, people and development manager. He was told that the respondent would arrange a car to pick him up and that he had the right to be accompanied by a work colleague or trade union representative.

84. On 2 March 2018, there was then correspondence between the claimant and Ms Iliescu regarding arrangements for the grievance hearing. The claimant said that he would like Sergio Lopez, night concierge, to attend but was not sure about his availability and not yet contacted him.

85. Ms Iliescu tried to telephone the claimant to discuss the arrangements but the . claimant emailed to say that he had no mobile on him right now. He asked if Sergio would be available for Monday. Ms Iliescu replied that she had spoken to Sergio and he was not available. The claimant asked: 'So you want to move it to Tuesday then?' Ms Iliescu said that Ms Murrell, who was hearing the grievance was not available on Tuesday. She suggested they might rearrange for the following week after the claimant's surgery. The claimant suggested that they should wait and see how his recovery went before setting a date.

86. On 16 March 2018, after some further correspondence about the claimant's fitness to attend a hearing, Ms Iliescu sent him an invitation to a rescheduled grievance hearing on 27 March 2018. The claimant was told a car would be provided to transport him to the meeting and that he could be accompanied by a colleague or trade union representative. The claimant did not contact a colleague nor did he ask the respondent to contact a colleague on his behalf.

87. On 27 March 2018, the grievance hearing was held in front of Ms Murrell with Ms Iliescu taking notes. The claimant did not have a colleague or trade union representative with him nor did he raise the issue of not having someone accompanying him. He attended by taxi and the taxi fare was paid for by the respondent. There was a discussion about the claimant's assertions that he should have been medically suspended and that the respondent was failing to make reasonable adjustments to allow him to attend work.

88. 3 April 2018 the claimant received a Statement of Fitness for Work saying that he was not fit for work.

89. On 11 May 2018 Ms Murrell sent the claimant a grievance outcome. She did not uphold his grievance.

90. On 22 May 2018, the claimant submitted an appeal against the grievance outcome.

91. On 30 May 2018, Ms Le Sauvage-Barry sent the claimant an invitation to a grievance appeal hearing. She told the claimant that he could bring a colleague or trade union representative. On 12 June 2018, the claimant attended a grievance appeal hearing in front of Ms Le Sauvage-Barry. There had been correspondence between the claimant and Ms Le Sauvage-Barry about accompaniment. Ms Le Sauvage-Barry explained that the companion had to be a trade union representative or colleague. The claimant did not attend with a companion. It was clear from his own evidence that the claimant very much liked Ms Le Sauvage-Barry and felt that they had had a good discussion in the appeal hearing.

92. On 22 June 2018 Ms Le Sauvage-Barry sent the claimant a grievance appeal outcome in which she did not uphold his appeal.

Law

Failure to comply with a duty to make reasonable adjustments

93. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to

make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.

94. In considering a reasonable adjustments claim, a tribunal must consider:

- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
- The identity of non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] ICR 218, EAT.

95. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.

96. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.

97. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.

98. The substantial disadvantage must be connected to the relevant disability: "there can be no duty to make an adjustment for the lack of an ability which is wholly unrelated to the disability": Lalli v Spirita Housing Ltd [2012] EWCA Civ 497.

99. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer

reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

100. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: Rider v Leeds City Council EAT 0243/11, Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT.

101. The duty to comply with the requirement to make reasonable adjustments begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194

102. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:

- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
- The extent to which it was practicable for the employer to take the step
- The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance in respect of taking the step
- The nature of the employer's activities and the size of its undertaking
- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

98. Redeployment to a new role may be a reasonable adjustment, but it is unlikely to be reasonable to appoint an employee to a role where the employer genuinely believes that the employee fails to meet the essential requirements of the role: Wade v. Sheffield Hallam University [2013] UKEAT/0194/12/LA.

Discrimination arising from disability

103. In a claim under s 15, a tribunal must consider:

- Whether the claimant has been treated unfavourably;

- Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
- Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

104. There are two aspects to causation:

- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.

105. So far as causation is concerned, the something arising must have "a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment": Hall v Chief Constable West Yorkshire Police [2015] IRLR 893 at [42].

106. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

107. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

108. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification': Dominique v Toll Global Forwarding Ltd EAT 0308/13. The EAT commented that it was difficult to see how a disadvantage which could have been alleviated by a reasonable adjustment could be justified.

109. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

110. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

Right to be accompanied

111. Under section 10 Employment Relations Act 1999 a worker who reasonably requests to do so has a right to be accompanied to a grievance hearing by a trade union employee or official or another of the employer's workers.

Unlawful deductions from wages

112. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

113. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

Right to paid annual leave

114. Under regulation 13 of the WTR 1998, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.

115. Under regulation15 a worker may take leave to which that worker is entitled on such days as he or she may elect provided appropriate notice as set out in the regulation is given and the employer has not given counter notice.

116. Under regulation 30 of the WTR 1998, an employee may present a complaint where the employer has 'refused to permit him to exercise any right he has' under the WTR. Any claim must be presented within three months from the date when it is alleged that the exercise of the right should have been permitted. Time can be extended if it was not reasonably practicable to present a claim in time.

117. The appellate case law on what constitutes a 'refusal' of the exercise of a right does not speak with one voice. In Miles v. Linkage Community Trust Ltd [2008] IRLR 602, the EAT held that for there to have been a refusal (in that case of a right to a rest break), there must have been an actual request and an express refusal. In Grange v. Abellio London Ltd [2017] ICR 287, a differently

constituted EAT considered that there might be a refusal without some active response to a positive request.

Submissions

118. We heard oral submissions form both parties, and the respondent also submitted written submissions. We carefully took into account the parties' submissions but refer to them only insofar as is necessary to explain our conclusions,

Conclusions

Failure to make reasonable adjustments:

First period 9 – 31 October 2017:

Issue: Did the respondent impose the provision, criterion or practice of: Requiring luggage porters to carry out the manual handling tasks in the luggage porter job description?

119. There was clearly a PCP that in order to perform the role of luggage porter, an employee would have to carry out significant manual handling tasks.

Issue: *Did that provision, criterion or practice put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*?

120. That requirement undoubtedly put the claimant at a disadvantage because he could not perform those activities and so was unable to perform his substantive role.

Issue: If so, did the respondent know (or ought it reasonably to have been expected to know) that the claimant was likely to be placed at the substantial disadvantage caused by the PCP?

121. The respondent had medical evidence which demonstrated that the claimant was unable to carry out the luggage porter role. The respondent had actual knowledge of the disadvantage.

Issue: Did the respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

122. Looking at this period, the respondent had already started the process of investigating what work the claimant was fit for prior to the start of the period by sending him for an occupational health appointment in September 2017. That report was received about a week into the period during which the claimant was

said by his doctor to be possibly fit for work with adjustments. It was appropriate to wat for the report which was then imminent.

123. The claimant was promptly asked to a meeting to discuss the adjustments and that meeting took place on 20 October 2017. The claimant accepted at the meeting that he could not perform the luggage porter role and he expressed a lack of confidence in his English for roles such as reservations roles.

124. There was a dispute of fact as to what was agreed about how the process would be taken forward. We accepted the respondent's account that the claimant was to identify roles from the list of vacancies he was sent rather than the claimant's account that the respondent was to identify such roles and send him a list. This was not only because the notes of the meeting were consistent with the respondent's account but also because it would have made no sense for the respondent to perform the exercise of looking at a large number of roles and considering whether they could be suitable for the claimant with or without adjustments without knowing whether he would be interested in the roles or might have the required skillset. We also accepted that the claimant misunderstood or misremembered what the plan was. We note that by the time of the meeting, the claimant's shoulder pain was worsening.

125. On 27 October 2017 the claimant emailed Ms Oberg to complain about not having been sent a list of suitable jobs and to say he should be medically suspended. By 6 November he had provided a statement of fitness for work which indicated he was unfit and had been unfit since 31 October 2017. We were unable to conclude that the duty to place the claimant in an alternative role had arisen in the eleven days which had elapsed since the meeting on 20 October 2017. Standing back from the focus which this case has trained on relatively short periods of time, what the employer should be doing in a case such as the claimant's is planning for a long term return to work. Hurrying a disabled employee back to what may be an unsuitable role is likely to be counter-productive.

126. We do not uphold the claimant's claim in respect of this period, either in respect of an adjustment of providing an alternative role or in respect of creating an action plan which would have provided the detail of how the return to work would happen.

127. No duty to make these adjustments had arisen because the respondent was not in a position to take these steps during the period because it had not yet been possible to properly assess if there was any vacancy the claimant could perform with any necessary and reasonable adjustments to the role.

Second period: 22 November 2017 – 31 January 2018

128. In respect of this period, the same provision, criterion or practice in relation to the luggage porter tasks was applied and it continued to place the claimant at a

substantial disadvantage. The respondent had actual knowledge of the disadvantage.

Issue: Did the respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

129. Looking at this period, we note that prior to the start of the period Ms Oberg was working to arrange a meeting with the claimant to discuss roles. The claimant did not attend a meeting because he said he was unhappy about the number of people who would be in the meeting although he later indicated to Ms Oberg that he had, understandably, been feeling moody and depressed when he declined to attend.

130. A meeting was held on 22 November 2017 and there was a discussion about possible roles. Although there was a discussion about the switchboard operator role and claimant expressed a willingness to do a day's trial in the role, he acknowledged during that meeting that his fluency in English might not be to the standard required by the respondent for some of the vacant roles.

131. The claimant provided a fit certificate on 7 December which back-dated his fitness to work to 22 November 2017. He had already told the respondent he might be having surgery to his shoulder and was going to be reviewed in early January. The respondent promptly arranged a meeting at which Ms Petit proposed a supernumerary doorman role with no handling of luggage for the claimant. We were impressed by Ms Petit's evidence. We thought she had thought hard about a role which the claimant could perform and which would have the considerable benefit of returning him to work in an environment he was used to and would be comfortable in. We think that she recognised, as we do, that just getting back to work in some capacity can have immense psychological benefits for an employee who has been on long term sick leave. It was reasonable for the respondent not to seek to return the claimant to a role such as switchboard operator which the respondent reasonably doubted the claimant was equipped to do, because of his lack of fluency and confidence in English, but also reasonably considered would be stressful for the claimant because of his unfamiliarity with the tasks and environment.

132. We conclude that it was not made clear at the meeting that the claimant would not have to handle heavy doors and that that confusion carried over to the appointment the claimant had with Dr Khan on 27 December 2017 and led to Dr Khan concluding that the role was not suitable for the claimant.

133. However, if we look at this time period, there was in any event no time when the respondent could have returned the claimant to work. The claimant wanted to take and did take holiday before Christmas. The respondent acted appropriately in seeking an occupational health report to determine whether the claimant could return in the proposed role. The respondent received the occupational health report on 12 January 2017, by which point the claimant was in a period when he had requested holiday. He remained in that period until 31 January

2017 and did not respond to an invitation to discuss the OH report sent on 19 January 2017. By 1 February 2017, the claimant had had had foot surgery and was unfit for any work.

134. We considered that some employers might reasonably have deferred an attempt to return the claimant to work until after his assessment for surgery in January 2018, given the developing medical picture and the changing certificates being received from the claimant's GP. We concluded that the attempt to return the claimant to the workplace in advance of that assessment in a role which was supernumerary showed a genuine effort on the respondent's part to address the financial and psychological effects on the claimant of his long absence.

135. We do not uphold the claimant's claim in respect of this period, either in respect of an adjustment of providing an alternative role or of creating an action plan which would have provided the detail of how the return to work would happen because we concluded that there was no point at which the respondent could reasonably have taken the steps contended for by the claimant.

Reasonable adjustments: PCP of attending meetings at the respondent's premises from January 2018

Issue: Did the respondent impose the provision, criterion or practice of: Requiring employees to attend meetings at the respondent's premises?

136. This PCP was applied. Such meetings as were arranged were to be held in person at the respondent's premises.

Issue: Did that provision, criterion or practice put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

137. There was no evidence that this PCP put the claimant at a substantial disadvantage by comparison with a person without his particular disability. The disadvantage arose because of the claimant's unconnected foot surgery. The duty to make reasonable adjustments did not arise.

138. In any event, the respondent made such adjustments as were reasonable in terms of providing a taxi for the claimant to attend his grievance meeting. There were no other relevant meetings during the period.

139. We did not uphold this claim.

Discrimination arising from disability: Section 15 claim

Issue: Did the respondent treat the claimant unfavourably by not providing him with a role when he was fit for work?

140. The claimant was not placed in an alternative role nor was there an action plan to accompany an alternative role.

141. We were not persuaded that this was unfavourable treatment in circumstances where, on the chronology we have considered, there simply was not a point at which the claimant could have safely started work in a satisfactory and suitably adjusted alternative role.

Issue: If so, was this because of something arising in consequence of the claimant's disability? The something arising relied on is the claimant's inability to carry out luggage porter duties.

142. In any event, this claim fails because the something arising – the claimant's inability to do his substantive role – was not the reason he was not returned to an alternative role. It was simply the context in which the need to look for alternatives arose.

143. For those reasons we did not uphold this claim.

Right to be accompanied: s 10/11 ERA 1999

Issues: In respect of the claimant's grievance hearing on 27 March 2018 and grievance appeal hearing on 12 June 2018:

a. Did the claimant reasonably request to be accompanied by a trade union official or colleague?

b. Did the respondent fail to permit the claimant to be accompanied in circumstances which contravened the claimant's right in s.10 ERA 1999?

144. The statutory right is a right to be accompanied by a work colleague or trade union representative. The complaint relates to the grievance and grievance appeal hearings.

145. The claimant had said that he wanted to be accompanied by a work colleague, Mr Lopez, at the grievance hearing. The respondent made enquiries about Mr Lopez's availability to attend the meeting and offered to reschedule for a time when he was available. The claimant did not bring Mr Lopez to the rescheduled hearing and did not ask the respondent to arrange for his attendance. There was no refusal of the right to be accompanied.

146. The claimant did not ask to have a work colleague or trade union representative at the appeal hearing and there was no refusal of accompaniment by any such person.

147. We did not uphold this claim.

Unlawful deductions from wages for periods 9 – 31 October 2017 and 22 November – 31

Issue: Was the claimant entitled to be paid his salary during the periods in which his GP had certified that he may be fit for work (subject to adjustments) i.e. 9 - 31 October 2017 and 22 November 2017 to 31 January 2018?

148. An unlawful deduction from wages occurs when a worker is paid less than what is properly payable to him or her. What is properly payable is generally governed by the employee's contract. The claimant's contract provided that he be paid SSP when he was absent from work due to sickness.

149. The claimant was not actually working during the periods claimed for and he was not fit for the role he was employed to do. There was no express contractual entitlement to be paid in those circumstances and we could see no basis on which a relevant term could be implied.

150. We did not uphold this claim.

Refusal to permit annual leave

Issue: Did the respondent refuse to allow the claimant to exercise his right to annual leave between 9 and 31 January 2018?

151. This complaint arises because the claimant requested leave for 9 – 31 January 2018 and the respondent did not confirm he could take the leave until midway through the period. The claimant was paid holiday pay for the period.

152. We have looked carefully at the Working Time Regulations 1998 and it seemed to us that the provisions in relation to annual leave differ significantly from those in respect of breaks. In respect of breaks, there may be an implicit refusal to allow the statutory right if there is simply no prospect of taking a break on a particular occasion. In relation to annual leave, the right is one which extends over the course of a whole year; an employee asks for annual leave and is then entitled to take it during the period requested unless the employer says no to the particular request. If the employer says no on a particular occasion, the right to take the leave at some other time remains. We concluded that there would be a refusal to allow annual leave where an employer indicated that an employee could not take leave on a particular occasion but had no good reason to do so (regulation 13(2)) or where the employer prevented the employee from taking leave to which he or she was entitled during that leave year throughout the leave year.

153. Neither of those circumstances applied in this case. The claimant requested leave on particular dates; that leave was not refused.

154. We did not uphold this complaint.

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Employment Judge Joffe

05/05/21

Sent to the parties on:

05/05/2021

For the Tribunal: