Case Number: 3320838/2019

MK

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr P Facey	and	KAB Seating Limited

Held by CVP on 12 to 15 April, 20, 21 July and, in Chambers, 9 September 2021

Representation	**Claimant:**	In Person
	Respondent:	Mr D Godfrey, Legal Adviser
	Members:	Mr R Allan
		Mr C Grant

Employment Judge Kurrein

Statement on behalf of the Senior President of Tribunals

This has been a remote hearing that has not objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a video hearing.

JUDGMENT

1 The Respondent has discriminated against the Claimant for a reason arising from his disability by dismissing him.

2 The Respondent has failed to comply with its duty to take steps to make reasonable adjustments.

3 The Respondent has unfairly dismissed the Claimant.

4 The Claimant's claims alleging unauthorised deductions and a failure to pay holiday pay are not well founded and must be dismissed.

REASONS

Claims and Issues

1 On 18 July 2019, having started early conciliation on 28 May 2019 and completed it on 27 June 2019, the Claimant presented a claim to the Tribunal alleging unfair dismissal, disability discrimination, a failure to make payment of holiday pay and sick pay. On 23 August 2019 the Respondent presented a response in which it denied those claims.

2 On 16 March 2020 a preliminary hearing took place before EJ Ord. Unfortunately the Claimant was not in attendance. The claims were defined as follows:

> (6) In the relation to the claim for unfair dismissal, the Respondent says that the Claimant was dismissed for a potentially fair reason (capability). It is said that the Claimant could not perform the work for which he was contracted to do and accepted that there was no other work that he could carry out.
>
> (7) The Claimant's position as set out in his ET1 is that he could have carried out other work and that such other work was given to people who were newly recruited into the Respondent's business.
>
> (8) The Respondent says that it has paid the Claimant all the sick pay that he was entitled to and all holiday pay that he was entitled to. Although in the response the Respondent says that it requires further particulars of these claims it has made no request.
>
> (9) In relation to the claim for disability discrimination, this is recorded in the application to the Tribunal as follows:-
>
> "Discrimination
>
> Because of my health restrictions I have been discriminated against. Rather than offer me the posts they have preferred to recruit new people to carry out work I could have done."
>
> (10) On that basis the complaint appears to be one of a failure to make reasonable adjustments by adjusting the Claimant's duties. The Respondent again has indicated that it requires further particulars of the Claimant's complaint but has not made any request for such particulars.
>
> (11) I have advised the Respondent that in the circumstances a properly constructed request for further particulars in relation to those claims which it says it does not fully understand would be appropriate. In the absence of the Claimant I was unable to make further enquiry or order.
>
> (12) The Respondent has admitted that the Claimant is disabled within the meaning of s.6 of the Equality Act 2010 on the basis of his suffering "tennis elbow" and depression. The Claimant has referred to other conditions in his application to the Tribunal and in the event that he considers it necessary to do so, I have ordered him to disclose documents relating to any further conditions for the purpose of this hearing.

3 Despite what appears to us to have been the clearest possible indication that it should do so the Respondent did not ask for any further particulars of the Claimant's case.

4 In the course of the hearing it became clear that the Claimant's claim was not as clear as it seemed, and there were important issues that had to be resolved. We adjourned the hearing part-heard saying,

> 3 We were concerned that the issues were not sufficiently defined in the following respects:-
>
> 3.1 What was the date or dates on which it was alleged the duty to make adjustments was engaged? This had not been addressed by either party. It might be the date of lay-off in April 2018, when the Claimant was certified as fit for adjusted duties, or the date of termination, when he was unfit by reason of depression, in March 2019.
>
> 3.2 It also seemed to us that there was a clear and obvious claim for discrimination arising from disability under S.15 Equality Act. Such a claim might, of course, be met with the statutory Defence of a proportionate means of achieving a legitimate aim.
>
> 4 Those 'new' issues were further complicated by the question of what had caused the delay in starting early conciliation in respect of the lay-off and whether, and to what extent if at all, had the Claimant's depression caused or contributed to that delay and whether, if at all, it would have prevented the Claimant returning to suitably adjusted duties in March 2019.
>
> 5 Unfortunately, none of these issues had been foreseen at the Preliminary Hearing or at any time since. They had not been addressed in the evidence we had heard.

5 We made Orders for further disclosure and evidence. specifically limiting that evidence, in the case of the Respondent, to answering the Claimant's additional evidence and it's case on what it asserted to be a proportionate means of achieving a legitimate aim.

6 The Claimant did his best to comply with our order requiring him to give evidence on the issues set out above.

7 The Respondent sought to advance comprehensive evidence as to why the job roles the Claimant maintained he could have performed despite his disabilities would not have been suitable for him. That evidence, as became clear during the first part of the hearing, was wholly absent from the Respondent's original evidence. The Respondent maintained that that evidence should be admitted because it went to its case on dismissing the Claimant being a proportionate means of achieving a legitimate aim.

8 Unfortunately, that statement did not contain a single paragraph setting out what the Respondent's case was on the dismissal being a proportionate means of achieving a legitimate aim. When asked about this the Respondent first of all asserted that the legitimate aim was to achieve a dignified exit for the Claimant

from his employment. We questioned this. It was then asserted that it was to ensure the Respondent had an efficient workforce. We questioned that. We granted the Respondent a short adjournment to consider its position, and on re convening, we were told the legitimate aim was to manage workforce attendance.

9 We took a short adjournment to consider the position. Somewhat reluctantly, we thought the Respondent to have acted contrary to the spirit of the Order, we concluded that all the new evidence should be admitted.

The Evidence

10 We heard the evidence of the Claimant on his own behalf and the evidence of former colleagues Mr Capener, live, and Mr Johnson, in a written statement, on his behalf.

11 We heard the evidence of Mr Pritchard, Vice President of Operations for the Respondent from January 2019; Mr Cathrine Head of HR until 31 August 2019; and Mrs Jeziorska, HR Officer.

12 We considered the documents in the original bundle of 389 pages, together with numerous further documents that appeared regularly throughout the hearing. We considered the submissions of the parties. We make the following findings of fact.

Findings of Fact

Background

13 The Claimant was born on 18 December 1965 and first started work for the Respondent, as a temp, on 29 January 2001. He worked as a General Operator. He was provided with a job description for that role and continued working in it until, on 14 February 2002, he was offered a permanent position as a General Operator.

14 The Respondent is a world leader in the manufacture of specialised seating for drivers and operators of large vehicles, plant and machinery. Its UK operations are based in Northampton. The route followed by the Claimant to gain his position as a permanent employee is one commonly followed by the Respondent to recruit shop floor workers.

15 The Respondent employees 300 full time employees and, at any one time, has approximately 100 temporary staff working on the shop floor. It's staff turnover is high. The figures produced to us showed a turnover of approximately 250 positions over a period of 15 months.

16 The range of seats produced by the Respondent is huge: there are approximately 1000 different products, although many of them will share different components. The work of a General Operator on the manufacturing line may change from day to day. They work in teams to produce the product assigned to them. Some of the duties will involve heavier lifting and more repetitive movement then others. We heard evidence concerning the following possible positions that the Claimant had knowledge of:

16.1 General Operator, 411 sub assembly

16.2 General Operator, 800 a final assembly

16.3 General Operator, spares

16.4 Sewing machinist

16.5 General Operator, 100 sub assembly

16.6 General Operator, logistics

16.7 General Operator LLOP dispatch

17 It was the Claimants case that with minor adjustments he could do some if not all of these jobs. His witnesses supported him in that view, particularly in respect of the Spares role. It was the Respondent's case that no reasonable adjustments could be made so as to enable the Claimant to carry out any of those duties.

Chronology

18 On 26 January 2001 the Claimant was formally offered permanent employment subject to receipt of satisfactory references a medical examination and monthly assessments. His hours were subject to change as required.

19 In 2006 and 2008 the Claimant completed medical history forms. He had never had any of the diseases or difficulties on that form.

20 The Claimant reported difficulties with wrist strain on 9 April 2008, 31 March 2009, 29 April 2009 and again on 9 April 2010. When reported to the Respondent on the latter date a query was raised as to the fact there had been no investigation and as a recurring injury it might result in a claim against the company.

21 We thought the Respondent’s response to this query to be somewhat dismissive. The email reply was in the following terms,

> This complaint always arises when he has a problem with tight covers I think it's his way of complaining. I have reported the problem with Chris woods and Steve Collett some time ago. The problem is the storm covers from Camira. In cold weather they will shrink up to 10mm a week and when they have been sitting around for some time they are really tight to fit and Paul feels that the company is not doing anything about it.
>
> I have told Paul to inform Dillip when he receives a tight batch Dillip is then to give them to Chris and get new stock or cut in house.
>
> I have asked Paul on numerous times to see a doctor and let me have a letter supporting this, but so far he still hasn't done it.

22 The Respondent did refer the Claimants to its then occupational health advisor, Dr Toseland. He was seen on 21 April and the report is dated 6 May 2010. The Claimant reported that his Dr had diagnosed RSI for which he took ibuprofen and sometimes wore a wrist support. Having observed the Claimant carrying out his usual duties on the shop floor Dr Toseland thought a problem arose from a

combination of lack of uniformity of parts and the accuracy of their fitting. He advised that these should be examined and monitored to ensure uniformity.

23 In May 2010 the Claimant was placed on the Respondent's "Light Duties Register."

24 The evidence concerning the Light Duties Register was unsatisfactory. The criteria for inclusion on it was not defined and there appears to have been no policy for it. Mrs Jeziorska's evidence was not very helpful. She had trained in HR in Poland and worked for the Respondent as a General Operator from 2011 before being appointed HR Officer in 2014. She had since studied with the CIPD. She could not tell us the criteria for registration, who decided when someone should be placed on the Register or how someone on the Register might be transferred to 'light duties'. She said she periodically reviewed long-term sick employees, and any available roles, and would discuss them with the H&S Department. She did not tell us how the Register worked.

25 This document recorded the Claimant's name and date of registration and continued as follows

Disability	Painful wrists
Action	Monitor situation
Review Date	April 2013
Notes	To continue with present job with no restrictions. Should he be moved to another job a restriction of lifting over 10kg would apply
Review Date	Only on job change

26 We concluded from this document that the Respondent was aware that some employees might need to be assigned to light duties and that some roles could be classified as 'light duties'. Unfortunately the Respondent gave no evidence at all of:-

26.1 how many employees were on the Register;

26.2 which employees had been assigned to 'light duties', or when;

26.3 what length of service those employees had;

26.4 whether the employees on light duties were permanent or temporary;

26.5 what those 'light duties' roles were.

27 On the basis of all the evidence we heard, however, we were satisfied that there were roles in the Spares department for General Operators that could be carried out by employees requiring light duties. That conclusion is based on:-

27.1 The evidence of the Claimant and his witnesses, to the effect that:-

27.1.1 much of the work in Spares involved picking small components from a list from racks and boxes and placing them in envelopes;

27.1.2 it did not involve repetitive twisting, straining or pushing;

27.1.3 only occasionally would items weighing more than 5kg be required to be 'picked';

27.1.4 it would be simple for another member of staff to assist on those occasions.

27.2 The evidence of Mrs Jeziorska that some staff in Spares, out of a total of about 20, were on light duties.

27.3 The evidence of Mr Pritchard, elicited in re-examination, that there were sufficient staff in Spares to do any heavy lifting that might be required.

28 What we could not understand, however, was how, with the staff turnover it had, the Respondent was unable to place the Claimant on light duties at any time before he was laid off in April 2018.

29 The inclusion of the Claimant on this Register appears to have coincided with a decision that the Claimant's duties should be rotated with those of other members of his team so that he was not constantly carrying out "trimming" work and that the various parts used for trimming, seat foam, back foam, seat cover and back cover, were uniform and compliant with the specifications. The Claimant consented to the rotation on 1 June 2010, at which point it was intended he would be trained on other parts of the process and rotate to other roles for at least two to five hours a day.

30 There was no evidence of compliance inspections and we accepted the Claimant's evidence that the intended training and rotation did not take place.

31 On the 6th June 2010 Dr Toseland provided a further letter to the Respondent. He accepted that the Claimant had had pain and aching in his hands and forearms for some time. On the basis of their being "no evidence the Claimant has talked to his supervisor or management" Dr Toseland concluded the Respondent should simply monitor the situation and the process. As is clear from our above findings, however, Dr Toseland was ill-informed: the Claimant had made repeated complaints to supervisors and management about his difficulties.

32 On 1 August 2012 the Claimant was awarded an NVQ2 in Process Improvement.

33 On 6 November 2012 the Claimant strained his back while pulling springs on a seat suspension unit. This was recorded in the Respondents records. The Claimant returned to work after a few days off.

34 On 1 January 2016 the Respondent awarded the Claimant a payment of £225, less tax, as a long service award for 15 years employment.

35 On 3 February 2017 Dr Toseland, who had seen the Claimant, advised the Respondent that the Claimant's weight lifting should be limited to 10kg and be reviewed in six weeks time.

36 On 22 February 2017 Mr Cathrine wrote to the Claimant to congratulate him on not having had any lateness or absence in the whole of 2016. The Claimant had received several such awards in previous years.

37 In March 2017, as it did on a regular basis, the Respondent carried out generalised risk assessments for the processes on various of its production lines.

38 In September 2017 it appears the Claimant was referred by his GP for an Xray. Apparently he has a slight Scoliosis. When the Claimant attended the department declined to carry out the Xray because the request did not conform to the guidelines.

39 On 20 September 2017 the Claimants GP issued him with a statement of fitness to work that recorded that he might be fit for work provided he avoided repetitive movements so as to avoid strain on the elbow and wrist. That statement applied until 15 October 2017. Dr Toseland saw the Claimant on 27 September and provided a report indicating that the Claimants grip was "exceedingly poor". The second page of that letter was not copied into the bundle. The Respondent sought information from the Claimants GP, to which the Claimant consented on 11 October 2017.

40 On 27 September 2017 the Claimant was signed off as unfit to work because of tennis elbow and wrist tendonitis until 31 October 2017.

41 On 19 October 2017 Dr Toseland wrote to Mrs Jeziorska concluding, "It is as ever inadvisable for any employee to be in a job that might exacerbate his or her condition."

42 On 4 April 2018 the Claimant was signed as fit to work with light duties. A Mr Dodds, who works in H&S, carried out a risk assessment for the Claimant's return to work on 9 April. This was confined to the Claimant returning to work on the "Genesis" line and similar production work. It also recorded that no suitable office work was available. It made a point, apparently indicating that the Claimant had not been trained in all roles as had been the case in the past, that the Claimant could not do job rotation as he could not do all the tasks required on the Genesis line.

43 The Claimant was at work on the 9, 10 and 11 April, and was paid for 18.25 hours on 19 April 2018.

44 As a result of this assessment Mr Bailey wrote to Mrs Jeziorska to inform her that he did not have a position which would suit the Claimant's light duties and he had no choice but to lay him off. That took place on 11 April 2018.

45 On 12 April 2018 the Claimant was paid 9.75 hours of holiday pay.

46 Mr Bailey and Mrs Jeziorska exchanged emails on the position until, on 12 April 2018, Mr Bailey confirmed his position.

47 The Claimants Unite Regional Officer, Ms Mortimer, thereafter got involved and raised an issue with a senior manager, Mr Fry. On 13 April 2018 he set out his understanding of the position in a number of detailed points, the following of which we think most relevant:

> 4. His sick pay has now ended and he has expressed a wish to return to work - his Drs note suggests that he can only do jobs that do not require lifting more than 4-5kg
>
> 5. Some processes on Genesis suit this restriction due to the way the line is laid out and operates and so we took him back on, on that basis (incidentally, his old job on the 200 line would involve more lifting and is likely to aggravate his condition)
>
> 6. Paul has since complained that his condition is once again being aggravated by the work he is undertaking - although I should point out that the process does meet the restriction noted by his Dr
>
> 7. A risk assessment was conducted by our Health and Safety Manager and it was agreed that whilst the job met the restrictions on the Drs note there was a possibility of aggravating his condition and therefore he was removed from it as per his request
>
> 8. A review of other tasks was undertaken that could accommodate Paul - and whilst he is correct that there are possibly tasks within the business that he could undertake, none of these are available to him/us right now without displacing another operative who does not have the required skills in the areas they are needed without extensive training and disruption to the business

He concluded,

> Sally, as I tried to explain to Paul, I have every sympathy for him and his condition. As a business we have demonstrated time and time again that we will bend over backwards to accommodate those who have restricted duties and we will continue to do so. We aim to be fair and consistent with each of our employees. Unfortunately, the amount of restricted duties employees is now at a level (I am going to say around 5% of our workforce but would need to verify this) where there are simply no suitable processes left without impacting on either our efficiencies or other operators. Whilst I can understand Paul's frustrations, it is absolutely not the case that we wish to be rid of him.

48 Ms Mortimer forwarded part of that letter to the Claimant on 16th of April 2018 and repeated Mr Fry's assurance that when the Claimant was fit and able to return to work there would be a position waiting for him. She concluded by advising him that the Respondent had not breached his rights or treated him unfairly.

49 There was further consultation between Mr Dodds and Mr. Bailey which concluded with emails from Mr Bailey and Mr Dodds indicating that there did not appear to be a suitable job for the Claimant despite Mr Bailey having consulted his production managers and carried out a complete factory walk.

50 That assessment was forwarded by Mr Catherine to Ms Mortimer and from her to the Claimant. There were then further exchanges between Ms Mortimer and the Respondent without a positive outcome. He was laid off on 11 April 2018.

51 The Claimant received the following holiday pay payments:-

51.1	On 17 May 2018	1 weeks holiday pay.
51.2	On 24 May 2018	2 weeks holiday pay.
51.3	on 5 July 2018	£37.97 holiday pay.
51.4	On 26 July 2018	1 weeks holiday pay
51.5	6 September	£84.73 holiday pay
51.6	10 January 2019	£189.46 holiday pay
51.7	4 April 2019	£189.46 holiday pay

52 With the last payment he was also paid £4,066.92 PILON.

53 We accepted the Claimant's evidence that he lost all hope and respect for himself as a consequence of being laid off and became depressed. That evidence was corroborated by the Claimant's GP's sick notes which on 11 April 2018 diagnose the Claimant as suffering from stress at work and home and sign him off for two weeks, which diagnosis continued to 31 July 2018, when the diagnosis was simply "stress", before transitioning to "depression" on 12 September 2018. All those certificates were forwarded to the Respondent in accordance with its absence policy.

54 In the interim, the Respondent had referred the Claimants to its new Occupational Health advisors Corazon. Its report on 3 July 2018 suggested the Respondent consider,

54.1 Avoiding any repetitive action role, so no prolonged twisting movement in the wrist or elbow

54.2 Avoid any heavy lifting, initially suggesting nothing heavier than 5kg

54.3 Rotation of work

54.4 A phased return to work starting with four hours daily.

55 On 5 July 2018 the Claimant attended a stress risk assessment with Mr Dodds at the Respondents premises. The Claimant expressed the view that he had never suffered from stress in the workplace: it was being laid off that had caused it. Mr Dodds concluded that most of the risk assessment was irrelevant and thought the Claimant to be inattentive and more interested in when he could return to work.

Mr Dodds “categorically explained” to the Claimant there was no position for him in his condition.

56 On 22 August 2018 the Claimant went to the Respondent's premises to meet Mr Dodds and others so that he could be assessed for his suitability to work as a shipping administrator within Despatch. The Claimant took the view that there was too much going on in his head to do work of that nature at that time.

57 The following day Mrs Jeziorska updated Mr Cathrine on a number of issues with one bullet point:-

> Paul Facey has been on site, we potentially had a job that may suit him (Shipping Admin) he wasn't interested, said he's too stressed to work. Email was sent to you too.

58 Included within the bundle were a number of documents called “Standard Work Step Sheet” for the processes to be carried out for different teams producing different items. They set out numbered steps and the time, in seconds, allowed for each. None of the Respondent’s witnesses gave evidence concerning them. Each step varied in apparent simplicity and duration. from, for example, applying labels (12 seconds) to fitting a cover to a frame (“trimming’’), (128 seconds), and continuing to do so (147 seconds). It certainly appeared to us, as the Claimant contended, that he would have been able to carry out at least some of the steps in those processes despite his disabilities.

59 On 13 November 2018 Corazon provided a further report to the Respondent on the Claimant's condition. The writer confirmed the restrictions on the Claimant’s ability to lift weights or have strenuous repetitive duties, and the Claimant’s perception that his frustration and distress at not returning to work was the cause of his depression. She reported that if a suitable role could be identified the prognosis for a successful return to work would be greater. In recording their meeting she concluded

> During our meeting the Claimant did offer some suggestions for alternative roles if these could be risk assessed then it may provide a way forward. These included activities that involved work with decals/labels, spotwelding and finger guards. Other suitable roles may include picking or the putting together of small components. Work is therapeutic and I do believe that a return to work is an essential part of [the Claimant’s] psychological recovery.

60 A further report from the same practitioner was sent to the Respondent dated 22 November 2018. It appears to be in almost identical terms.

61 On 1 February 2019 the Social Entitlement Chamber of the First-Tier Tribunal allowed the Claimant’s appeal against the decision of the Secretary of State to refuse the Claimant’s claim for Employment Support Allowance. The Claimant was supported by a friend with some knowledge of the benefit system in that appeal. The reasons given were,

> By reasons of anxiety and depression [the Claimant] is significantly limited. Nevertheless he does not score sufficient points. However if he were found capable of work this would result in a substantial risk of deterioration in his mental health.

62 At about the same time Ms Mortimer was discussing the Claimant's position with Mr Catherine. He wrote to her on 13 February 2019, as follows

> I write further to our recent discussions and confirm my understanding of the situation and the proposed move forward.
>
> [The Claimant] has been unable to work for some time and continues to be "signed" off as unfit to return. [The Claimant] has recently been reviewed by the occupational health service.
>
> [The Claimant] has indicated, through Unite the union, that he does not believe he has the capability for filling any role at [the Respondent]. This would be based on his assessment of his medical conditions, and his established knowledge of the roles variable *(sic)* at the site.
>
> If this was the situation, then his future employment would be under question. The company would have to consider that his employment may be risked by reason of capability. Termination would be a possibility. In this situation notice would be paid in lieu, rather than worked. [The Claimant] would qualify for 12 weeks notice. On termination any outstanding holiday entitlement may also be paid.
>
> I believe I have understood correctly and can you confirm this is also your understanding.

63 Miss Mortimer confirmed that to be her understanding later the same day.

64 On 27 March 2019 the Claimant, accompanied by Ms Mortimer, attended a meeting with Mr Cathrine and Mrs Jeziorska.

65 The following day Mr Cathrine wrote to the Claimant setting out the history of his absences and the occupational health reviews and their outcomes. He recorded the Claimant's recent indication that he did not believe there to be any roles that he could fulfil with the Respondent and that his best interests would be served if he was no longer employed. He confirmed the Claimant's employment with the Respondent would be terminated with an effective date of termination of 27 March 2019, and that the Claimant would be paid in lieu of notice. The letter confirmed the Claimant's right to appeal.

66 On 1 April 2019 the Claimant appealed that decision. He did not give any grounds. On 3 April 2019 he wrote again confirming his wish to appeal on the basis of new evidence and because of the wording of the letter "written and dictated by yourself and Miss Sally Mortimer".

67 The Claimant was invited to and attended an appeal hearing on 25 April 2019 which was conducted by Mr Pritchard. The Claimant was unaccompanied. In the course of the hearing the Claimant made it clear that he did not want to be dismissed, it was 'all lies' and not what he wanted.

68 Mr Pritchard wrote to the Claimant on 30 April 2019 to confirm that his decision was that the Claimants appeal should not be upheld.

Submissions

69 We received written submissions from the Respondent and heard it and the Claimant in Reply. It is neither necessary nor proportionate to set them out here.

The Law, and Further Findings and Conclusions

Disability Discrimination

70 This forms by far the most important element of the Claimant's claims and we deal with it first.

71 The principal statutory provisions we have to consider are in the Equality Act 2010 as follows:-

> **15 Discrimination arising from disability**
> (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.
>
> **20 Duty to make adjustments**
> (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.
>
> **123 Time limits**
> (1) Proceedings on a complaint within section 120 may not be brought after the end of–
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of–
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (3) For the purposes of this section–

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something–
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(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.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to–
(a) an employment tribunal;

Discrimination arising from disability

72 The Respondent has conceded that the claimant was a disabled person by reason of both his tennis elbow and tendonitis and accepts that it had knowledge of those impairments and their effects at all material times.

73 It is clear to us that dismissal amounted to unfavourable treatment. We gave short shrift to the Respondent's submission that this was not unfavourable because the Claimant had received ESA, was receiving JSA and had been paid 12 weeks PILON.

74 We are unanimous in concluding that the Claimant has established, on the balance of probabilities that:-

74.1 He was laid off on 11 April 2018 because his physical disabilities prevented him carrying out all the duties the Respondent required of him.

74.2 That caused the Claimant stress and led to him having depression.

74.3 That depression prevented the Claimant from returning to work.

74.4 He was dismissed because he was unable to return to work.

75 In our view the chain of causation set out above is both short and simple. The Respondent knew of the Claimant's disabilities. It dismissed him because they prevented him from returning to work.

Proportionate means and Legitimate aim

76 The onus is on the Respondent to establish. on the balance of probabilities, this justification.

77 It relied on three legitimate aims: managing attendance, giving the Claimant a favourable exist and dealing with Health & Safety.

78 We are unanimous in our decision that the Respondent has failed to discharge that burden. In that context we also refer to our findings on the issue of reasonable adjustments, below.

79 We first deal with each of the legitimate aims relied on in turn.

Managing Attendance

80 We accept that managing attendance, in the sense of ensuring staff are on duty at relevant times, and are not absent unexpectedly to an unacceptable extent, is a legitimate aim. We thought this not to be such a case: it involved long-term absence. We thought this to be particularly so in light of the Respondent's reliance on temp workers and its high staff turnover.

81 However, we have given the Respondent the benefit of the doubt.

82 The Claimant had been absent from work, save for 3 days, since 20 September 2017 and was laid off on 11 April 2018 before being dismissed on 27 March 2019. There was no evidence that his long-term absence caused any difficulty. His entitlement to sick pay had long since expired, but he was entitled to, and received, some holiday pay.

83 The Respondent, however, gave no evidence of the financial and administrative costs of not dismissing him.

84 Against the above background we are quite unable to weigh the benefit/detriment balance and have concluded that the Respondent has failed to establish this as a justification.

Favourable exit

85 This might be a legitimate aim in a case where an employee was actually unable to perform any duties at all and was entitled to a generous ill-health retirement pension.

86 However, this was not a favourable exit, see above, and it could not justify dismissal on the facts of this case.

Health & Safety

87 We accept that this could be a legitimate aim and that the Respondent has a duty of care to its employees.

88 The difficulty we perceived with this argument was that the Respondent had never carried out a risk assessment on the Claimant other than for doing normal production line work, carrying out all the duties of a particular role in a team.

89 We refer to the Respondent's attitude to the Claimant's case that he could do at least some of the parts of the roles, which they termed 'cherry-picking', below.

90 In particular, the Respondent did not assess the Claimant for a role in Spares, where Mrs Jeziorska accepted some staff worked on 'light duties', despite his specific assertions that he could perform such a role without risk.

91 We have again concluded that the Respondent has failed to establish, on the balance of probabilities, that dismissal was a proportionate means or ensuring health and safety. There were other options open to them than dismissal.

Time

92 The Claimant's effective date of termination must be the day after the date on which he was given oral notice on 27 March 2019. It was thus 28 March 2019.

93 The Claimant started early conciliation on 28 May 2019, it ended on 27 June 2019 and his claim was presented on 18 July 2019. This claim is in time.

Conclusion

94 In light of all our above findings we are unanimous in finding that the Respondent has discriminated against the Claimant for a reason arising from his disability by dismissing him.

Reasonable adjustments

The PCP

95 We took this to be a requirement that in order not to be dismissed the Claimant was required to be able to carry out all the duties of a role as a General Operator on the production line without risk to his health.

Substantial disadvantage

96 The Claimant was substantially disadvantaged because his physical disabilities meant he could not carry out all the duties of a role as a General Operator on the production line.

Duty to make adjustments

97 Based on all the evidence we have heard we are satisfied that the Respondent was subject to such a duty. It did not appear to contend otherwise.

When did the duty arise?

98 We have given careful consideration to this issue. The Respondent knew the Claimant was impaired from at least 2010, and unable to lift more than 10kg from 2013.

99 We have no doubt this duty was engaged in April 2017, when the Respondent was actively looking at alternative roles for the Claimant, and probably on several earlier occasions.

100 We have also concluded, in light of the content of the Corazon report of 22 November 2018 which set out the Claimant's views on the adjustments that might be made, that this duty arose afresh at that time.

Adjustments

101 It was the Respondent's case throughout that there were no adjustments it could have made to permit the Claimant to continue in its employment.

102 However, it is also clear from what Mr Fry wrote on 13 April 2018,

> … whilst he is correct that there are possibly tasks within the business that he could undertake, none of these are available to him/us right now without displacing another operative who does not have the required skills in the areas they are needed without extensive training and disruption to the business

and

> Unfortunately, the amount of restricted duties employees is now at a level (I am going to say around 5% of our workforce but would need to verify this) where there are simply no suitable processes left without impacting on either our efficiencies or other operators.

that there were roles with the Respondent that the Claimant could have done, even on the Respondent's own evidence, but that they were unwilling to make the necessary adjustments to enable him to do so.

103 Quite apart from the above unidentified roles we determined that there were the following other reasonable adjustments that the Respondent could have made, which would have enabled him to stay in employment:-

103.1 Assigning him to a job in Spares and ensuring other staff would be aware that he may need occasional assistance with heavy items, or assigning him pick lists that did not contain heavy items. Bearing in mind that the Spares department contributed over 20% of the Respondent's profitability, with only about 20 staff, we thought it unlikely such an adjustment would have very much adverse effect.

103.2 Assigning him light duties, such as labelling and/or assembling sub-components, within a team, or across more than one team.

104 It was adjustments such as these that Mrs Jeziorska referred to as 'cherry picking'. We thought that displayed a lack of awareness of the duty imposed on an employer to make reasonable adjustments.

105 By the conclusion of the hearing we had formed the view that the Respondent had expended much more time and effort on seeking reasons why the Claimant could not continue to work for it than it had on considering adjustments. Had that time and effort been more appropriately directed this case might never have arisen.

Reasonableness 2018

106 We were rather hampered in our assessment of this issue by the failure of the Respondent to have identified any of the roles that it accepted he could have performed.

107 This was exacerbated by the failure of the Respondent to identify, far less cost, the potential difficulties of moving and training an employee to enable the Claimant to be given their role. It was not the Respondent's evidence that the person to be moved could not do a different role, it was simply unwilling to bear the costs of the necessary training and/or disruption.

108 We thought this to be unreasonable. It had told the Claimant, years before, that he would be trained in other roles so he could rotate roles within his team. Although that never came to pass, if the Respondent was willing to embrace that cost then, and thereafter, it would have been reasonable for it to do so for another employee, so as to enable the Claimant, a long serving, faithful and respected employee, to continue in its employment.

109 We also thought it unfortunate that at a time when it is generally accepted that about 18% of the working population are disabled within the Equality Act 2010, it was thought that 5% was an appropriate self-imposed limit.

110 It appeared to us that the Respondent had a fundamental misunderstanding of its obligations in the situation it was in. The making of adjustments may impact on a businesses' 'efficiencies', but in the absence of that impact being quantified we are quite unable to say that it would have been unreasonable to require the Respondent to make the adjustments that it knew it could have put in place and which would have enabled the Claimant to continue working, and not be laid off, in April 2018.

Reasonableness 2019

111 We are also of the view that had the Respondent offered to make appropriate adjustments, as above, at the time it was considering his dismissal, his ability to return to work with a suitable role, particularly on a phased basis, would have been little hampered by his depression. We took the view that, on the balance of probabilities, he would have recovered his former enthusiasm for his work and the workplace in a short space of time of being offered alternative duties.

Conclusion

112 We are unanimous in concluding that the Respondent failed to comply with its duty to take steps to make reasonable adjustments:-

112.1 in April 2018, by laying off the Claimant;

112.2 in March 2019, by dismissing the Claimant

Time

113 We are, of course, aware of the decision in Matuszowicz v. Kingston upon Hull [2009] IRLR 28. We accept that time runs from the date on which an employer should reasonably have made an adjustment. However, the Respondent had

known of the need for it to make adjustments from at least 2013, and probably before. In those circumstances we concluded that the duty to take steps to make adjustments arose afresh on the date lay off and/or dismissal was considered.

114 It appears to us that the claim relating to the failure to make adjustments in 2019 is in time.

115 The claim relating to lay-off in 2018 is, equally clearly, out of time. The lay-off took place on 11 April 2018, so that the Claimant should have started early conciliation by no later that 10 July 2018. He did not in fact do so until 28 May 2019.

116 We have a discretion to extend time if, in all the circumstances of the case, it is just and equitable to do so.

117 We accept that granting such an extension is the exception, not the rule: Robertson v Bexley Community Centre [2003] IRLR 434, but that is a general principle, not a rule in itself.

118 We do not apply the principles set out in British Coal Corpn v Keeble [1997] IRLR 336 by rote.

119 We accepted the Claimant's evidence that he was suffering from depression throughout this period: that is borne out by the GPs sick notes. It started shortly after he was laid off, and worsened following his dismissal.. He also enlisted the assistance of his wife and Mr Capener and Mr Kelly for his appeal. He had clearly fallen out with Ms Mortimer by that time.

120 He also had the help of a friend for his ESA appeal.

121 The vast majority of the evidence on this claim is of a documentary nature. No one appears to have forgotten anything, or had difficulty of recall.

122 We accept that there is some prejudice to both parties if we grant or refuse an extension of time. In our view it is evenly balanced.

123 Having regard to all the circumstances of the case we have concluded that it would be just and equitable to grant the Claimant an extension of time in respect of this claim so as to confer jurisdiction on the Tribunal.

Unfair Dismissal

124 We accept that the Respondent dismissed the Claimant for capability, a potentially fair reason.

125 We did not accept that the dismissal was fair in accordance with S.98(4) Employment Rights Act 1996: Newbound v. Thames Water Utilities Ltd [2015] IRLR 734. Had the Respondent complied with its duty to take steps to make reasonable adjustments the Claimant would have been perfectly capable of carrying out appropriate duties.

126 We are unanimous in concluding that this was an unfair dismissal.

Holiday Pay

127 The Claimant has failed to establish that he was not paid all the holiday pay to which he was entitled.

Unauthorised deductions

128 We accept that the Claimant attended work for three days, but he appears to have been laid off in the course of the third day. He was paid for over 2 days pay, 18.25 hours.

129 The Claimant has failed to establish that he has been subjected to unauthorised deductions.

Remedy Hearing

130 A remedy hearing will take place before the same Tribunal, by CVP, on 26 November 2021. It has been given a time estimate of 1 day.

131 Directions for that hearing accompany this Judgment.

Employment Judge Kurrein 9/9/21

Sent to the parties and
entered in the Register on

……..
For the Tribunal office