EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Toth**	
Respondents:	**(1) HR Go Liverpool Limited** **(2) Mayr-Melnhof Packaging UK Limited**	
Heard at:	**Mold**	**On: 9, 10, 11 and 12 August 2022**
Before:	**Employment Judge S Moore**	
Members:	**Mrs L Bishop** **Mr M Lewis**	

Representation:

Claimant:	Mr Andras Toth, in person
Respondents:	(1) Mr Singh, Consultant (2) Mr Steele, Solicitor

Interpreter: Ms K Morvay (Hungarian Interpreter)

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The Claimant's claim for discrimination arising from disability fails and is dismissed.

2. The Claimant's claim for failure to make reasonable adjustments fails and is dismissed.

REASONS

Background and Introduction

1. The claim was presented on 7 November 2019. This followed a period of Early Conciliation against the First and Second Respondent which commenced on 6 November 2019 and ended on 7 November 2019.

2. There have been a number of Preliminary Hearings in this matter on 14 May 2020, 10 September 2020, 7 December 2020, 4 February 2021 and a Preliminary Hearing to decide whether the Claimant was a disabled person which he was so deemed by Judge Ryan in a decision of 22 March 2021. A further Preliminary Hearing took place on 8 October 2021 where the issues in the claim were clarified by Judge Jenkins and set out in his Order. The Claimant brings claims of discrimination arising from disability under Section 15 of the Equality Act 2010 and failure to make reasonable adjustments under Section 20/ 21 EQA 2010.

3. The hearing took place as a hybrid hearing with Judge Moore sitting in Mold and the non-legal members joining remotely by video. All of the parties and witnesses attended in person save that permission was given to Ms O'Rourke of the First Respondent to finish her evidence by video on one of the days as her evidence had gone part-heard overnight. The translator interpreted throughout the proceedings. There was an agreed bundle added to during the course of the proceedings by agreement of both parties. The Tribunal heard evidence from the Claimant and the Claimant's son Mr Adam Toth. For the First Respondent the Tribunal heard from Ms O'Rourke. For the Second Respondent the Tribunal heard from Ms A Varanauskiene, Mr Martin and Mr Samuels. The Tribunal permitted admission of witness statements for Miss Harrison (R1) and Ms Christian (R2) but decided not to call them to give live evidence.

4. There were a number of issues that arose during the hearing that require setting out in this Judgment.

   The First Respondent's application to strike out the claim.

5. On the first morning of the hearing the First Respondent made an application to strike out the claim on the basis there were no reasonable prospects of success. This was refused, oral reasons were provided and no written reasons have been requested. In summary the Tribunal considered that it was not possible to conclude that there were no reasonable prospects of success of the claim succeeding against the First Respondent without evidence being heard. Further the timing of the application, having had a number of previous hearings was most unfortunate and not in accordance with the overriding objective. No notice had been given and the claimant

was a litigant in person who then had to be given time to prepare a response to the application. This subsequently had a knock on effect on the proceedings which ended up in the decision having to be reserved as not enough time was left at the end of the hearing for the Tribunal to deliberate. The Tribunal met on 22 August 2022 to deliberate their decision.

6. The Claimant complained that after witness statement exchange that Ms Varanauskiene's witness statement was changed and an amended version was served upon him. That amended version was available to the Tribunal as well as a tracked change copy which showed the amendments that had been made. The Tribunal gave permission for the amended statement to be admitted. We deal with this below in our findings of fact.

The issues

7. The agreed issues in the claim were as follows:

8. Discrimination arising from disability (Equality Act 2010 section 15)

a) Did the Respondents treat the Claimant unfavourably by moving him from the "Flats" area to another area where more physically demanding work was required.

b) Did the following things arise in consequence of the Claimant's disability:

(i) His inability to lift and move heavy objects?

c) Was the unfavourable treatment because of that?

d) Was the treatment a proportionate means of achieving a legitimate aim?

e) The Tribunal will decide in particular:

(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?

f) Did the Respondents know or could they reasonably have been expected to know that the Claimant had the disability? From what date?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

a) Did the Respondents know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

b) A "PCP" is a provision, criterion or practice. Did the Respondents, or either of them, apply the PCP of requiring that the Claimant undertake any and all work directed of him?

c) Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was less able to undertake heavy lifting due to his back condition?

d) Did the Respondents know or could they reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

e) What steps could have been taken to avoid the disadvantage? The Claimant suggests that he could have remained working in the "Flats" section.

f) Was it reasonable for the Respondents to have to take those steps and when?

g) Did the Respondents fail to take those steps?

Findings of Fact

10. The Claimant is a Hungarian national. In a judgment dated 22 March 2021 the Tribunal found that the Claimant was at all material times a disabled person by virtue of pain, discomfort and numbness in his back, neck, shoulders and upper limbs, in accordance with the definition of disability at s.6 Equality Act 2010.

11. In November 2017 the Claimant signed on as an agency worker with the First Respondent. The First Respondent had an onboarding process which consisted of a number of different tests and an induction. The Claimant was required to complete a man handling test, induction policy and a night workers assessment form dated 3 November 2017. The Claimant had ticked "no" to all of the health questions on that form. Question 10 asked whether the Claimant had any other health condition/health problems that may affect his ability to do night work. Question 11 asked whether he considered himself to have a disability that may affect his ability to carry out the assignment. It is relevant to record that the Claimant told the Tribunal in evidence under cross examination that he has previously brought four separate disability discrimination claims against different employers. The Claimant had referenced one of these claims in a previous preliminary hearing advising he had already was found to have been a disabled person

in that case (1600586/2016). On this basis we find that the Claimant had a understanding and knowledge of the question on the form asking if he had a disability as he has litigated this issue previously.

12. On the second page of that assessment form under additional information the Claimant had written:

    "I need avoid cold area, and heavy lifting"

13. There had been an interview with the Claimant by someone called Sophie at the First Respondent who had completed the candidate assessment form. The relevant matters noted on that assessment form were that the Claimant could do any shifts, she noted "no cold factory" and "not the best English". The Claimant also completed a numeracy spelling and literacy test which he accepted he had had assistance from his son who attended his induction at the agency at the same time. The Claimant's son, Mr Adam Toth also worked for the First and Second Respondent.

14. On 9 November 2017 the First Respondent placed the Claimant at a placement with the Second Respondent. The Second Respondent is in the business of sale and supply of carton board packaging and employs approximately 200 people. They have a HR department.

15. On 31 January 2018 the Claimant completed the same night worker assessment form as described above with the same responses save on this occasion he did not mention under additional information that he needed to avoid cold areas and heavy lifting.

16. From January 2018 the Claimant was placed in the "Flats" department also called the "Expressway" which was located from that time in a separate building to the factory within the Second Respondent. The Flats department operatives tear away excess card from printed packaging by hand and that packaging is then packed and wrapped for sending on to the Second Respondent's customers. A typical product would be the cardboard wrapped around 4 cartons of yogurt. There was no heavy lifting involved in the Flats department and it was not a cold environment.

17. The factory environment was different to the Flats department. In the factory there were Lines called "lines 1,2 and 3" and a "basket" line and an "end of line". Lines 1, 2 and 3 are fast machines involving lifting but not heavy lifting. They have adjacent lifting tables that bring up the loads to the level of the lines. The basket line was slow and there was no heavy lifting. In respect of the end of the line we find there was heavy lifting required. We find this based on the evidence of Mr Martin in respect of the "manning sheet" which was introduced by the Second Respondent as late evidence that was permitted. We return to this below.

Arrangements between the First Respondent and Claimant for offering shifts

18. The Tribunal had sight of a number of text messages in the bundle between the First Respondent and the Claimant and also the Claimant's son. The First Respondent offered staff on their books shifts by text message. This was a company telephone and therefore the text messages could have been sent by a number of individuals who worked at the First Respondent albeit we find it was likely that they were mostly sent by Ms O'Rourke as she was the person within the First Respondent who dealt with the Second Respondent's client account. The First Respondent would text the Claimant either directly or via his son and offer shifts. The Claimant was free to accept or decline any shift that was offered to him at any location and there were no consequences if he decided not to accept a shift. On 22 February 2018 the Claimant was offered work in the factory at the Second Respondent.

19. In March 2018 the Claimant was sent to work for a different company to the Second Respondent unloading containers. He was offered and accepted work back at the Second Respondent in the factory on 11 April 2018 for one week in the afternoons.

20. On 2 May 2018 the Claimant sent a text to the First Respondent as follows

> "If it is possible, I would like to work from next week on the expressway. Can I do morning shift on the next week and after that rotation with that shift? In the factory I need to lift heavy weight, and it is difficult in long term. I should avoid the work with heavy weights, as I told. On the expressway we lift rarely heavy weights, that is why that place would be better for me. Thank you for your understanding. Regards, Andres"

The First Respondent did not acknowledge or reply to that text. Thereafter the Claimant was offered shifts mainly in the expressway.

21. On 10 May 2018 the Claimant sent a text to the First Respondent. He asked for a possible night shift next week and stated that he was going to a doctor on Tuesday at 11.00am in Liverpool. The Claimant had asserted in his witness evidence that this was evidence that he had informed the First Respondent about a condition in relation to his disability as he stated he had advised he was seeing a spine doctor. The Claimant accepted under cross-examination that the text message did not mention that he was going to see a spine doctor but that it stated as set out above.

22. On 28 June 2018 the Claimant was offered further work in the factory which he accepted. On 7 August 2018 the Claimant sent a further text message to the First Respondent which stated as follows

> "I went to the expressway yesterday, because I didn't check my phone earlier. Then they sent me in the factory, but I don't want to go there today. As I said earlier, because of my limited health condition. Please send me to expressway in the future."

The First Respondent replied straight away and said that they did not have expressway this week and they would therefore have to cancel the Claimant as they only had factory work. There were no adverse consequences of not accepting the factory work. The Claimant continued to be offered assignments at the Second Respondent in the Flats department where it was available.

23. Thereafter all the texts before the Tribunal from 7 August 2018 indicated that the Claimant was offered and accepted shifts in the expressway.

24. On 8 February 2019 the Claimant filled in a third night worker assessment questionnaire which was the same as above insofar as no disability was disclosed or any other health conditions that might affect his ability to do night work.

25. According to the Claimant from 22 January 2018 he worked in the flats department with minor interruptions. He stated he was able to complete all tasks in that department. He also referred in his statement to working at the factory "a few times" where he says he performed heavy lifting tasks despite the fact that there were easier tasks in the factory and gave the following examples; "the windows PACT, the basket line and periodical stripping". The reference to stripping involving heavy lifting contradicted what the Claimant had said in his claim form, where he stated that stripping did not involve heavy lifting. He stated that he had to do the more difficult tasks as well because if he did not do it the Second Respondent would not give him a job at all. He said he did the work even at the cost of pain because he was afraid of being fired.

26. The Claimant was asked when he worked in the factory, if he had told anyone he found heavy lifting difficult. The Claimant's evidence was difficult to follow. He firstly stated "not in the factory" but went on to recall an occasion where he was due to be placed on line 1 which he asserted included heavy lifting. The team leader asked if he was ok with heavy lifting and he reportedly told the team leader he would rather have some other job and the team leader therefore gave him another task.

27. The Claimant also asserted that he had worked on the end of line packaging in the factory. The Claimant asserted this for the first time in his witness statement and this had not been mentioned previously. This is despite the second respondent's representative repeatedly asking the

Claimant to confirm in writing before the hearing what heavy lifting he had been engaged so the Second Respondent could prepare their case. The Claimant was asked about the end of line shifts as there was no evidence before the Tribunal as to when the Claimant had worked on the end of line shifts. The Claimant was unable to say or recall on what dates he had worked on the end of line and also he was unable to recall anyone that he had worked with during such shifts or the name of the team leader. The Claimant told the Tribunal he had worked with his son in packing and wrapping but not on end of line.

28. Mr Adam Toth's witness statement did not mention working with his father on the end of the line but when he was asked by the Judge if he had ever seen his father working on the end of line he told the Tribunal he had worked with him on end of line. This was contrary to what the Claimant had told the Tribunal (that he had not worked with his son on the end of line).

29. Mr Leigh Martin, who ran that department, told the Tribunal that he did not recall the Claimant ever having worked in that department and that he had also checked the manning sheets back as far as 2018 and had been unable to see the Claimant on those sheets on the end of line.

30. The Claimant also asserted that when he had been asked to work on the end of line he brought to the attention of his supervisor his condition and was forced to do the heavy lifting. There was no evidence to support this contention and we find that that was an implausible thing to have happened. If it had happened we would think that the Claimant would have complained and there would have been a record of the complaint and/or a record of him being injured as a result or having to have an increase in medication or visit his GP there was simply no evidence to support this contention.

31. We find that the Claimant did not work on the end of line. The Claimant's evidence was inconsistent and not credible. He could not give any dates or times or names of people with whom he worked.

Alleged list held by the Second Respondent of worker's health conditions

32. The Claimant's evidence was that the Second Respondent retained a list of the health status of workers which was made several times. The Claimant said that the shift leader would approach each worker separately during work and ask if they had any health problems and that data would be written down on a list by the interviewer. The Claimant claimed that he had his last health assessment in July 2019 and that his information was written down by his supervisor, Ms A Varanauskiene. The Claimant claimed that Ms Varanauskiene recorded he had a problem with his spine. The Claimant had requested that record be added to the bundle and requested it from the Second Respondent who informed the Claimant after taking instructions

that the Second Respondent kept no such records. Ms Varanauskiene was asked about this when she gave her evidence.

33. Ms Varanauskiene disputed that she had ever kept such records or had such a conversation with the Claimant. She told the Tribunal the statement was incorrect and that the Second Respondent, as far as she knew had never been asked to check the health status of agency employees. She also had never seen the list to which the Claimant referred to and denied that she had ever filled in any list relating to the health of any agency worker including the Claimant. Ms Varanauskiene also told the Tribunal that the Claimant had never informed her he had a disability or any health condition specifically any problem with his spine. We preferred the account of Ms Varanauskiene in this regard. We found Ms Varanauskiene to be a plain speaking credible witness with a clear recollection of events which was not impacted by the changed witness statement for the reasons we set out below. We considered it to be implausible that the Second Respondent would charge untrained team leaders the task of going around and asking staff about health conditions and compiling some sort of list or record of the result of the verbal enquiries.

34. The Second Respondent effectively fully relied on the First Respondent to send them agency workers who did not require any reasonable adjustments. This was evidenced by the Second Respondents Response that had been pleaded to the claim. This was set out in paragraph 11 as follows:

> "the Claimant continued to be used in other areas of the Second Respondents site, but then stipulated that he could only do certain aspects of the role here. Leigh Paul Martin a manager for the Second Respondent informed the First Respondent all agency workers must have ability to do all aspects of the role."

35. Mr Martin was asked about this in supplementary questions and stated that he could not recall giving instructions to the Second Respondent's representatives at the time to this effect and that this was something he had said. He then later accepted that he would have informed the First Respondent that the agency workers would need to have the ability to do all tasks. It was suggested that Mr Martin was referencing only to the ability to speak English. The Tribunal did not accept this explanation as that is not what it says in the context of the pleaded Response and furthermore, Mr Martin, whilst mentioning the ability to speak English also then subsequently accepted an agency worker would be expected to do the role they had been sent to do.

Manning sheet

36. This was a document that the Second Respondents sought to admit during the hearing and permission was granted. This was a sheet that set out the three shifts and the different tasks within the factory and who would be performing those tasks so it was broken down into line 1, 2 and 3, basket 521 and the end of line. Mr Martin would send this to Ms O'Rourke with a number of blank areas where they required agency workers to do the different tasks, Ms O'Rourke would fill in the sheet on a first come first served basis so she would have no input into who would be doing a particular task, for example the first person to respond to a text message would have their name put against line 1. Mr Martin accepted then once he received the manning sheet from Ms O'Rourke he could and did change around the names on the sheet so that different people would be allocated to different tasks. Mr Martin was asked whether the end of line involved heavy lifting he said it involved "lifting" but then later said that if a female had been placed on the end of line by Ms O'Rourke they would change it to a male.

Events leading to the termination of the claimant's assignment in the Flats Department

37. In approximately June 2019 the Claimant began to work in Ms Varanauskiene's team. There was a dispute of evidence about the Claimant's performance. The Claimant's case was that prior to the events on 7 August 2019 nether the First or Second Respondent had an issue with his performance. It was common ground that the Second Respondent had not raised any issues in respect of the Claimant's performance with the First Respondent before that date. There was evidence from the First Respondent that the Second Respondent was particularly desperate for agency workers at that time.

38. Ms Varanauskiene explained why there was an amended witness statement sent to the Claimant and relied upon as her evidence. She had previously given instructions as to the content of her witness statement. A draft had been produced but she had not been able to read it before it was subsequently exchanged. When she read the statement it contained some factual inaccuracies that she wished to amend and did so after informing the legal team the statement was incorrect. These inaccuracies were about matters that were not contentious such as the content of pallet loads and where there were changes to the statement regarding her opinion on the standard of the Claimant's work these were how things were phrased rather than changing any factual assertions. We also accepted that she had not read the Claimant's witness statement before making her amendments.

39. From June 2019, when Ms Varanauskiene started to work with the Claimant onwards she had to help the Claimant every day by supporting him as he was a very slow worker. She gave him easier tasks but staff would complain

he was very slow and some refused to work on the same lifting table as him. She told the Tribunal that the Claimant would wander off and do other tasks that he had not been asked to do such as wrapping and banding the cardboard that had been torn ready to be packed or that had been packed into pallets and would also pack other peoples stripped board which also upset his colleagues.

40. On 6 August 2019 Ms Varanauskiene described that shift as very stressful. The Claimant was on shift with another agency worker who we shall call agency worker V who was also a Hungarian national. This agency worker V was also known to be slow but not as slow as the Claimant. On that day a combination of having the Claimant and the agency worker V as well as a large volume of work to try and complete was described as the last straw by Ms Varanauskiene. She reported that the Claimant and V were constantly talking and not doing enough work so she went to see her manager, Mr Samuels and told him that they were not going to get the work done. Mr Samuels then came down to observe the Claimant and agency worker V himself and they worked at normal pace when he was there and they were aware they were being observed but as soon as he left they went back to their talking and slow working. Ms Varanauskiene went back to see Mr Samuels and Mr Samuels made a decision that both the Claimant and agency worker V would not be offered any more work in the flats department. He contacted the First Respondent by email, Mr Samuels said that Ms Varanauskiene was quite distressed because the Claimant and V were not doing what she was asking them to do and as a result the department got behind with the work. Mr Samuels told the Tribunal he has a very high opinion of Ms Varanauskiene and her abilities to manage the department and concluded that he did not think she would have raised the problem with him if it was not serious. Mr Samuels was satisfied that she had tried hard to get them to work but they were not interested he therefore decided to email the First Respondent on 7 August 2019 and ask that they be removed from the site. The email stated:

> "Ask Ms O'Rourke to find one replacement for tomorrow's afternoon shift and stop both Andras and agency worker V from coming into work on Asta's shift."

He said he would explain the reasons when they spoke tomorrow but he did not want them back again.

41. There was no evidence that either Mr Samuels or Ms Varanauskiene knew anything about the Claimant's disability. We find that the Claimant was removed from the flats department as it was perceived he was slow and disruptive and we find this was corroborated by the removal of another worker about whom the same perception existed and had the same treatment as the Claimant.

42. Ms O'Rourke told the Tribunal that it was relatively common for a client to ask them to remove a worker from the site usually as they are not suitable. Ultimately it is the clients decision and the First Respondent will abide by what they want as they do not want to upset their relationship with them. Ms O'Rourke told the Tribunal that when she received the email from Mr Samuels she telephoned him to find out why he wanted the Claimant and the other worker removed. He told Ms O'Rourke that they were being disruptive and talking too much and that was slowing down the workforce. Ms O'Rourke says she then spoke to the Claimant to let him know he was no longer required by the Second Respondent and the assignment would end. Ms O'Rourke told the Claimant she would seek alternative work for him but the Claimant told Ms O'Rourke he wanted to return to work for the Second Respondent and did not want to work anywhere else. Ms O'Rourke said that she had a similar conversation with agency worker V who accepted work for a client similar to the Second Respondent. The manning sheet showed that agency worker V had been working in the factory on Line 1. So despite Mr Samuel's instruction to remove the Claimant and agency worker V from the Flats Department there was no work wide ban on them being offered other roles within the Second Respondent.

43. Following this the Claimant repeatedly called and emailed Ms O'Rourke demanding to go back to work for the Second Respondent and he was offered work with alternative clients but he refused to accept any other assignments.

44. On 13 August 2019 the Claimant's wife, Mrs Tundes Toth, lodged a grievance with the Second Respondent. Mrs Toth had never worked for the Second Respondent. Mrs Toth had also brought a claim as part of these proceedings but it was dismissed after Judge Ryan found that she was not disabled. The Claimant assisted his wife in writing this letter. The grievance brought by Mrs Toth was that she had been "handled unfavourably" by the Second Respondent because of her "mental disability against her son who is young and healthy." It went on to say that Adam Toth had turned down work in the flats department so that the Mrs Toth would have an opportunity to work there. Mrs Toth requested that her and the Claimant should be allowed to work together in the expressway flats department. The position of the First and Second Respondent was that Mrs Toth had registered to work with the First Respondent but had not been placed at the Second Respondent because she was unable to speak English to the required standard. It was accepted by the Claimant that he would have had to have translated for his wife at all material times.

45. The Second Respondent responded to Mrs Toth by a letter dated 21 August 2019 advising that as she had never worked for them she should take up matters with the First Respondent.

46. On the 18 September 2019 the First Respondent offered the Claimant work in the stripping department at the Second Respondent. This was similar work to the work in the flats department in the factory and involved stripping out cardboard by hand and it was common ground that the stripping department did not involve heavy lifting. This particular assignment was a one off short term assignment to strip packaging for an Easter Egg carton order.

47. This was offered by text message via Adam Toth. The text message read as follows:

"..I have stripping work in factory at weekend would dad want to do it it's not on machines".

48. The claimant's case was that this supported his contention that the First Respondent had knowledge of his disability as it was acknowledging he did not want to work on machines. Ms O'Rourke was not able to assist the Tribunal on what might have been the meaning of this sentence.

49. We find that the author of the text message was acknowledging the claimant did not want to work on machines which were based in the factory. This is unsurprising given that the claimant had previously informed the First Respondent of his difficulties and his preference to work in the Expressway (see paragraphs 20 – 22 above).

50. Two days later after being offered this work, the Claimant lodged his own grievance with the Second Respondent. This grievance did not mention anything about being required to do heavy lifting or indeed anything about the Claimant's disability instead it alleged that there had been associative discrimination because the Claimant wanted to work with his wife who had a "mental disability." The Second Respondent acknowledged the grievance and informed the Claimant they had asked the First Respondent to investigate that grievance as they did not employ the Claimant.

51. Thereafter the Claimant was offered shifts in the stripping department between 27 September and 11 October 2019 but it is material and significant that despite having lodged two grievances with the Second Respondent he was still offered work there as can be evidenced by his assignment to the stripping department.

52. On 1 October 2019 the Claimant lodged a further grievance with the Second Respondent and complained again about associative discrimination in connection with his wife's disability and raised for the first time that he had not been offered work in Expressway since August 2019. He alleged that only "young, healthy strong person are working" in the Expressway and he

had a “disadvantage of being disability against healthy person.” He wished to work in Expressway with his wife on the same shifts in guaranteed positions and said that “this would be a calming result.”

53. Following this the First Respondent arranged a grievance meeting on 3 October 2019. This was dealt with by Josie Harrison who did not give live evidence but the Tribunal admitted her statement. Ms Harrison arranged for a meeting to take place with someone called Justine Jones to discuss his concerns in more detail. The Claimant, Mrs Toth and Mr Adam Toth attended this grievance meeting. Thereafter, Ms Harrison undertook some background investigation by reviewing all of the paperwork the Claimant had completed since he had been engaged by the First Respondent and concluded that none of the information in the three health questionnaires completed by the Claimant disclosed a disability.

54. Following that meeting Ms Harrison wrote an outcome letter setting out in summary that they could trace no record of any disability, she recorded that Ms Jones had offered to look at alternative assessments to take into account the Claimant’s condition and make reasonable adjustments and also informed them that they failed to understand the discrimination claim and asked him to provide further information. The Claimant accepted under cross-examination that he had done neither, he had not provided any further information to the First Respondent and he had not taken up Ms Jones’s offer to look at alternative assignments. We accepted Ms O’Rourke’s evidence that the Claimant refused any other assignments and would not consider any other option other than to work back with the Second Respondent with his wife.

55. On 18 October 2019 the Claimant submitted a further grievance to the Second Respondent. In this he stated “he could do all jobs in expressway and some jobs in the factory” but that he had been banned as he had complained. He asserted it would be a reasonable adjustment for him to work in the expressway and a healthy person work in the factory. On 14 December 2019 the Claimant lodged a further grievance alleging breach of agency worker regulations. Thereafter the Second Respondent wrote to the Claimant advising that they would not be responding to any further grievances and had asked the First Respondent to contact the Claimant.

56. After the end of the one off stripping assignment the Claimant was not offered any further work at the Second Respondent. In respect of the Flats Department this was because, as we have found above, Mr Samuels asked for him not to be sent again. That left stripping and factory work. It is unsurprising that the Claimant was not offered further factory work as he had asked not be placed there and had not been placed there since August 2018. Mr Leigh Martin told the Tribunal that the Second Respondent had embarked on a project to reduce manual labour and agency staff. Work had

been done on tooling to reduce waste. This had resulted in that particular job no longer requiring stripping and a department of 8 people on shift stripping had been reduced to zero. We find that the claimant's disability, or inability to lift or move heavy objects was nothing to do with the reasons he was no longer offered assignments at the Second Respondent.

57. It transpired in evidence from Ms O'Rourke arising from questions from the Tribunal panel that in the 18 years she had worked for the First Respondent that not one agency worker had ever required reasonable adjustments. Ms O'Rourke was not aware whether the First Respondent had engaged or used the services of Occupational Health to assess any worker's need for reasonable adjustments and how this could be carried out in practice in any of the assignments they placed their agency workers on. Ms O'Rourke told the Tribunal it was common for agency workers not to want to work in cold environments or engage in heavy lifting and as such, she had not been prompted to make further enquiries regarding the additional information that had been provided by the Claimant on his first health assessment form.

The Law

S15 – Disability Arising from Discrimination

58. Section 15 provides:

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.

58. **Basildon & Thurrock NHS Foundation Trust v Weerassinghe UKEAT/0397/14** provides the Tribunal should identify two separate causative steps in Section 15 claims (per Langstaff J, then the President of the EAT):

''The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages.''

59. **Pnaiser v NHS England & anor [2016] IRLR 170** sets out the approach to be followed in Section 15 claims (paragraph 31):

    1. A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
    2. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
    3. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.
    4. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.
    5. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
    6. The statutory language of section-on 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

    b. It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising

in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

60. In respect of S15 (1) (b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In **Birtenshaw v Oldfield [2019] IRLR 946**, the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

S20/21 – Failure to make reasonable adjustments

61. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duty arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT).**

62. S41 (4) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker). Under S41 (5) a principal is defined as a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

63. Paragraphs 2 and 6(1), Schedule 8 EQA 2010 set out the principal's duty to make reasonable adjustments in respect of work which the principal may make available or actually does make available. Where work is made available, a principal is obliged to comply with the first, second and third requirements of the reasonable adjustments duty under S20 EQA 2010. Paragraph 6(2) provides that a principal is not required to make any adjustment which the disabled person's employer is required to make.

Disability – Knowledge

64. This is a question of fact for the Tribunal. The burden is on the employer to show it was unreasonable to have the required knowledge.

65. The EHRC Employment Code provides that employers must do all they can reasonably be expected to do to find out whether a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

66. S15 (2) provides that the discrimination will not arise if A shows they did not know and could not reasonably be expected to know that B had a disability.

67. In respect of reasonable adjustment claims, an additional element of knowledge is required. The first element is the same test as in S15 namely that A shows they do not know or could be reasonably be expected to know that the [interested] disabled person has a disability. Schedule 8 EQA 2010 pt. 3 para 20 states that A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage. Accordingly, the additional element on knowledge for S20/21 claims is that A must also be reasonably expected to know the disabled person is likely to be placed at the disadvantage.

68. In deciding the S15 claims it is necessary to determine who the alleged discriminator was and whether they had imputed knowledge **(Gallop v Newport City Council [2016] IRLR 395, EAT).** In the Court of Appeal decision in Gallop [2014] IRLR 211, a reasonable employer must form their own judgment as to whether the employee is disabled and not simply rely on advice from an occupational health advisor. The employer must have the requisite knowledge at the time of the unfavourable treatment. In cases where there are alleged series of acts it is necessary to consider whether it gained knowledge at any subsequent stage when the treatment was ongoing.

69. Under S15 (2) lack of knowledge that a disability causes the “something arising” in response to which the employer subjected the employee to unfavourable treatment is not a potential defence **(City of York Council v Grosset ICR 1492, CA).**

70. In respect of the reasonable adjustment claim, the approach in **Ridout v TC Group 1998 IRLR 628, EAT** was endorsed in **Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT.** The Tribunal must consider two questions:

71. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?

a. If the answer to question (i) is “no”, ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?

72. If the answer to both questions is “no”, then the employer will qualify for the exemption from any duty to make reasonable adjustments.

73. Also in **Ridout** the EAT held that it is not incumbent on an employer to make every enquiry when there is little or no basis for doing so and that ‘people must be taken very much on the basis of how they present themselves’.

74. The issue of constructive knowledge arose in the case of **Donelien v Liberata UK Ltd UKEAT/0297.14.** The knowledge required is that the person has a disability. This must take the Tribunal back to the definition now in S6 EQA 2010. Accordingly it is for the employer to show that it was unreasonable to be expected to know first that a person suffered with a physical or mental impairment, secondly that the impairment had a substantial and long term effect (and further as this was a reasonable adjustments claim, of the substantial disadvantage). In that case the Claimant had a very poor sickness record with erratic and occasional attendance. She did not suffer with a condition giving rise to impairments which had consistent effects. There were occupational health referrals identifying a myriad of different reasons for the absences other fact was that it was difficult to disentangle from what the claimant could not do because of her disability as opposed to what she would not so.

75. In **A Ltd v Z EAT 0273/18** the EAT held that in relation to S15 claims, the complete answer to the S15 (20 question in that particular case was even if the employer could reasonably have been expected to do more (make enquiries), it could not reasonably have been expected to have known about the Claimant’s disability. The Tribunal must also take into account what the employer might reasonably have been expected to know had it made enquiries.

Conclusions

Knowledge of disability

76. We remind ourselves of the claims and the relevant timings as this is important when considering the issue of knowledge.

77. In respect of the S15 claim, the unfavourable treatment relied upon was “moving him from the “Flats” area to another area where more physically

demanding work was required." Our findings of fact at paragraphs 40, 46 and 51 are that the Claimant was removed from the Flats department on 7 August 2019 and offered work in Stripping between 27 September – 11 October 2019. These must therefore be the relevant periods for assessing the knowledge of the Respondents for the S15 claim.

78. In respect of the S20/21 claim, the PCP relied upon was that the Respondents, or either of them, required the Claimant undertake any and all work directed of him. The claimant was offered assignments from the start of his engagement to the last assignment in the stripping department which ended on 11 October 2019. These must therefore be the relevant periods for assessing the elements of knowledge required for the S20/21 claim.

Knowledge of First Respondent

79. We made a number of findings as to what factual circumstances could have led the First Respondent to have knowledge of the claimant's disability which was found to be "pain, discomfort and numbness in his back, neck, shoulders and upper limbs". These were:

(i) The first night worker assessment form and induction completed at the start of the Claimant's employment where he asks to avoid cold areas and heavy lifting (see paragraphs 12 and 13);

(ii) The text messages from the Claimant dated 20 May 2018 and 28 June 2018 (see paragraphs 20 and 22 above), where he advises he has difficulty with heavy lifting and wants to avoid working in the factory as a consequence;

(iii) The text message from the First respondent to Adam Toth acknowledging the Claimant did not want to work on machines (see paragraphs 47 and 49).

80. We have concluded that this information was not sufficient to impute knowledge or lead us to conclude that the Respondent ought to have known the Claimant had a disability or knowledge of the substantial disadvantage relied upon.

81. Dealing with actual knowledge first, on three separate forms, the Claimant had ticked "no" to all of the health questions on that form. Question 10 asked whether the Claimant had any other health condition/health problems that may affect his ability to do night work. Question 11 asked whether he considered himself to have a disability that may affect his ability to carry out the assignment. We do not think it matters that the question was asked about night work specifically as there was no case advanced that the Claimant's impairments would have differed had he worked nights

82. We do not consider that the Claimant advising that he had difficulty lifting and needed to avoid cold areas resulted in the First Respondent having actual knowledge of his disability. We find that it would have been unreasonable to be expected to know first that the Claimant suffered with a physical impairment and secondly that the impairment had the substantial and long term effect on the basis of this limited information. Many individuals are unable to lift heavy objects. The knowledge of this fact about an individual cannot in our judgment be enough to show a knowledge about a disability.

83. We turn to discuss whether the First Respondent ought to have known the Claimant was disabled. We must balance this question by considering:

(i) It is not incumbent on an employer to make every enquiry when there is little or no basis for doing so and that 'people must be taken very much on the basis of how they present themselves' (**Ridout);**

(ii) employers must do all they can reasonably be expected to do to find out whether a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. **(EHRC Employment Code)**

84. We have considered whether the First Respondent should have made further enquires following being informed at the beginning of the engagement that he needed to avoid cold areas and heavy lifting. This was reaffirmed by the Claimant is his text messages in May and June 2018. Whilst we consider it would have been best practice to have made those further enquiries, especially on receipt of the May and June 2018 text messages, we have balanced that with the fact that the Claimant had informed the First Respondent on three separate occasions (and the last occasion after sending those text messages (see paragraph 24)) that he did not have any condition that would affect his abilities to carry out night work and that he did not have a disability. In these circumstances it was not reasonable for the First Respondent to have undertaken further enquiries at that time.

85. Further, the Claimant did not even assert he was disabled in his first grievance (see paragraph 50). He referenced Mrs Toth having a disability but made no mention of his own disability.

86. It was not until his second grievance dated 1 October 2019 (see paragraph 52) did the Claimant assert for the first time that he was a disabled person. The First Respondent responded to this by offering to look at alternative assessments to take into account the Claimant's condition and make

reasonable adjustments. They invited the Claimant to provide further information about his disability discrimination. The Claimant accepted under cross-examination that he had done neither, he had not provided any further information to the First Respondent and he had not taken up Ms Jones's offer to look at alternative assignments.

87. For these reasons we find that the First Respondent had done all they reasonably can have been expected to do to make enquiries. As such the First Respondent did not know nor should they have reasonably known that the Claimant was a disabled person at all material times.

88. In respect of the Second Respondent there was absolutely no evidence to support the contention that they either knew or should have known that the Claimant had a disability. The first time the Second Respondent could be argued to have been on notice of a disability was on receipt of the second grievance letter by the Claimant dated 1 October 2019. However this letter gives no detail of what his disability is only that he asserts that "young healthy strong persons were working in the Expressway" and this disadvantaged him. In our judgment it cannot follow that just because someone writes a letter making a general assertion they are disabled, with no detail about the impairment or even what the impairment is said to be that could give rise to a duty to make further enquiries or that they ought to have known the Claimant was disabled.

89. For these reasons both claims must fail as neither Respondent had knowledge of the Claimant's disability nor of the substantial disadvantage in respect of the S20/21 claim. However, even if there had been knowledge by either of both of the Respondents we consider the claims would not have succeeded in any event. We consider it appropriate, for the sake of completeness to set out our reasons as follows in this judgment.

<u>S15 - Discrimination arising from disability.</u>

(ii) The unfavourable treatment asserted by the Claimant is that he was moved from the Flats department to another area where more physically demanding work was required and that the unfavourable treatment arose because of his inability to lift and move heavy objects.

90. This claim fails based on our findings of fact. The Claimant was not moved from the Flats department to another area, he was excluded from the Flats department on 7 August 2019 and offered no further assignment there. The reason he was excluded was not because of his inability to lift and move heavy objects but because he was perceived to be disruptive and slow. This claim never had any basis as even on the Claimant's own case there was no requirement to lift and move heavy objects in the Flats department. He was also not moved to another area with physically more demanding work.

He was offered further work in the stripping department which again on his own case did not require moving and lifting heavy objects.

91. The only area that could have been possibly said to have heavy lifting was the factory but the Claimant was not moved to the factory nor was he offered any further assignments there after August 2018. He had previously been offered and declined shifts in the factory with no consequence. The unfavourable treatment simply was not made out and it did not occur. This was in our judgment a claim with no reasonable prospect of success.

S20/21 – Failure to make reasonable adjustments

92. In respect of the reasonable adjustments claim we find firstly that the First Respondent did not apply the PCP. There was ample evidence that the Claimant was not required to accept all and any work that was directed to him. He was offered work elsewhere and was free to decline or accept those shifts as he saw fit. See paragraphs 22 and 43.

93. In respect of the case against Second Respondent the basis of the PCP appears to have derived from their response which has been described above at paragraphs 34 and 35. We found that the Second Respondent did apply the PCP that all workers sent to the them by the First Respondent were expected to be able to fulfil all duties. The Second Respondent had an expectation that the First Respondent would undertake monitoring in respect of reasonable adjustments and in reality does not send them any agency worker that would require any adjustments. The Second Respondent had no monitoring or arrangements in place to manage a situation whereby an agency worker required reasonable adjustments.

94. We find that they did not apply that PCP to the Claimant. There was no evidence that the Claimant had been required to actually undertake a role that would have placed him at the substantial disadvantage he relied upon. At paragraphs 25-31 we set out the Claimant's evidence regarding this PCP. The Claimant told the Tribunal that on one occasion where he had informed a supervisor he would rather have some other job, he was given another job. We found that he was not forced too undertake heavy lifting and had not worked on the end of line.

95. Further, on the Claimant's best case the last time he worked in the Factory was 6 August 2018 (see paragraphs 22 and 23) which would give a primary limitation date of 5 November 2018. He did not contact Acas to commence early conciliation until 6 November 2019 and we have not heard any evidence or submissions on whether it would be just and equitable to have extended time. The failure to make reasonable adjustments claim was therefore presented out of time and the Tribunal does not have jurisdiction to hear that complaint.

Employment Judge S Moore
Dated: 14 September 2022

JUDGMENT SENT TO THE PARTIES ON 27 September 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS