



EMPLOYMENT TRIBUNALS

Claimant: Mr R Brown

Respondent: BT PLC

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 4, 5 and 6 October 2021

Before: Employment Judge Ayre, sitting with members
Ms R Wills
Mrs C Hatcliff

Representatives:

Claimant: In person

Respondent: Mr S Hall, in-house solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The respondent discriminated against the claimant contrary to section 15 of the Equality Act 2010 by:-
 - a. Removing him from his role as Acting Manager on 4 March 2020; and
 - b. Ceasing to pay him his acting up allowance on his return to work in February 2020.
2. The claim that the respondent discriminated against the claimant contrary to section 15 of the Equality Act by removing him from his voluntary position as National Safety Lead fails and is dismissed.
3. The respondent failed to comply with its duty to make reasonable adjustments for the claimant under section 20 of the Equality Act 2010 by not allowing him to work from home or from Bedford or Milton Keynes upon his return to work in February 2020.

4. The claim that the respondent failed to make a reasonable adjustment for the claimant by requiring him to carry out physically demanding work as a warehouse supervisor on his return to work in February / March 2020 fails and is dismissed.

REASONS

Background

1. The claimant is employed by the respondent as Warehouse Supervisor based in the respondent's premises in Magna Park. He has continuity of service going back to December 1997 and is currently off sick, recovering from strokes that he suffered earlier this year.
2. On 5 June 2020, following a period of Early Conciliation which lasted from 10 May 2020 to 28 May 2020, the claimant issued a claim in the Employment Tribunal for disability discrimination.
3. In essence, the claimant complains that during and following a period of long term sickness absence from August 2019 to February 2020 the respondent removed his acting up responsibilities and allowance, and appointed someone else as National Safety Lead. He also complains that the respondent failed to make reasonable adjustments both during and following his period of sickness absence by not allowing him to work from home or a place nearer to home, and by requiring him, upon his return to work, to carry out physically demanding activities. The respondent defends the claim.

The Proceedings

4. A Preliminary Hearing took place on 2 September 2020 before Employment Judge Blackwell. The complaints were identified during that hearing as being ones of direct disability discrimination contrary to section 13 of the Equality Act 2010 ("the Act"), discrimination arising from disability contrary to section 15 of the Act and a failure to make reasonable adjustments contrary to sections 20 and 21 of the Act.
5. Following the preliminary hearing the respondent conceded that the claimant was disabled. At the outset of the final hearing Mr Hall confirmed that the respondent admits that the claimant is disabled by reason of sciatica and back pain. The respondent also admits that it had knowledge of the claimant's disability at the material time.
6. We heard evidence at the hearing from the claimant and, on behalf of the respondent, from Brian Norris, Head of Technical Services and the claimant's line manager, Anthony Green, Head of Warehousing (Consumer) who heard the claimant's grievance, and Philip Buch, Head of

Distribution, who heard the claimant's appeal against the outcome of his grievance.

7. There was an agreed bundle of documents running to 227 pages.
8. At the start of the hearing the issues that fell to be determined by the Tribunal were discussed and agreed. During that discussion the claimant told the Tribunal that as part of his claim under section 21 of the Act he wished to argue that the respondent had imposed a provision criterion or practice ("**PCP**") of requiring him to carry out physically demanding work as a warehouse supervisor from February / March 2020 onwards.
9. On the evening of the first day of the hearing the respondent wrote to the Tribunal and the claimant arguing that this allegation was a new one and needed an application to amend the claim. The respondent identified that the new allegation covered two periods:-
 - a. March 2020 to late February / early March 2021 when the claimant was doing project work / light duties; and
 - b. Late February / early March 2021 when the claimant stepped back into the warehouse supervisor role.
10. The respondent submitted that this allegation was significantly out of time, had not been raised until the morning of the final hearing, and that the respondent had not had the opportunity to respond or provide evidence to defend the claim.
11. The issue was discussed at the start of the second day of the hearing. It was noted that the claim form included a reference to the claimant being moved to a more physical role from a desk-based role, and that the claimant had been unrepresented throughout the proceedings.
12. Mr Hall helpfully accepted on the part of the respondent that the allegation in relation to the first period of time (from March 2020) was in the claim form and that the respondent had evidence to deal with that period. His concern was about the second period (late February / early March 2021) which postdated the claim form and the preliminary hearing in September 2020 and which the respondent was not in a position to deal with at the hearing.
13. We adjourned the hearing briefly for the claimant to consider his position. After the adjournment the claimant told the Tribunal that he would not pursue the allegation in relation to the second time period. By agreement therefore this allegation of failure to make a reasonable adjustment was pursued in relation to the first period only.
14. The Tribunal was satisfied that it was in the interests of justice to allow this amendment given that the issue was raised in the claim form, the claimant has been unrepresented throughout these proceedings, and that there

was no prejudice to the respondent in allowing the amendment, as it was prepared to deal with it at the hearing.

15. At the end of the hearing Mr Hall prepared written submissions on behalf of the respondent, for which the Tribunal is grateful.
16. By agreement the claimant's wife read out a personal statement on behalf of the claimant and this was taken as the claimant's closing submissions.
17. The claimant represented himself during these proceedings and was accompanied by his wife. The claimant is currently recovering from strokes, and at times he found it difficult to concentrate. As a result, and with the agreement of the respondent, we took regular breaks during the hearing and allowed the claimant's wife to read out his closing submissions.

The Issues

18. At the beginning of the hearing, we discussed the issues that fell to be determined by the Tribunal. Three of the allegations made by the claimant were identified during the Preliminary Hearing in September 2020 (the allegations set out in paragraph 21 (a) below) as being either complaints of direct discrimination and / or claims of discrimination arising from disability.
19. After some discussion about the differences between direct discrimination and discrimination arising from disability, the claimant told the Tribunal that he did not wish to pursue a complaint of direct discrimination, and that the first three allegations were being pursued as complaints of discrimination arising from disability only.
20. The claimant also wished to pursue a claim that the respondent failed to comply with its obligation to make reasonable adjustments. He identified two adjustments that he says the respondent should have made: -
 - a. Allowing him to work from home or from a location closer to home (Bedford or Milton Keynes) whilst he was off sick and/or on his return to work in February 2020; and
 - b. Allocating him a less physically demanding role on and following his return to work in 2020.
21. The issues that fell to be determined were as follows: -

Discrimination arising from disability

- a. Did the respondent treat the claimant unfavourably by:-
 - i. Informing him on or around 4 March 2020 that he was to be removed from the Acting Manager role that he had held

since 2015, and would revert to the role of Warehouse Supervisor (“**the First Allegation**”);

- ii. Stopping paying the claimant’s acting up allowance in August 2019 (“**the Second Allegation**”) and / or
 - iii. Removing the claimant from his role as National Safety Lead (“**the Third Allegation**”)
- b. Did the following things arise in consequence of the claimant’s disability:-
- i. The claimant’s sickness absence?
 - ii. Restrictions on the claimant’s ability to drive?

The claimant relies upon both i and ii in relation to the First Allegation, and on i in relation to the Second and Third Allegations.

- c. Was the unfavourable treatment because of any of those things? The respondent’s position is that, in relation to the First Allegation, the reason for the claimant’s treatment was a restructure and a decision that the Acting Manager role was no longer required.
- d. Was the treatment a proportionate means of achieving a legitimate aim. The respondent says that its legitimate aims were:-
- i. Rewarding employees for work that they perform;
 - ii. Ensuring that the workplace is managed efficiently;
 - iii. Avoiding paying twice for work to be carried out ; and
 - iv. The requirement to have a National Safety Lead in place at all times and present at work.

The respondent relies upon i, ii and iii in relation to the Second Allegation, and on iv in relation to the Third Allegation.

- e. The Tribunal will consider:-
- i. Was the treatment an appropriate and reasonably necessary way to achieve those aims?
 - ii. Could something less discriminatory have been done instead?
 - iii. How should the needs of the claimant and the respondent be balanced?

Reasonable adjustments

- f. Did the respondent have the following PCPs (provision, criterion or practice):-

- i. A requirement that the claimant return to work in Magna Park rather than from home or in a location closer to home;
 - ii. A requirement that the claimant carry out a more physically demanding role on his return to work.
- g. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?
- h. What steps could the respondent have taken to avoid the disadvantage? The claimant suggests that the respondent should have:-
 - i. Allowed him to work from home or closer to home (from the respondent's premises at Bedford or Milton Keynes); and
 - ii. Allocated to him a less physically demanding role.
- i. Was it reasonable for the respondent to have to take those steps?
- j. Did the respondent fail to take those steps?

Findings of Fact

Claimant's role

22. The claimant is employed by the respondent as a Warehouse Supervisor. He has continuity of service going back to 15 December 1997 and his employment is ongoing. Since March 2021 he has been off sick following a series of strokes.
23. The claimant's substantive role is one of Warehouse Supervisor based in the respondent's premises at Magna Park, Lutterworth. The role of Warehouse Supervisor is a manual, hands on role, which involves supervising a team, arranging for dispatch of orders, putting items on shelves, dealing with quality control issues and escalations. It is a role that can only be done on site at Magna Park and is graded as C1 in the respondent's pay structure.
24. In or around Easter 2015 the claimant's second line manager, who was at the time Mr Paul Haslam, agreed with the claimant that, in recognition of the fact that the claimant was at the time doing more of a management role, the claimant would be made up to a Band One Manager.
25. The claimant was told that he would be Acting Manager until the promotions process was complete. The claimant was told to claim a Short Term Cover (STC) supervisor to manager uplift payment whilst he was acting up. The claimant claimed and was paid the STC uplift payment consistently, except during periods of holiday and sickness absence, until August 2019.

26. At no point was the claimant told that the acting up position was temporary or that he would have to go through a formal application process in order to secure the role permanently. The claimant used, and continues to use, the job title of Operations Manager on his email sign off, and there was no evidence before us of anyone at the respondent objecting to this.
27. On 12th April 2018 the claimant sent an email to Mr Haslam asking what was happening with his promotion. He referred to the fact that he had been carrying out the role for 3 years already and asked Mr Haslam to tell him 'If it's not going to happen'. Mr Haslam replied saying that the promotion was still very much on his agenda, and made no mention of the claimant having to make a formal application.
28. In May 2018 Brian Norris, who is currently Head of Technical Services with the respondent, transferred from EE to BT plc. Mr Norris reports in to the Head of Operations, Ioan Thomas-Daniels, and has been the claimant's line manager since that year
29. The respondent's witnesses gave evidence that the normal process within BT is that roles have to be advertised and formal applications made, and that it is not possible to promote someone without going through that process. The written policy was not in the bundle however. There is no evidence from the respondent to suggest that the claimant was ever told that the acting up position was temporary or that he would have to formally apply for the role.
30. The claimant continued to perform the role of Acting Manager until 27 August 2019 when he began a period of long-term sickness absence which lasted until 17 February 2020. There was no suggestion that the claimant's acting up role may be removed from him at any time prior to the claimant's sickness absence in 2019. Mr Norris's referral of the claimant to Occupational Health dated 30 October gave the claimant's job title as Warehouse Manager (acting with uplift)
31. As Acting Manager the claimant's responsibilities included people management, liaising with employment agencies as most of the staff in the team were agency workers, and appraisal and holiday management for BT employees. All of this work is still required although the size of the team has reduced so there are fewer staff to manage. The people management work is currently being performed by other employees of the respondent.
32. Whilst the claimant was off sick another manager, Jackie Jenkins, performed these duties in addition to her substantive role. She continued to carry out these duties when the claimant returned to work. In June 2020 responsibility for managing the agency staff passed to Adam Brookes, whilst Jackie Jenkins retained responsibility for managing the one BT employee that remained in the team.
33. Throughout the period that he was acting up, the claimant claimed and was paid the acting up allowance, except for periods when he was off sick

or on holiday. It was surprising to us that the acting up allowance was not included in the claimant's holiday pay, given that it appeared to form part of his weekly earnings.

34. The amount of the acting up allowance was of much greater significance to the claimant than it was to the respondent, which is a large employer with substantial resources.

National Safety Lead

35. For a number of years the claimant also carried out a voluntary, non-paid additional role as National Safety Lead. This role involved making sure that general health and safety measures are being adhered to within the warehouse at Magna Park, acting as a liaison with the respondent's Health and Safety Manager, attending meetings and a monthly 'walk through' an area of choice.

Sickness absence

36. In 2019 the claimant became seriously unwell with sciatica and back pain. He was off sick from 16 July to 5 August, returned to work for approximately three weeks and then was off sick from 27 August 2019 until 17 February 2020.

37. Whilst the claimant was off sick discussions took place about the structure of the team in which the claimant worked. In or around September 2019 a decision was taken to create a new role of Operations Support Manager. This role was not discussed with the claimant at all and it appears that he was not even considered for it. Mr Norris said in evidence that the reason he did not discuss this role with the claimant was because the claimant was off sick. The role was offered to another employee, Nilam Karadia, without the claimant even having been considered for it. Mr Norris accepted that, with hindsight, he should have discussed the role with the claimant.

Removal of acting manager role and uplift

38. Also around that time it was decided that the role of Acting Manager that the claimant had been carrying out would no longer be required. The decision to remove the role was taken by Mr Norris and Mr Thomas-Daniels. Again, there was no discussion with the claimant about this, and he was not told of the decision until 4th March, several months later, and three weeks after he had returned to work.
39. The reasons for the removal of the Acting Manager role were not entirely clear and there was confusing evidence from the respondent on the issue. In its response to the claim the respondent did not accept that the claimant had been demoted, displaced or informed on 4 March 2020 that he was no longer an acting Operations Manager. By the time of the final hearing however the respondent's position had changed.

40. In his witness statement Mr Norris said that *“the profile of the business and volume of staff in the team had changed while the Claimant had been on sick leave. We no longer required anyone to carry out the managerial function that the Claimant had previously been carrying out...”*
41. In cross-examination, Mr Norris said that the decision to remove the Acting Manager role was linked to the loss of a significant customer, and that the structure of the team had been discussed during the TUPE process.
42. Mr Green, in his witness statement, referred to the business as *“always tweaking the way it operates and reshuffling certain functions. By the time the Claimant returned from his sickness absence the additional responsibility that had been required of the Claimant before his absence was no longer required to the same degree. This was down to the volumes of work in the Claimant’s area of the business. There is a lot of project work in that part of the business, the volumes of which can fluctuate.”*
43. The claimant’s evidence, which we accept, was that when Mr Norris and Mr Thomas-Daniels told him that his role had been removed the reason that they gave him for the change was that the team ‘was being restructured due to financial issues’.
44. When asked why he hadn’t made the claimant aware of the removal of the Acting Manager role, Mr Norris was unable to answer the question and said that he didn’t know. When asked why he hadn’t mentioned it when the claimant returned to work in February 2020 he replied *“I can’t say”*
45. Mr Norris said that there was a lot going on and *“so many jobs being created within Magna Park at the time”*. None of the jobs were discussed with the claimant, either at meetings that the respondent had with the claimant on 11th October 2019, 24 January 2020, 18th February 2020, 4 March 2020, or on any other occasion.
46. During the claimant’s sickness absence from 27 August 2019 to 17 February 2020 the claimant was not paid the STC acting up allowance. When he returned to work he was no longer able to claim the allowance as his acting up responsibilities were removed from him. The claimant had been receiving the allowance for years, and it had become part of his normal earnings.
47. The claimant was not consulted about the removal of the allowance, nor given any warning. It was imposed on him unilaterally by the respondent. The claimant only became aware that he would no longer be able to claim the allowance on 4th March when he was told he would no longer be acting up.

Removal of responsibilities as National Safety Lead

48. The claimant was also replaced, during his sickness absence, as National Safety Lead. The reason he was replaced was because the respondent needed someone who was present at work to carry out this role.
49. The claimant accepted that the National Safety Lead role needed to be performed by someone in the workplace but complained that he was not informed about the change. At no point during the claimant's sickness absence, or on his return to work did Mr Norris or anyone else tell the claimant that he had been replaced. The claimant found out when he returned to the warehouse on 9th March 2020 and saw posters in which his picture as National Safety Lead had been replaced with the picture of someone else. There was no discussion with the claimant about whether he could resume the role on his return to work.

Meetings about the claimant's absence and return to work

50. On 11th October 2019 Mr Norris met with the claimant to carry out an absence review meeting. During that meeting Mr Norris asked the claimant what was preventing a return to work. The claimant told us that during this meeting he told Mr Norris that he was keen to get back to work, either from home or at the respondent's sites in Milton Keynes or Bedford, which were just a short drive from his home. The Magna Park site is approximately an hour's drive from the claimant's home, and a 90 mile round trip.
51. There was also a discussion about the claimant carrying out project work and the claimant asked Mr Norris to look out for projects that he could carry out. There was no evidence before us of Mr Norris taking any steps following the meeting to try and find alternative work that the claimant could do, from home or from a location closer to his home. Mr Norris told us that the reason for this was that the fit notes submitted by the claimant certified him as unfit to carry out any work.
52. Mr Norris did, however, refer the claimant for an occupational health assessment. The claimant was assessed by occupational health on 9 December 2019 and occupational health produced a report on 10 December 2019. The report stated that, in the doctor's opinion: -
- “Currently we are unable to predict a return to work date.... At the moment, there are no specific adjustments that would enable him to return to work.... Based on his current functional status, he will struggle to do the normal role of Operations Manager which required him to commute for about one hour each way, to sit for prolonged periods and to walk considerable distances around the warehouse.... Mr Brown is currently not fit for work”*
53. On 15th January 2020 Ioan Thomas-Daniels wrote to the claimant inviting him to an absence review meeting on 24th January. The meeting took place on 24th January at the Milton Keynes offices. During the meeting the claimant was asked “What's specifically preventing a return to work” and

replied, *“The driving, I can’t drive all the way to Magna due to the pain associated with driving, the drive takes approximately 60 minutes dependant on traffic, I’m ok with driving for a short period of time, around 10-15 minutes however beyond that don’t feel comfortable due to the pain.”*

54. The claimant reiterated what he had said to Mr Norris in October and told Mr Thomas-Daniels that he was happy to work from home and really keen to feel he could help in some way. When asked what adjustments or support the line manager could give to help the claimant back to work, he replied: *“Not really sure what adjustments can be made, me getting into Magna is dependent on getting the pain under control...In short term I’m happy to go to a local facility in the Bedford area or work from home if there was available in these locations.”*
55. At the end of the meeting Mr Thomas-Daniels told the claimant that his case could proceed to a Resolution meeting. There was limited evidence before us as to what a Resolution meeting is, save that in the invite to the meeting on 24 January Mr Thomas-Daniels wrote: *“You should be aware that if your current absence is likely to last for much longer, I will need to re-consider the arrangements for covering your job and your own future within BT...”*
56. It was, in our view, clear from the claimant’s evidence and the evidence of the occupational health report, that the main factor preventing the claimant from returning to work in the later stages of his sickness absence was his inability to drive for more than 10-15 minutes. It was also clear that the claimant was keen to return to work and asked the respondent whether there was any work he could do from home or locally. Despite this, the respondent did not ask either the claimant’s GP or occupational health whether the claimant would be able to do some work from home. No consideration appears to have been given to the question of working from home or locally prior to or on the claimant’s return to work.
57. The claimant returned to work at Magna Park 18th February on a phased return recommended by his GP. The phased return was for a three week period. When the claimant returned to work, he was still suffering reduced mobility as a result of his back problems, and walked with a stick.
58. On his return the claimant was told by Mr Norris that it was felt that his existing office on the ground floor of the warehouse was too far for him to walk, and that he had been allocated a meeting room on the second floor, with lift access, where he would be working alone, away from the other managers in his team. He was asked to work on a project involving some spreadsheets regarding missing stock.
59. Mr Norris’ evidence was that he considered it appropriate for the claimant to come into Magna Park rather than work from home, so that face to face conversation would be easier. We were not convinced by his reasons for requiring the claimant to come into Magna Park, especially since he knew

that the claimant had difficulties driving long distances, and he accepted in his evidence that the majority of the work could have been done at home. He told us that there had been no request by the claimant to work from home. That is incorrect, the claimant had mentioned on at least two previous occasions the difficulties he had driving, and that he would like to work either from home or closer to home. The respondent failed to give this request proper consideration.

60. The respondent did make some adjustments for the claimant when he came back to work. He was provided with a parking space, and a room to work from that did not require much walking to. He was also assigned to desk based duties. None of the arrangements that were put in place for the claimant on his return to work were discussed with him. They were presented to him on 18th February as a 'fait accompli'.
61. Mr Norris conducted a return to work meeting with the claimant on the 18th February 2020. During the meeting there was a discussion about the phased return to work, and that the claimant's condition would be monitored. Mr Norris told the claimant that he would be provided with parking close to the building, allocated a temporary office with lift access, and that his duties would be desk based for the period of the phased return. There was no discussion at the meeting about the removal of the Acting Manager role and the acting up allowance or the National Safety role.
62. There was no evidence before us as to what, if any, further support was provided to the claimant in relation to his return to work.
63. On 4 March 2020 the claimant asked to speak to Brian Norris and Ioan Thomas-Daniels about returning to his normal role the following week, when the phased return ended. At that time the claimant considered his role to be Acting Manager / Operations Manager.
64. There was a conflict of evidence between the claimant and Mr Norris as to what was said during this meeting. There were no notes made of the meeting, and Mr Thomas-Daniels did not give evidence. On balance we prefer the claimant's version of events in relation to the meeting. It was consistent with an email that he sent to HR on 8 March 2020 and was clearly a meeting that was of great importance to him.
65. The claimant was told that the team was being restructured due to financial reasons and that he would no longer be Acting Manager but would return to his previous role as Warehouse Supervisor. There was a discussion about the claimant reporting to Nilam Karadia, which the claimant interpreted incorrectly as meaning that she would now be his line manager.
66. The claimant complained that for the last four years he had been told that he was being promoted to manager. Mr Thomas-Daniels' response was dismissive, and he told the claimant that it was just a 'nice conversation'.

He also told the claimant that he expected him to return to work in the warehouse the following Monday 'mucking in' with the rest of the team and effectively doing a manual job. Mr Thomas-Daniels also told the claimant that if he couldn't do that, he would need to go to the doctor and get a 'light duties' form, but that if he kept getting them a Resolution meeting would be required.

67. At no point during the meeting on 4th March did either Mr Norris or Mr Thomas-Daniels tell the claimant that he had been replaced as National Safety Lead whilst he was off sick.
68. The claimant left the meeting feeling angry, confused and worried. He was scared he was going to lose his job, which in the circumstances was an entirely understandable reaction.
69. The claimant got a 'light duties' note from his GP which ran for two weeks from 8th March 2020.
70. On 8th March the claimant wrote to Gae Kennedy in HR. He expressed concern that he was being demoted to the position of supervisor, and stated that the acting up role had never been a temporary position. He asked why he had not been given the opportunity to apply for a new role in the department, and why, having returned to work with a disability and requiring the use of a walking stick, he was being moved from primarily an office-based role to a far more hands on physical role.
71. The claimant repeatedly chased Ms Kennedy for a substantive response to the concerns that he had raised, but she did not respond in a timely manner. This caused the claimant further upset.
72. On 9th March the claimant returned to the warehouse. It appeared to the claimant that there had not been a restructure, and that Jackie Jenkins was still managing the warehouse. Whilst in the warehouse the claimant saw a poster with a picture of someone else as the National Safety Lead. That was how he found out that he no longer had the responsibility of National Safety Lead.
73. Mr Norris asked the claimant to continue to work on missing stock spreadsheets for the time being. The claimant was allocated desk-based project work from 18th February 2020 until late February / early March 2021 and did not actually perform any manual duties during this time.
74. On 7 April 2020, as he had not received any substantive response from HR to the serious concerns that he had raised a month earlier, the claimant raised a grievance. On 22nd April the claimant had a call with a manager Charmaine Mighten. Ms Mighten told the claimant that Brian Norris had decided to remove his acting manager role before he returned to work but had forgotten to tell the claimant. Ms Mighten also said that the reason Brian Norris gave her for the removal of the role was that the

claimant's work was dwindling, so it was being transferred to Nilam Karadia.

75. On 22nd April, the claimant asked Ms Mighten to appoint a grievance hearer. On the 4th May the claimant was told that Anthony Green had been appointed as grievance hearer. The claimant told Ms Mighten that he did not consider it appropriate for Mr Green to be the grievance hearer as he is a direct report of Mr Thomas Daniels, who was part of the grievance.
76. The respondent chose not to change the grievance hearer and Ms Mighten told the claimant that Mr Green would be in touch. The claimant had to chase several times before Mr Green eventually contacted the claimant on 4th June.
77. On 11th June 2020, some two months after the claimant had raised his grievance, Mr Green wrote to the claimant inviting him to a grievance meeting on 18th June. The grievance meeting took place on 18 June. There were no minutes of the grievance meeting before us.
78. On 10 August, some four months after the grievance was raised formally, and five months after the claimant first raised concerns with HR, Mr Green wrote to the claimant to inform him of his decision on the grievance. Mr Green's conclusions, in summary were that:-
 - a. There was no evidence of a formal agreement for promotion to a manager from a supervisor position;
 - b. The respondent has a recruitment policy and there was no evidence to show that the claimant's promotion had been approved in line with the policy;
 - c. There was no evidence of formal restructuring in the claimant's department;
 - d. The end date for the light duties was 5 April 2020; and
 - e. There were no new positions available for Operations Managers
79. Mr Green partially upheld one of the claimant's complaints, in relation to communication by Mr Norris during his sickness absence but dismissed all of the other complaints out of hand. In his response to the grievance and during his evidence to the Tribunal Mr Green demonstrated little understanding of the position that the claimant found himself in.
80. On 16th August the claimant appealed against the grievance outcome. Phil Buch was appointed as appeal hearer and on 30 September he wrote to the claimant inviting him to an appeal hearing on 9th October. Mr Bush subsequently changed the date of the appeal hearing to 16th October 2020. There were no minutes of the appeal hearing in the evidence before us.
81. On 4th January, two and a half months after the appeal hearing, and almost ten months after the claimant first contacted HR about his

concerns, Mr Buch wrote to the claimant to tell him the outcome of the appeal. Mr Buch was unable to provide any valid reason for this delay.

82. None of the claimant's grounds of appeal were upheld. Mr Buch also showed little understanding of the position the claimant found himself in.
83. There was no evidence before us that either the grievance or the appeal hearer, or indeed Mr Norris, had any genuine understanding of the impact the situation had on the claimant. Mr Norris, to his credit, admitted on several times when giving evidence that the claimant 'had a fair point' and that things could have been done differently.
84. There was, in our view, a remarkable lack of communication with the claimant both during his sickness absence and after his return to work, and a significant delay in dealing with his grievance.
85. From March 2020, when the country went into national lockdown due to the Coronavirus pandemic, the claimant was allowed to work from home some of the time, however this was in response to the national lockdown rather than by way of reasonable adjustment on the part of the respondent.
86. In late February / early March 2021 the claimant returned to the warehouse supervisor role. Shortly afterwards he had a number of strokes. He has been off work since 22nd March 2021 due to his strokes and is still off work.

The Law

Discrimination arising from disability

87. Section 15 Equality Act 2010 provides:

“(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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

88. In Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 Langstaff P explained the two step test required for a section 15 claim:-

1. The Tribunal must ask what the something 'in consequence' of the disability is; and
2. The Tribunal must then ask itself, was it 'because of that' that the employer treated the claimant unfavourably?

Reasonable adjustments

89. Section 20 of the Equality Act 2010 states as follows:-

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage...”

90. Section 21 of the Equality Act 2010 provides that:-

“(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments...”

91. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in *Environment Agency v Rowan* [2008] ICR 218 and in *Royal Bank of Scotland v Ashton* [2011] ICR 632, both approved by the Court of Appeal in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734. 65.

92. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

- a. What is the provision, criterion or practice (“PCP”), physical feature of premises, or missing auxiliary aid or service relied upon?
- b. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

- c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?
- d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?
- e. Is the claim brought within time?

93. Paragraph 6.28 of the Code sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

- a. The extent to which it is likely that the adjustment will be effective;
- b. The financial and other costs of making the adjustment;
- c. The extent of any disruption causes;
- d. The extent of the employer's financial resources;
- e. The availability of financial or other assistance such as Access to Work; and
- f. The type and size of the employer.

94. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law (*Romec Ltd v Rudham* [2007] All ER(D)).

95. It is almost always a good idea for the respondent to consult the claimant about what adjustments might be appropriate. A failure to consult the claimant makes it more likely that the employer might fail in its duty to make reasonable adjustments.

Time limits

96. Section 123 of the Equality Act 2010 provides that complaints of discrimination may not be brought more than three months after the date of the act of alleged discrimination, or within such other period as the employment tribunal thinks is just and equitable.

97. A failure to make a reasonable adjustment is generally discrimination by omission. Section 123(3)(b) of the Equality Act 2010 provides that a failure to do something is to be treated as occurring when the person in

question decided upon it; and Section 123(3)(b) states that conduct extending over a period is to be treated as done at the end of the period.

Burden of proof

98. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision...”

99. There is, in discrimination cases, a two stage burden of proof. Where a claimant persuades the Tribunal that there is a ‘prima facie’ case of discrimination, then the burden of proof shifts to the employer. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment.

100. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact, and can be drawn not just from the details of the claimant’s evidence but also from the full factual background to the cases.

Conclusions

Discrimination arising from disability: section 15 of the Equality Act

First Allegation

101. The respondent accepts that it removed the claimant from the Acting Manager role and that this amounts to unfavourable treatment.

102. The respondent asserts that the unfavourable treatment was not because of something arising in consequence of the claimant’s disability, but rather because the role was no longer required.

103. The claimant alleges that the removal of the role was because of his sickness absence and / or the restrictions on his ability to drive, and that both of those things arose in consequence of his disability. We have no hesitation, based on the evidence before us, in finding that both the claimant’s sickness absence and the restrictions on his ability to drive arose in consequence of his disability.

104. The decision to remove the duties from the claimant was not taken in March 2020, as Mr Hall submitted, but rather in or around September 2019.
105. It was not clear to us that the respondent did carry out a reorganisation which caused the claimant's Acting Manager role to no longer be required. It is clear that the managerial duties that the claimant was carrying out continued to be required, albeit on a smaller scale as the size of the team had reduced. Moreover, if there was a reorganization, it was not in September 2019 when the decision to remove the Acting Manager role was made because, until June 2020 the managerial functions that the claimant had been carrying out were performed by Jackie Jenkins. It was only in June 2020 that they were split between her and Adam Brookes.
106. There was confusion and a degree of contradiction in the respondent's evidence as to why the claimant's acting up responsibilities were removed. In the ET3 the respondent did not even accept that they had been removed, a position which had changed by the time of the hearing.
107. Mr Norris told the Tribunal that the reason for the removal of the role was a change in the profile and business of the team, and that they no longer required anyone to carry out the claimant's managerial function. At the same time, however, he accepted that the managerial function was still being performed – just by different people. He also said in evidence to the Tribunal that the decision was linked to the loss of a significant customer – there was no mention of this in his witness statement, or in the ET3.
108. Mr Green told the Tribunal that the reason for the change was a reduction in volumes of work in the claimant's area. This was not in the Response to the claim, nor in the evidence of Mr Norris who was involved in the decision to remove the Acting Manager role.
109. On 4 March 2020 Mr Norris and Mr Thomas-Daniels told the claimant that the reason for the change was 'financial constraints'. We find this surprising, particularly given Mr Norris' evidence that there were a lot of new roles being created at the time.
110. The contradictions within the respondent's evidence and the failure to call Mr Thomas-Daniels to give evidence, cause us to have serious concerns about the real reason the acting up responsibilities were removed. There was clearly still a need for the work to be carried out.
111. Not only that, but Mr Norris was clear in his evidence that the reason he didn't consider the claimant for any of the managerial roles that were being created was because the claimant was off sick. The claimant's absence from work was clearly something arising from the claimant's disability.

112. The claimant has, in our view, established a prima facie case that the real reason his responsibilities were removed from him and passed to others (Jackie Jenkins initially and then Adam Brookes) was because of his sickness absence. It appeared to be a case of 'out of sight, out of mind', as evidenced by the lack of communication between Mr Norris and the claimant during his sickness absence.

113. The respondent has not persuaded us, on the balance of probabilities, that the reason for the removal of the Acting Manager was a non-discriminatory reason. We draw an inference in this situation that the reason the claimant's responsibilities were removed from him was because of his sickness absence.

114. The respondent did not try and argue 'justification' in relation to the First Allegation. We therefore find that by removing the claimant's acting up responsibilities the respondent discriminated against the claimant for a reason related to his disability, namely his sickness absence.

Second Allegation

115. The respondent admitted that the claimant received STC acting up payments over a number of years, and that he did not receive payments during his sickness absence from August 2019 onwards.

116. The respondent also admitted that this amounted to unfavourable treatment of the claimant but did not admit that this was because of something arising in consequence of the claimant's disability, namely his sickness absence. Rather, the respondent argued, it was because the claimant was unable to carry out the Acting Manager role. This was, Mr Hall argued, 'one degree removed' from the claimant's disability and was not something that arose in consequence of the disability.

117. We were not persuaded by Mr Hall's argument on this point. The reason the claimant was unable to perform his duties as Acting Manager was because of his disability and therefore arose in consequence of the disability.

118. We find that the failure to pay the STC acting up award was unfavourable treatment and that the reason for the unfavourable treatment was the claimant's sickness absence, which was something arising in consequence of his disability.

119. The respondent also argued that its actions in removing the payments were a proportionate means of achieving a legitimate aim. The legitimate aims relied upon were: -

- a. Rewarding employees for work that they perform (and not paying employees for work that they don't carry out);
- b. Ensuring that the workplace is managed efficiently / the respondent's resources are utilised efficiently; and

c. Avoiding paying twice for work to be carried out.

120. There was no evidence before us that the respondent was paying someone else to perform the acting up duties whilst the claimant was off sick. Jackie Jenkins took them on, in addition to her 'normal' role.
121. On balance, however, we find that not paying employees for work that they do not carry out and therefore ensuring that the respondent's resources are used efficiently, is a legitimate aim. Whilst employees are paid at times whilst not carrying out any work (for example when they are on holiday or on sick leave) we accept that the purpose of an acting up payment is to reward someone for additional duties that they are carrying out, and that if they are not carrying out the duties, it is legitimate not to pay them for it.
122. We then went on to consider whether the action of the respondent was a proportionate means of achieving that aim. We find, on balance, that it was not. We do not accept that removing the acting up allowance from the claimant was reasonably necessary to achieve those aims.
123. There was no evidence that the respondent was paying anyone else to carry out the people management duties. There was no evidence that the respondent had considered the impact of removing the allowance on the claimant, who had been receiving the allowance for years. The respondent did not consult the claimant about the removal of the allowance or give him any warning that it would be removed. It made a unilateral decision that the claimant would no longer be able to claim the award. The respondent is a large organisation with considerable resources. The impact on the claimant of having the award taken away without warning, was significantly greater than the impact on the respondent of continuing to pay what was, to it, a relatively modest sum.
124. We find that the claim in relation to the Second Allegation is in time. The failure to pay the allowance to the claimant is conduct which extended over a period of time, and which is ongoing. If we are wrong on that, then it would be just and equitable to extend time to allow the claim in. The claimant only found out that he would no longer receive the allowance on 4th March 2020. He commenced early conciliation on 10 May 2020, less than three months after finding out about the removal of the allowance, early conciliation ended on 28 May and he issued his claim on 5 June. His claim was, therefore, in time.

Third Allegation

125. The respondent admits that it removed the claimant from his National Safety Lead role during his period of sickness absence. The respondent also admits that this was unfavourable treatment and that the

removal was because of something arising in consequence of his disability, namely his sickness absence.

126. The respondent asserts that this was a proportionate means of achieving the legitimate aim of having a National Safety Lead in place at all times and present at work, to ensure that the respondent complies with its health and safety obligations and/or protect the wellbeing of staff.
127. The claimant accepted that the respondent needed to have someone on site to perform the role. His complaint was that the respondent did not tell him that it had appointed someone else to perform the role whilst he was off sick, and that there was no discussion about him resuming the role when he returned to work.
128. We accept that the respondent had a legitimate aim when it removed the National Safety Lead duties from the claimant. The role was an important one, helping to ensure the health and safety of staff at Magna Park, and could only be fulfilled by someone who was present on site.
129. We also find that, on balance, the respondent's actions were a proportionate means of achieving the aim. The importance of the role and the need of the respondent to have someone on site performing it outweighed, in our view, the needs of the claimant.
130. We were, however, concerned that the claimant was not consulted about his removal or even told about it. The way in which the issue was handled was indicative of the lack of compassion that the respondent has shown to the claimant. There was no good reason why the claimant could not have been told that he was being replaced as National Safety Lead. The respondent should have told him.
131. Instead, the claimant found out by seeing a poster with someone else's picture on it, shortly after he'd been told that he would no longer be Acting Manager.
132. The claimant clearly attached importance to the role. Mr Norris should have understood that it would be a big deal for the claimant to have these responsibilities, which gave him worth, removed from him. It is understandable that the claimant was upset by this. Within just a few days, the claimant was told that he was no longer Acting Manager and became aware that he would no longer receive the acting up allowance or act as National Safety Lead.

Failure to make reasonable adjustments: sections 20 and 21 of the Equality Act

Not allowing C to work from home and/or to work from Bedford / Milton Keynes

133. The respondent accepts that it applied the PCP of requiring the claimant to travel to Magna Park between August 2019 and February 2020 to perform his normal role. It also accepts that the PCP placed the claimant at a substantial disadvantage compared to non-disabled people. The disadvantage to the claimant was that he was not able to work.
134. The respondent denies, however, that it would have been a reasonable adjustment to allow the claimant to work from home or from a location closer to his home during this period because: -
- a. The claimant was extremely unwell;
 - b. The medical evidence was that he was not fit for work in any capacity;
 - c. The claimant's offer to work from home or another location was aspirational and not realistic in light of the advice of his GP and occ health.
135. There was no evidence before us of either the GP or the respondent's occupational health providers having been asked if the claimant would be able to work from home or from another closer BT location or of R having given serious consideration to the issue. Both occupational health and the claimant told the respondent that driving was the problem. There was no evidence before us of why the claimant could not have been allocated duties from home or in Bedford or Milton Keynes.
136. We did not find Brian Norris' evidence as to why he did not consider offering the claimant work from home / nearer to home during his sickness absence convincing. Equally, we did not find his evidence as to why the claimant needed to be in the office at Magna Park on his return to work persuasive. The respondent is a telecommunications company. The claimant could have worked from home, and indeed he did so during the national lock down. The claimant did not need to be on site in Magna Park to perform the project role / light duties that he has carried out since returning to work in February 2020. He performed these duties from home during the pandemic.
137. It would, in our view, have been a reasonable adjustment for the respondent to allow the claimant to carry out project work from home or nearer to home both during the later weeks of his sickness absence and on his return to work. Doing so would have removed the substantial disadvantage to the claimant of not being able to drive to Magna Park during his sickness absence and of the pain and inconvenience caused by the drive on his return to work. The claimant's back problems were not

resolved when he came back to work. He still had mobility and pain issues and returned to work with a stick.

138. On 24 January, just a few weeks before he returned to work, the claimant told Mr Thomas-Daniels that it was only the driving that was preventing him from returning to work. Despite this, there does not appear to have been any consideration of offering the claimant a home-based role. It is understandable that the claimant felt that he was 'out of sight, out of mind' and that the respondent was not keen to have him back.

139. We recognise that the respondent did make some adjustments when the claimant returned to work, including changing his office, providing him with parking and assigning desk-based duties to him. Those adjustments were however not discussed with the claimant, and the respondent failed to make the adjustment that would have helped him the most – namely allowing him to work from home or from Bedford or Milton Keynes.

140. The claimant was subsequently allowed to work from home, but this was due to the pandemic, rather than as an adjustment for his disability.

141. Taking into account the size and resources of the respondent, which are considerable, and the fact that the claimant worked from home during the pandemic, it would, in our view, have been a reasonable adjustment to allow the claimant to work from home on his return to work, and to consider allowing him to do so from December 2019 onwards.

142. The respondent therefore failed to comply with its obligation to make reasonable adjustments by not allowing the claimant to work from home or from a location nearer to his home.

Requirement to undertake a physical role on the claimant's return to work

143. The respondent told the claimant that he would have to return to the role of Warehouse Supervisor on 4 March 2020. The respondent did not however require the claimant to perform physical duties on his return to work, or at any time until late February / early March 2021.

144. The claimant had a genuine belief, based upon what he was told during the meeting on 4 March with Mr Norris and Mr Thomas-Daniels, that he would be required to perform the more physical role of warehouse supervisor.

145. We understand why the claimant thought he could have been required to return to physical duties at any time. The manner in which the claimant was told about the change in his role on 4 March caused significant distress to the claimant and was lacking in empathy or compassion. There was no discussion with the claimant about how he could return to work in light of his ongoing medical condition. However, the respondent did not require the claimant to perform any manual duties.

We therefore find that the respondent did not apply a PCP of requiring the claimant to carry out a more physically demanding role upon his return to work.

146. This complaint that the respondent has failed to comply with its duty to make reasonable adjustments therefore fails and is dismissed.

Employment Judge Ayre

11 October 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE