EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104740/17 Held at Aberdeen on 3, 4 and 31 July 2018

Employment Judge: Mr N M Hosie
Members: Mr A W Bruce
Ms M Williams Edgar

Mr James Ross	Claimant Represented by: Mr R Falconer – Solicitor
Brewdog Plc	Respondent Represented by: Mr L Lane – Peninsula

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The majority Judgment of the Tribunal (one Member dissenting) is that: -

(i) the respondent unlawfully discriminated against the claimant by failing to comply with its duty to make reasonable adjustments;

(ii) the respondent unlawfully discriminated against the claimant by treating him unfavourably because of something arising in consequence of his disability; and

(iii) the respondent shall pay to the claimant, by way of compensation, the sum of Twelve Thousand and Fifty-Two Pounds and Forty-Five Pence (£12,052.45).

2. The unanimous Judgment of the Tribunal is that the direct discrimination complaint is dismissed.

REASONS

Introduction

1. James Ross brought a claim which comprised complaints of disability discrimination. The respondent, Brewdog Plc ("Brewdog"), accepted that the claimant was disabled in terms of the Equality Act 2010, but otherwise denied the claim.

The Evidence

2. Each of the witnesses spoke to written statements which had been exchanged prior to the Hearing.

3. We first heard evidence from the claimant and then on his behalf from:

- Ruth Morrell, Employment Adviser with the Royal National Institute of Blind People ("the RNIB")
- Jeff Bligdon, Senior Rehabilitation Worker, Visual Impairment Team, Aberdeenshire Council.

On behalf of the respondent we heard evidence from:

- Fiona Hunter, Head of People

- John Fairclough, HSE Manager
- Chris Sneath, Warehouse Manager, who took the decision to dismiss the claimant.

4. A joint bundle of documents was produced ("P") along with an agreed "Timeline".

5. Having heard the evidence and submissions from the parties' representatives, the Tribunal reconvened, on its own, on 31 July 2018 and finalised its decision.

The Facts

6. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following material findings in fact.

7. Brewdog operates a brewery in Ellon, Aberdeenshire, where the claimant worked, and a number of licensed premises. It has several hundred employees, around half of which are engaged in "production and sales" and the other half in "retail".

8. The claimant commenced his employment with Brewdog on 12 July 2016. He worked in their brewery in Ellon, Aberdeenshire. At first, he was employed as a Packaging Assistant, cleaning kegs. From August 2016 he was engaged as a Packaging Operator. His job description for that role was one of the documentary productions (P.68/69).

Claimant's disability

9. When he started to work for the respondent, the claimant went through an induction involving HR and John Fairclough, the respondent's HSE Manager from whom we heard evidence. The claimant gave his evidence at the Tribunal Hearing in a measured, consistent and convincing manner and presented as credible and reliable. We accepted his evidence, and find in fact, that at the time of his induction he made the respondent aware that he had been diagnosed with Stargardt Macular Dystrophy (Stargardt Disease) in both eyes around 2010 and that he was registered as partially sighted. A "general information sheet" from the RNIB with details of this condition was included with the documentary productions (P.110-115).

10. The claimant can see shapes and movements at a distance, but he has difficulty with changing light and night vision. It also affects his central or detailed vision (when looking straight at something). His central vision is a blur and it is difficult for him to read print. He has difficulty reading paperwork or with a normal computer screen for more than ten minutes. It is a progressive condition. However, he has found ways to adapt and work around it using his peripheral vision.

11. His employment was uneventful for about 6 months, until around December 2016, when he sensed that his eyesight was deteriorating further.

12. In early January 2017, the claimant advised the Packing and Warehouse Manager, Chris Sneath, of his concern that his vision was deteriorating. He kept the respondent advised of his medical advice. He also provided the respondent with a copy of a Report dated 20 January 2017 which a Consultant at the Eye Clinic at Aberdeen Royal Infirmary had sent to his G.P. (P.116). In her Report, the Consultant confirmed that his eyesight was deteriorating and that it was likely that the further tests which were to be carried out would result in "*a change of registration from partially sighted to blind*".

Risk Assessment

13. Consequently, the respondent's HR Department asked John Fairclough, the HSE Manager, to complete a risk assessment which he did on 6 February 2017. A copy of his report was included with the documentary productions (P.78-90). The claimant confirmed to Mr Fairclough that he was concerned about the deterioration in his vision, but otherwise he was not involved in the risk assessment. He was not given a copy. Notwithstanding the "*high risk rating*", he was allowed to continue working, as normal.

Occupational Health

14. The respondent also arranged an appointment for the claimant with their Occupational Health Advisers and a Report was issued shortly after his consultation with them on 8 March (P.70-72). The respondent was unable to produce a letter of referral to Occupational Health or give evidence as to the terms of reference. Ms Alison Bathgate, a "SOHN" who prepared the Report, did not give evidence at the Hearing; there was no evidence that she had inspected the claimant's workplace, or that she was familiar with it; and we were unaware of exactly what "information" she had available. However, in her Report she advised that:

"*I am of the opinion that Mr Ross is not fit for work in his substantive role. There are Health and Safety implications working within the packaging department with severe sight impairment.*

We discussed alternative roles that were not of a safety critical nature with Brewdog and he was unaware of any role that would be suitable. He is having difficulty reading and this exacerbates blurred vision and ability to focus. He also struggles with PC work but does have a software package at home which increases the font size, however, he advised he is struggling to read this and a voice activated software package may be required in the near future……..

I would not advise any modifications or restrictions in his substantive role. I am unsure if Brewdog could provide an alternative role in the workplace. Access to work HTTPS://www.gov.uk/access-to-work *may be able to offer some guidance on reasonable adjustments in an alternative role if this was an option.*"

Ms Bathgate also advised that: "*The disability provisions of the Equality Act would apply in Mr Ross' case.*"

Suspension at meeting on 10 March 2017

15. The claimant was invited to a meeting on 10 March with Rachel Harrison ("People Advisor") and John Fairclough (HSE Manager). He was not told what the meeting was about. He was not accompanied. No minutes were taken.

16. The claimant was advised by Mr Fairclough that he felt that it was unsafe for him to carry out the Packaging Operator role and that he should *"go home*" and consider any other jobs he might be able to do. The claimant advised that he did not want to do "desk work" and that he had difficulty reading and using computers. However, he would be undergoing further medical tests.

RNIB

17. The claimant has been assisted and advised by Ruth Morrell of the RNIB since 2015. We heard evidence from Ms Morrell at the Tribunal Hearing. She has been an Employment Adviser at the RNIB for some 9 years. Her evidence was consistent and measured. It was supported by contemporaneous notes she kept. She also presented as entirely credible and reliable. She was an impressive witness.

18. The claimant had made her aware early in February of his concerns that his eyesight was deteriorating. He informed her that he was to be referred to Occupational Health and on 14 March he sent her a copy of the Occupational Health Report from Ms Bathgate (P.70-72). There was nothing to suggest that Ms Bathgate was a specialist in visual impairment and we accepted Ms Morrell's evidence, which was not challenged, that: "*Occupational Health are not usually specialists in visual impairment.*"

Meeting on 21 March 2018

19. Following the claimant's suspension, Ms Morrell arranged to inspect the claimant's workplace at the brewery on 21 March. The claimant was not allowed into the production area. He had to stay in the canteen while Ms Morrell did a "walk round" with Chris Sneath, the Packing and Warehouse Manager and Rachel Harrison of HR when they discussed the tasks which the claimant was required to carry out: "*Working on the bottling line, wrapping, cleaning and preparing kegs.*"

20. Ms Morrell prepared a note of the meeting which we were satisfied was reasonably accurate (P.161): -

"*Meeting held with James, Rachel Harrison (People Partner), Chris Smeath* (sic) *(Line Manager), Sarah Smith (People Partner) and John, Health and Safety at Brewdog Plant in Ellon. Discussed concerns regarding James' reduced sight levels and had a walk around James' working environment. Much of the concern relates to forklift trucks. I recommended that safe walkways should be clearly marked by coloured tape, stair edges and should also be marked (discussing this is appropriate H & S for any employee). Part of James' job is to lift the empty kegs onto a conveyer belt and he was concerned that he might hurt a colleague's fingers, suggested that colleagues let James know when they are close by and discuss whether any staff should have any hands on conveyer belts. Was advised this should not happen. Line Manager appeared reassured and discussed a mobility referral for James at Brewdog and his current AtW application. H & S colleague discussed that he was unhappy about James using stairs, being around working forklifts and chemicals. I discussed that people with sight loss do use stairs and that they should be clearly marked in an industrial environment. We discussed using chemicals and James discussed this was only for cleaning floors (in a later discussion with James, he said there was no signs used for wet surfaces which again I will raise with H & S). I discussed that slips and trips should be no different for James as clear walk spaces should*

be part of H & S in the workplace and that James has good peripheral vision which he uses. Suggested I forward on risk assessing in the workplace to John. John to e-mail so I have his contact details. Discussed that forklifts should have appropriate audible signals and lighting and instead of hand signals verbal ones could be given. Discussed that colleagues could make James aware if they are working directly in front of him and James is moving pallets around. Agreed to follow up meeting to discuss return to work."

21. Ms Morrell was of the view that:

"*There did not seem to be anything that could not be addressed with a bit of housework adjustment or training.*"

22. As agreed, immediately after the meeting on 22 March Ms Morrell confirmed by e-mail to Rachel Harrison and Chris Sneath that she had spoken with Jeff Bligdon, Senior Rehabilitation Worker, Visual Impairment Team, Aberdeenshire Council and he was happy to arrange a meeting to "*provide advice and report*" (P.195).

RNIB Guide to Risk Assessment

23. She also attached to her e-mail the RNIB Guide to risk assessing people with sight loss in the workplace which had been prepared with input from health and safety professionals amongst others (P.197-214).

Access to Work/DWP Report

24. As suggested by Ms Morrell, the respondent agreed to "*Access to Work*" carrying out an assessment. This was done by Bill MacKenzie of the DWP and he submitted a Report on 16 April 2017 in which he made the following recommendations (P.92/93): -

"*I have looked at Jim's place of work and have been advised of the areas where it is felt that Jim is at risk as a result of his visual impairment. I feel*

there is no technical solution to Jim's manual handling issues other than to automate the whole process. However, this would be very costly and, by making the process non-manual, you would effectively be putting Jim out of a job. Jim's safety, when getting around the plant, is also of paramount importance and also needs to be addressed. I have been advised that a Mobility/Rehabilitation Officer for the Blind is going to visit Jim, at his place of work, to see what strategy is put in place to minimise any risk to him whilst at work. This may help him in any other areas of the plant when manual handling is not as intensive. As a result of my visit, I feel that Access to Work support is not appropriate at this point. But would advise that both Jim and his employer to contact Access to Work again if the situation changes."

25. We did not hear evidence from Mr MacKenzie at the Tribunal Hearing and we accepted Ms Morrell's evidence, which was not challenged, that:

"*AtW assessors provide an assessment in the workplace. They had nothing to recommend by way of physical changes or modifications to the premises at that time for Jim's impairment. They are not specialists in sight loss…… I remember AtW suggesting that working on computers might be more appropriate. I did not agree and said so.*"

Mobility Officer Assessment

26. As arranged by Ms Morrell, Jeff Bligdon, a "Mobility Officer" carried out an "onsite assessment". Mr Bligdon was also an impressive witness who presented as entirely credible and reliable. He has worked in the field of visual impairment for some 33 years. As in this case, he is called in from time to time to look at work situations and he usually works with both employee and employer to make a workplace as safe an environment as possible to work in. There is, therefore, a cross-over with health and safety.

27. Mr Bligdon first visited the brewery on 4 April when he spoke with Chris Sneath, Rachel Harrison and John Fairclough and he followed this up with a meeting on 13 April with the claimant, Mr Sneath, "two ladies from HR" and Mr Fairclough.

28. The claimant took them all to his work station within the brewery. According to Mr Bligdon, he moved easily around obstacles and when he demonstrated filling barrels under pressure he did so "*proficiently, efficiently and quickly*". Mr Bligdon had no safety concerns and nor were any concerns raised by any members of staff.

29. When he gave evidence, Mr Bligdon made certain observations concerning the conduct and demeanour of the HSE Manager, John Fairclough at that meeting. As we recorded above, Mr Bligdon presented as both credible and reliable and his evidence in this regard was not challenged. We find in fact, therefore, that at that meeting Mr Fairclough appeared to disapprove of the exercise which Mr Bligdon was carrying out, was reluctant to engage, and responded by a *"negative shaking of his head*" to any suggestion which Mr Bligdon made as to possible adjustments.

30. Mr Bligdon also commented, in his evidence, on the risk assessment which had been done by Mr Fairclough on 6 February 2017 (P.78-90) as follows:

"*I have seen the risk assessment conducted by Brewdog on 6 February. This looks like a general risk assessment, not a detailed one for Jim. I would be surprised if he had any input in it. The risks identified are the same risks that apply to any employee. The conclusions seem to be based on assumptions. If it was not done with Jim's involvement, then for me it is not worth the paper it's printed on. If it was dated 6 February, it could not take account of any of the later discussions.*"

31. Mr Bligdon reported on his meeting to Ms Morrell in writing on 19 April (P.95/96). The following are excerpts: -

"*We started by being issued with a fluorescent vest and safety glasses. I had brought along a pair of yellow UV safety glasses for Jim to try. We proceeded to walk through the brewery to Jim's work station. Jim led the way and we all followed. I then observed Jim fill a plastic barrel with beer, which is fired in under high pressure, which is within a clear perspex/glass box safety box. There is little to no contrast, but Jim performed the task well and had no problems with the equipment. He also walked freely and confidently throughout the brewery. He demonstrated that he knows the building well and during the day is safe and uses his vision to good effect.*

His work station has not been adapted in any way to help him perform his job more efficiently or even safely. None of the bottling lines or other equipment has safety highlight markings on the floor and apart from one area there was a lack of safe walkways markings on the floor. I would have thought that the lighting levels through the building would be consistent through the day and nightshifts, purely because of the machinery involved and the health and safety procedure.

The assessment did not take long as I never had any time with Jim alone to discuss his situation. I also did not observe him do any other tasks. The meeting was directed by the Brewdog staff that were observing with myself. I felt that if they could end Jim's employment with them, they would have done it there and then. The Health and Safety person was particularly negative towards Jim and came across as not wanting to adapt or try anything that would assist Jim.

Jim is still undergoing assessment at ARI and was due to visit in early May to hopefully get a fuller diagnosis and clarification of his condition and particularly his problems with fatigue. He has been very upfront with his employers and kept them informed at every stage. They agreed to hold off any decision until later in May."

RNIB Report

32. Ms Morrell did not send the respondent a copy of Mr Bligdon's Report, but she reflected his opinion in the Report which she submitted to the respondent on or about 28 April 2017 (P.73-77).

33. In her Report, she made several recommendations by way of possible adjustments and said this in her conclusion: -

"*Although James has experienced a loss in his vision, he is an experienced individual who has a number of years being employed and working with sight loss, this meaning he has built a great many disability specific skills. James is fully aware of the impact of his sight and will concentrate and double check his environment to ensure he can move safely around. James currently continues to receive mobility training from Aberdeenshire Council; he also wears dark glasses to help when glare causes him issues outside. James and Brewdog can also continue to be supported by RNIB Scotland's Employment Services while he continues in his employment.*

James is very keen to return to work as soon as possible and to move forward after experiencing changes in his sight.

It is worth noting that people who develop sight loss are not specialists in their condition or relating to age, adaptations are reasonable adjustments which may support them to retain employment."

34. Finally, Ms Morrell referred the respondent again to the RNIB "Guidance for Risk Assessors" and "Working with Colleagues with Sight Loss" (P197-214).

Dismissal

35. On 12 May Sarah Smith, People Business Partner, wrote to the claimant to invite him to attend an "Absence Review Meeting" (P.97).

36. The meeting was held on 24 May. In attendance were Chris Sneath, (Manager), Sarah Smith (Notetaker), the claimant and Ruth Morrell.

37. The respondent produced Minutes of the meeting (P.98/99), but these were disputed by both the claimant and Ms Morrell.

38. We did not have the benefit of hearing evidence from Sarah Smith, and, as we have already recorded, both the claimant and Ms Morrell presented as credible and reliable. Based on their evidence, which was not challenged, we were satisfied that the meeting lasted no more than 30 minutes and that Ms Morrell's note was to be preferred as the more accurate account. It was in the following terms (P.161/162): -

"*Meeting at BrewDog with James, Line Manager Chris Sneath and Rachel Harrison, HR to discuss James' employment with BrewDog. Chris welcomed us and explained that I was not allowed to contribute in the meeting. Chris discussed timeline relating to James' change in sight beginning Jan 17 when James advised of change in his sight. He discussed the findings of AtW and OH report, made no reference to either mobility report or RNIB assessment. OH assessed not fit for work and AtW assessed the only changes which could be made to enable James to continue to work would be automation of entire plant. He further referred to risk assessment and indicated there was a massive health and safety risk of James being on site. Discussed alternative roles (something using computers which James rejected as no detail and no info regarding retraining). BrewDog therefore felt there was no option but to*

end James' contract of employment and this decision was based on safety and fear of injury. I asked if RNIB's recommendations had been taken into account, but line manager felt they were not sufficient to ensure safety within the plant. James was dismissed with one month's pay and holiday entitlement.

Further to previous notes. Line manager referred to James having a copy of Risk Assessment in work (neither James nor myself have had access to this report) ….."

39. On 26 May Sarah Smith wrote to confirm the claimant's dismissal (P.100). Her letter was in the following terms: -

"*Absence Review Meeting Outcome*

Further to our meeting on 24 May 2017, I am writing to confirm that your employment with BrewDog has unfortunately been terminated effective 24 May 2017. You will be paid 4 weeks salary in lieu of your notice plus your outstanding holiday allowance which was 8 days. Your final salary will be paid to your bank account on the last working day of this month.

I have included a copy of the Minutes which should be a true reflection of the meeting held.

We would like to wish you all the best for your future."

40. A copy of the Minutes was not enclosed with the letter.

Claimant's Grievance

41. With the assistance of Ms Morrell, the claimant sent a grievance letter to the respondent on 16 June (P.101-104). He alleged disability discrimination and a failure to consider the adjustments recommended by the RNIB, which he detailed. He also complained about the failure to provide him with a copy of Mr Fairclough's risk assessment, which he had been told was one of the reasons for his dismissal.

42. There was included with the documentary productions a letter from Fiona Hunter which purported to be a response to the claimant's grievance (P.106). In that letter she advised the claimant that as his employment had ended the

respondent was not prepared to treat his complaint as a grievance. However, she offered the claimant the opportunity of meeting to discuss his concerns.

43. The claimant denied ever having received the letter. There was no other evidence to support Ms Hunter's contention that the letter had been sent and the letter is undated. While the claimant took no steps to enquire about the lack of a reply, nor did the respondent, and we were persuaded that the evidence of the claimant was to be preferred. There was no grievance hearing and no meeting between the parties.

44. After his dismissal, the claimant was able to secure a seasonal job with the Council doing gardening and grass cutting work. In August 2018 he is due to start a two-year course that will train him to become a physical fitness instructor.

Claimant's Submissions

45. The claimant's solicitor drew the Tribunal's attention to the fact that the respondent did not contend that the claimant was physically unable to do his work (P.34).

46. While he accepted that it was difficult to balance the competing requirements of health and safety and duties under the Equality Act 2010, he submitted that did not excuse the respondent from making a genuine attempt to address its duties under the 2010 Act, and, in particular, to make reasonable adjustments.

47. The claimant accepted that he had "*nipped his fingers once*" when at work and he made his employer aware of this. In January 2017 he requested a change in shift pattern, but this was refused. It was submitted that the respondent's concern that there was a "*health and safety risk was without*

foundation". There was no record of any health and safety incident involving the claimant (P.35, answer 2).

48. There was no referral letter to Occupational Health and although Mr Fairclough said that he was unaware of the seriousness of the claimant's eye condition before he received the Occupational Health Report, it was clear from the Report that Occupational Health had been advised that the claimant had "Stargadt Disease" (P.70).

49. The claimant's solicitor submitted it was significant that Mr Fairclough did not have any medical evidence when he made the risk assessment and that when instructing the Occupational Health Report, the respondent did not select someone with expertise in visual impairment.

50. Nevertheless, in the risk assessment Mr Fairclough "set out his findings" and expressed the view that: - "*It would be reckless to allow an operator with poor vision into this type of environment.*" (P.87)

51. Mr Fairclough's evidence was that he "*couldn't sleep if an employee was at serious risk*". However, although he completed the risk assessment on 6 February, it was not until 10 March when he received the Occupational Health Report that he sent the claimant home. He had allowed the claimant to carry on working as normal for several weeks.

52. Although the claimant had accepted at first that it was not safe for him to continue working, it was submitted that he was entitled to change his mind when he received the RNIB Report and the "Factsheet" with guidance for those carrying out risk assessments for blind and partially sighted people at work (P.197-214).

53. Mr Fairclough did not revisit his risk assessment when he received the RNIB Report towards the end of April. This Report took account of the opinion of

Jeff Bligdon who had actually gone to the brewery and observed the claimant at work. Mr Bligdon said this in his witness statement: -

"*8. Jim was requested to take us to his work station within the brewery. Jim was able to do this with the only problem being keeping up with him. He knew where he was going and appeared confident, quick, assured and safe in his movements.*

9. We donned hi-viz vests and I had taken different coloured glasses for Jim to try and see whether tints would help enhance his vision and reduce glare. Jim set off towards his work station and we followed. There were not a lot of marked safeways, but Jim moved easily around obstacles and led us through the factory to a workstation where he demonstrated filling barrels under pressure with a cabinet and a hoist that lifted the barrel. It seemed to me that he did the task proficiently, efficiently and quickly. There were no concerns from what I saw and no members of staff at any point intervened. Jim used his vision well. He did as he was asked. There were no apparent issues with the lighting on the day."

54. Mr Sneath who took the decision to dismiss was not at work on 6 February when Mr Fairclough carried out the risk assessment.

55. At Para. 38 of his statement Mr Sneath maintained that Bill MacKenzie in his Access to Work Report concluded that, short of automation, the claimant could not fulfil his role but that is not what Mr MacKenzie said in his Report. He advised that the Mobility/Rehabilitation Officer for the Blind: "*is going to visit Jim, at his place of work, to see what strategies can be put in place to minimise any risk to him whilst at work*" (P93).

56. Further, neither Mr Sneath nor Mr Fairclough explained in any detail why the RNIB recommendations wouldn't work.

"<u>Reasonable Adjustments</u>"

57. The claimant's solicitor submitted that there was no response from the respondent to the claimant's request in January 2017 for an extra shift or an extra break. Mr Sneath said in evidence that he could not remember that request.

58. In any event, the Occupational Health Report suggested involving "Access to Work" (P.72). However, it was the RNIB, and not the respondent, who involved them.

59. The claimant's solicitor submitted that there should at least have been a "trial" of the adjustments suggested by the RNIB, but it was the respondent's position that "*they knew better than the experts*" and there was resistance to what the RNIB suggested, particularly on the part of Mr Fairclough. When he gave evidence, it appeared that Mr Fairclough thought that the RNIB was "*determined to keep the claimant in a job at any cost*".

60. So far as the respondent was concerned, health and safety was *"the predominant obligation"* and there was no attempt by the respondent to balance its health and safety obligations with its obligations under the 2010 Act. There was no "trial" and it was submitted that Mr Fairclough "never had any intention of trialling".

61. It was further submitted that when it came to the decision to dismiss Mr Sneath *"gave Mr Fairclough's conclusions greater weight than was merited"* and that he "*ignored the claimant's period of satisfactory employment".*

62. The decision to dismiss was based on Mr Fairclough's risk assessment but he did not follow the guidelines in the RNIB "fact sheet" (P.197-214).

63. Further, the claimant did not have any input in the risk assessment and, according to Mr Bligdon at para. 19 of his witness statement, this meant that it was "*not worth the paper it is printed on*".

64. The claimant's solicitor submitted that when Mr Fairclough read in the Occupational Health Report that the claimant was *"blind"*, he assumed that he was not fit to continue working in the brewery.

65. It was further submitted that the respondent's decision to remove the claimant from the work he had been doing was "*not a valid and proportionate response*". The claimant was motivated to continue doing the same job with the adjustments in place, the cost was not great, Ms Morrell spoke of how good the claimant's coping skills had been and there would have been ongoing support. However, the respondent was not prepared to even try any of the adjustments suggested by the RNIB.

66. The respondent also failed to advise the claimant of his right of appeal against his dismissal. The respondent's witness Fiona Hunter, "Head of People", was not involved at the time but she said in evidence that she felt *"discomfort"* at that failure.

67. In any event, it would have been possible to have treated the claimant's grievance as an appeal, but the respondent was not prepared to do so, on the basis that the grievance was not valid as he was no longer an employee.

68. It was further submitted that little weight should be attached to the evidence of Mr Fairclough who was *"very defensive".* He alleged that the risk assessment had been copied to the claimant, but it was never made available to him before his dismissal and there was no response to a request which the claimant's solicitor had made prior to the Tribunal Hearing for details of the risk assessment (P.34). The risk assessment was only disclosed to the claimant's solicitor in response to a Documents Order from the Tribunal.

69. Further, Mr Bligdon was only afforded limited access to the claimant's workplace and only allowed to observe him at work for a short period. That impacted on his ability to make further recommendations as to reasonable adjustments.

70. It was submitted that the refusal by the claimant to afford the claimant a right of appeal was direct discrimination.

71. The claimant was treated less favourably because of his visual impairment which culminated in his dismissal.

72. There was also a failure to make reasonable adjustments. Mr Sneath was given no clear guidance as to his obligations in that regard in terms of the 2010 Act.

Respondent's Submissions

Direct Discrimination

73. The respondent's solicitor submitted that the claimant was not treated less favourably: "*a non-disabled employee who had the same difficulties would have been treated the same way.*"

74. It was submitted that the respondent took steps to understand the claimant's condition. They spoke with him and prepared a risk assessment; they reviewed the Occupational Health Report; the RNIB Report; and the Access to Work Report.

75. All of this was done before the decision was taken to dismiss. The decision was not based, therefore, solely on him being a disabled person.

76. The respondent was also prepared to consider a new role for him.

Discrimination arising from Disability

77. In this regard, the respondent's solicitor referred to the "unfavourable treatment" averred in the claimant's Minute of Amendment (P.28).

78. It was accepted that the claimant was suspended and dismissed and that he was not afforded a right of appeal or a grievance hearing.

79. However, it was disputed that there were "*limitations on the claimant's Access to Work assessment*." Mr MacKenzie did not say this in his Report (P.92/93).

Suspension

80. It was submitted that this was not "less favourable treatment". The respondent had obtained an Occupational Health Report. The claimant agreed at the time that he could not continue to do his job safely and he was not prepared to move to another post.

Appeal

81. The ACAS Code does not require an employee to be advised of his right of appeal; the claimant asked for a meeting in his grievance letter and this was offered by the respondent. There was no unfavourable treatment.

Grievance

82. Although the respondent offered a meeting, the claimant did not respond. He maintained that he did not receive the letter, but this was disputed. The claimant was no longer an employee and only an employee can raise a grievance.

Dismissal

83. It was accepted that this was unfavourable treatment. However, it was submitted that this was a "*proportionate means of achieving a legitimate aim*", namely ensuring the claimant's safety and the safety of other employees. It was submitted that there was a significant safety risk in allowing the claimant to continue to work; and no reasonable adjustments that would have removed that safety risk to reduce the risk to an acceptable level.

84. Mr Sneath, who took the decision to dismiss, had to carry out a "balancing exercise". He weighed up the consequences of putting in place the RNIB proposed adjustments, compared with his own knowledge of the workplace. At Para. 40 of his witness statement he said this:

> "*Before reaching my decision to dismiss Jim, I considered if there was anything else I could do to avoid Jim's dismissal. I decided there was not. As I have explained above, I felt that Jim was simply unable to safely carry out the Packaging Assistant role. I also felt there were no adjustments that BrewDog could realistically make that would have any prospect of removing the safety risks. I was also conscious that Jim had made clear that he was unwilling to move to another role within BrewDog.*"

85. It was submitted that while he accepted that he was unaware of the terms of s.20 and s.21 of the 2010 Act and his obligation to make reasonable adjustments, that he did, in effect, comply with these obligations. There was "*positive evidence*" from him that he carried out a *"balancing act*" between the recommendations in the RNIB Report, which incorporated Mr Bligdon's Report and the risk assessment, Occupational Health Report, *"a professional report",* and the Access to Work Report and, having done so, he was of the view that it was not safe to allow the claimant to continue doing the same job, even with the proposed adjustments in place.

86. While it was accepted that Ms Morrell had specialist expertise and that her views required to be given "*considerable weight*", she acknowledged in her report that she had not carried out a risk assessment (P.74). She did not

"balance the risk" and she concluded in her Report that the claimant was fit to continue in his role.

87. It was submitted that "*the respondent got the balance right and the dismissal was a proportionate means of achieving a legitimate aim*".

88. It was further submitted that: "trialling the adjustments" was not "proportionate". The claimant worked in a *"dynamic environment and a serious accident could happen in an instant".* He submitted that such a trial would be "*too much of a risk".*

89. It was also submitted, in relation to the alleged failure to make reasonable adjustments, that the claimant's solicitor had failed to identify the "provision, criterion and practice" ("the PCP") relied upon.

90. It was submitted there was no reasonable adjustment that would have removed the safety risk or reduced it to an acceptable level and the claimant himself accepted that there was no reasonable adjustment that would remove the risk altogether.

91. He also referred to the terms of s.20 of the 2010 Act and the requirement to take *"such steps as are reasonable to* ***avoid*** *the disadvantage, not merely to limit the disadvantage".*

The Issues and the Tribunal's Decision

Direct Discrimination

92. It was not at all clear whether such a complaint was still being actively advanced by the claimant's solicitor. It was not a complaint he addressed, in any meaningful way, in his closing submissions. He only made a passing reference to it. However, the complaint was referred to in the claimant's updated Schedule of Loss, addressed, albeit briefly, by the respondent's solicitor in his closing submission and in his "Particulars of Response" at paras. 16-20 (P.31/32). For the sake of completeness, therefore, we considered the merits of such a complaint and we record our conclusions.

93. S.13 of the Equality Act 2010 ("the 2010 Act") is in the following terms: -

"***13 Direct Discrimination***

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others.*"

94. As we understood the claimant's position, it was alleged that his suspension, the alleged "limitations on the Access to Work Assessment", his dismissal and the failure on the part of the respondent to consider his grievance were all "less favourable treatment" and amounted to direct discrimination.

95. We were of the unanimous view that none of these amounted to less favourable treatment and that the submissions by the respondent's solicitor in this regard were well-founded.

"Suspension"

96. The claimant was "suspended" (he was sent home following the meeting on 10 March), because the respondent had taken the view it was not safe for

him to continue working in the brewery on the production line with the attendant risks of working in a factory with a large amount of machinery and forklift trucks.

97. At that time, **before** the respondent received the RNIB Report from Ms Morrell towards the end of April, the claimant himself had expressed concerns about his own safety and that of others because of his deteriorating eyesight; Mr Fairclough had carried out a risk assessment on 6 February which concluded it was not safe for him to continue working in that environment, though no action was taken to remove him from the workplace at that time; the respondent had obtained an Occupational Health report dated 8 March which concluded it was not safe; and the claimant was not prepared to do another job and actually agreed to his removal.

98. In these circumstances, it could not be said the claimant was treated "*less favourably*". A hypothetical comparator – a non-disabled employee working in the factory as a Packaging Assistant or doing like work in the factory - would have been treated the same way.

"<u>Limitations Imposed on the Access to Work Assessment or any other Assessment</u>"

99. We were not persuaded, on the evidence, that the "limitations" alleged were material and, even if they were, the respondent's safety concerns at the time, before they received the RNIB Report, were such that they would have treated a hypothetical comparator the same way. They could not be construed, therefore, as "*less favourable*".

Dismissal

100. The claimant was not dismissed "*because of*" his disability, an essential element of the s.13 definition. His dismissal "arose" from his disability. This is a s.15 claim, not a claim of direct discrimination.

Grievance

101. The Tribunal felt that it would have been possible for the respondent to have treated the claimant's grievance as an appeal against his dismissal and in the circumstances that could well have been a prudent course of action. However, as the claimant by then was no longer an employee he had no contractual right to raise a grievance. It could not be said, therefore, that this was "*less favourable treatment*" as a hypothetical comparator would have been treated the same way.

102. For all these reasons, therefore, the unanimous Judgment of the Tribunal is that the complaint of direct discrimination is dismissed.

Reasonable Adjustments

103. The alleged failure to make reasonable adjustments was the pivotal feature of this case. In this regard, the Tribunal's opinion was divided (one Member dissenting).

104. The core duty is set out in ss.20 and 21 of the 2010 Act and these sections are then supplemented by additional context-specific detail in the Schedules to the Act.

105. The statutory provisions relevant to the present case are as follows: -

"***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.
(4) The second requirement is a requirement, where a physical feature 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.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid……"

21. Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with a duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

106. When considering the issues with which we were concerned, we had regard not only to the provisions of the 2010 Act, but also to the EHRC Code of Practice on Employment (2011). Chapter 6 of the Code deals with the duty to make reasonable adjustments which it refers to as *"a cornerstone of the Act"*. Employers are required: *"to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants*

unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled."

The PCP

107. The first situation in which the duty to make reasonable adjustments arises, in terms of s.20(3), is where a *"provision criterion or practice"* ("a PCP") of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter, compared with persons who are not disabled. Although there is no definition of a PCP in the 2010 Act, the EHRC Employment Code states at Para 4.5 that: "*it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions…".*

108. In the present case, the PCP was not addressed, in any meaningful way, by the parties' representatives in their closing submissions, other than the respondent's representative submitting that the claimant had failed to identify the PCP. However, it was clear to the Tribunal from the written pleadings and our findings as to the nature of the substantial disadvantage suffered by the claimant, that the PCP was: **a requirement that the claimant work in the brewery, carrying out the normal duties of a Packaging Operator, which involved working with potentially dangerous machinery and in areas where fork lift trucks operated.**

109. The respondent was aware that the claimant was *"disabled due to his visual impairment".* When he started work, he was registered as *"partially sighted"* and he informed them at his induction that he had been diagnosed with Stargardt disease.

110. It was to his credit that in January 2017 the claimant alerted the respondent to his concerns, not only for his own safety but the safety of others in the brewery, due to a perceived deterioration in his eyesight. For some 6 months

prior to that there were no concerns about the claimant being able to work safely.

111. Having been so advised, the respondent was then required to reconsider its duty to make reasonable adjustments. Prior to that, no adjustments had been deemed necessary; the claimant's employment from when he started some six months before had been uneventful; there were no safety concerns.

112. The respondent was required to carry out what was, in effect, a "balancing exercise" between its health and safety duties and the requirement to protect all workers from the risk of injury or harm at work, so far as reasonably practicable and its duties under the 2010 Act. We recognised that this was no easy task.

Majority view

113. The majority of the Tribunal, was concerned to hear in evidence from Mr Sneath who was charged with the onerous task of deciding whether the claimant could continue working safely in the brewery or whether he should be dismissed, that he was not made fully aware of the respondent's duty to make reasonable adjustments under the 2010 Act and the implications of failing to do so. We are bound to say, that with some 800 employees, including those with HR expertise, we found that astonishing.

114. Mr Sneath was the Warehouse Manager responsible for production. He did not have a great deal of experience (if any) of considering the statutory duties on an employer towards disabled employees in terms of the 2010 Act. We were sympathetic, therefore, to the position in which he found himself. We believe he acted in good faith. However, when charged with the serious matter of deciding whether the claimant should be dismissed, he should have been made fully aware of the respondent's duties and the consequences of a failure to comply.

115. So far as Mr Fairclough, the Health and Safety Manager, was concerned, it was understandable that he was focused on health and safety, but what concerned the majority was that appeared to be to the exclusion of all other considerations and, like Mr Sneath, it appeared that he was not made fully aware of the duty to make reasonable adjustments under the 2010 Act and the consequences of failure.

116. He seemed to resent the involvement of those with expertise in such matters and he was dismissive of the adjustments which Ms Morrell suggested. When giving evidence he repeatedly referred only to the adjustment suggested by Ms Morrell that *"Hi-Viz vests should be supplied",* whereas in her Report she made several recommendations, by way of reasonable adjustments (P.74-76).

117. Further, when giving evidence Mr Fairclough expressed the opinion that Ms Morrell's only agenda was to ensure that the claimant remained at work, the inference being that she had little or no regard to the safety implications. Such a contention was entirely without merit. As we recorded above, Ms Morrell was an impressive witness and presented as entirely credible and reliable. She is a specialist in such matters with many years of experience and it is inconceivable that in making the recommendations which she did, she did not have regard to safety.

118. Mr Fairclough's attitude was also demonstrated by the evidence which we heard from Jeff Bligdon another specialist who had over 30 years' experience within the field of visual impairment. His evidence, which was not challenged, was that when he visited the brewery to consider what adjustments might be required, Mr Fairclough did not engage and *"seemed quite set against the exercise being carried out and greeted any suggestion with a negative shake of his head".*

119. While recognising that it was Mr Sneath who took the decision to dismiss, it appeared to the majority that Mr Fairclough was not minded to carry out the "balancing exercise" which was required. That was not only because he had not been made aware of this duties under the 2010 Act, but also because it was clear that in his view health and safety, in any circumstances, would always outweigh other considerations.

120. The majority also sensed that Mr Fairclough carried considerable influence and he was not alone in the view that health and safety would always have to take preference. Consequently, only "lip-service" was paid to the duty to make reasonable adjustments and once the claimant had advised that he was not interested in a "desk job", the respondent decided there was no alternative to dismissal and resolved to bring his employment to an end as quickly as possible without properly considering the possibility of putting the proposed adjustments in place and the claimant continuing in their employment.

121. That was a view shared by Mr Bligdon. Following his workplace assessment on 13 April, he reported to Ms Morrell at the RNIB as follows: *"the representatives from Brewdog were looking at ways to end his employment on the brewery floor, rather than compromise and look at the situation differently i.e. adapt the workstation to suit Jim. The health and safety officer particularly was negative about any enhancements or suggestions that would try to improve Jim's safety and efficiency. The impression I came away with is, if they could have ended Jim's employment he would have finished him there and then".*

122. Indicative of that desire, was the failure to consult the claimant about what adjustments should or could be made (not a legal duty but always a good practice according to the case law); not being prepared to even contemplate a trial period with the adjustments suggested by Ms Morrell in place; the failure in the dismissal letter to advise the claimant of his right of appeal; and then, when he raised a formal grievance, in writing, not being prepared to

prolong matters by treating that as an appeal and not being prepared to deal with the grievance at all, as the claimant was no longer an employee, albeit that he had only been dismissed shortly before and had raised genuine concerns.

123. The majority then considered the information which the respondent had available at the time of the claimant's dismissal.

124. On the one hand, there was Mr Fairclough's risk assessment (P.78-90); the Occupational Health report (P.70-72); and Mr Mackenzie's Access to Work report (P.92-94) and it was on that basis the decision to dismiss was taken.

125. However, on the other hand, all that information was provided **before** the respondent received the RNIB report from Ms Morrell with the proposed adjustments (P.73-77) and Mr Bligdon's visit to the brewery when he observed the claimant carrying out his duties without any apparent difficulty.

Risk assessment

126. So far as the risk assessment was concerned, this was carried out by Mr Fairclough on 6 February 2018. The majority accepted Mr Bligdon's evidence, which was not challenged, that this was: *"a general risk assessment not a detailed one for Jim …The risks identified are the same risks that apply to any employees."* Further, in his view as the claimant had minimal involvement it was of little value. The RNIB "Guidance" makes it clear at (P121, Para 4.2) that *"the individual must be consulted*". The majority was not persuaded that Mr Fairclough considered this Guidance and the proposed adjustments seriously.

127. The majority also questioned just how genuine the respondent's concerns were, as although Mr Fairclough claimed his risk assessment had given rise to very serious safety concerns indeed on his part, which he explained in graphic detail when giving evidence, the claimant was allowed to continue

working as normal for a number of weeks without any adjustments being put in place, until he was suspended on 10 March shortly after the respondent received the Occupational Health Report. It appeared to the majority that Mr Fairclough had made blanket assumptions (P121, Para 4.4) about the claimant's visual impairment and his ability to work safely.

Occupational Health Report

128. The majority had serious concerns as to the reliability of the Occupational Health Report. It was produced before Ms Morrell submitted her Report with the proposed adjustments. The respondent was unable to produce any referral letter (there was a suggestion by Ms Hunter during her evidence that the instructions may only have been given by telephone). The author of the Report was "Alison Bathgate" who was designed as an "SOHN", who we understand to be a nurse with expertise in the head and neck, ear nose and throat regions. We did not have the benefit of hearing evidence from Ms Bathgate. There was no evidence that she had any expertise in visual impairment or that she visited the brewery. She was never asked to comment on Ms Morrell's Report.

Access to Work Report

129. So far as the Access to Work Report was concerned, the majority accepted Ms Morrell's evidence that this was primarily concerned with the adjustment of physical features (P.92/93). In any event, in his Report Mr MacKenzie did not rule out the possibility of adjustments being made to enable the claimant to remain at work, as he said this in his recommendations (P.93):- "*I have been advised that a Mobility/Rehabilitation Officer for the Blind is going to visit Jim, at his place of work, to see what strategies can be put in place to minimise any risk to him whilst at work.*"

130. Ms Bathgate had also referred in her Occupational Health Report to "Access to Work" and "Guidance on Reasonable Adjustments" albeit *"in an alternative role*" (P.72).

RNIB Report

131. Notwithstanding the clear terms of Ms Morrell's Report of 28 April (P.73-77) and her recommendations and the RNIB "Guidance for Risk Assessors" (P.197-214), which Ms Morrell had sent to Mr Fairclough after he had prepared his risk assessment in February (guidance prepared in conjunction with health and safety professionals amongst others), Mr Fairclough did not prepare a further risk assessment as Ms Morrell expected him to do; the respondent did not go back to Occupational Health for further advice in light of the RNIB Report; there was no consideration of the adjustments being put in place on a trial basis and no proper consultation with the claimant about the proposed adjustments.

132. Nor did we hear in evidence any detailed explanation of why Ms Morrell's proposed adjustments were rejected. All that Mr Sneath and Mr Fairclough said in evidence was that in their *"opinion*" they would not remove the safety risk. While the majority accepted that Mr Sneath was aware of Ms Morrell's proposals and although he said he took the decision to dismiss in light of his own experience and knowledge of the safety risks within the brewery, he was not aware of the duty to adjust under the 2010 Act. It was impossible, therefore, for him to carry out a proper balancing exercise. It was not at all surprising, therefore, particularly having regard also to the strength of Mr Fairclough's feelings and his undoubted influence, that Mr Sneath took the view that the perceived health and safety implications were more important and took the decision to dismiss.

133. On the evidence, the majority could not say that the adjustments proposed by the RNIB were not reasonable, the test being an objective one. In all the circumstances and having regard to the claimant's desire to continue working

once the adjustments had been made, the respondent's size and resources and the apparently modest cost of implementing the proposed adjustments, the majority was of the view, that the respondent failed in its duty to make reasonable adjustments and that the complaint of discrimination on that basis was well-founded.

Minority view

134. However, one of the members was of a different view. The dissenting member shared the concerns of the majority at Mr Sneath not being made aware of the respondent's legal obligations to make reasonable adjustments. However, in his view, the respondent's health and safety obligations overrode its obligations in terms of the 2010 Act.

135. The Health and Safety at Work etc. Act 1974 inter alia makes important provisions for securing the health, safety and welfare of persons at work, and for protecting others against risks to health and safety in connection with activities of persons at work. In particular, s.2(1) of the Act requires every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all its employees. An employer's responsibilities under the Act are onerous and far reaching and failure to comply can have serious consequences. Sanctions include fines, imprisonment and disqualification. The law requires employers to assess the risks to employees, customers, partners and other people who could be affected by their activities. This, in part, may be achieved by undertaking risk assessments.

136. In the present case, the risk assessment was carried out by Mr Fairclough who had considerable experience of health and safety matters and he took the view that the risk of having a partially sighted/blind person in the brewery was too great. That was also the view of Mr Sneath, the Warehouse Manager, who had experience of such working environments.

137. In support of this, the respondent also had the Occupational Health Report, the claimant's own statement expressing concerns and a letter from his G.P. all of which, in general terms, were in accord.

138. All that was not in accord was Ms Morrell's RNIB Report. It made certain recommendations but carried no statutory authority. While it was important for the respondent to seek that view, they didn't have to abide by it and they concluded that the recommendations added nothing to eliminate the risk the claimant and others working in the brewery would be subjected to.

139. With these conflicting statutory duties, the respondent, to put it colloquially, was *"damned if they did and damned if they didn't".*

140. Ms Morrell was not a health and safety practitioner/professional and her aim was to allow the partially sighted/blind to remain in employment. While the dissenting member was of the view that Mr Fairclough was not co-operative with the RNIB and was set against allowing the claimant to return to work even if adjustments were put in place, there was no obligation on the respondent to engage with the RNIB.

141. The dissenting member questioned whether, in all the circumstances, it would have been sensible to continue to allow the claimant to work in such a potentially dangerous environment. Had a serious accident or fatality occurred involving the claimant and or other member(s) of staff, it is inevitable that Brewdog would have been severely criticised and possibly prosecuted for allowing an individual with a known progressive visual impairment to work in a hazardous area. Favouring a limited scope RNIB Report over the professional OH and medical advice obtained, and their own risk assessment would seriously undermine their position if they were required to defend any legal action against them following an accident at work. For these reasons, it is understandable why Brewdog decided, on balance, that they were not prepared to take risk of allowing the claimant to work in a production area.

142. While the dissenting member was of the view that the respondent could have done more – on receipt of the RNIB Report they could have revisited the Occupational Health Report and risk assessment and considered alternative employment more carefully – it did not follow that *"preferring health and safety"* meant there was a failure to make reasonable adjustments.

143. For all these reasons, the dissenting member came to the view, albeit with some hesitation, that there was not a failure on the part of the respondent to make reasonable adjustments.

144. However, the majority view prevails and accordingly the decision of the Tribunal is that there was a failure on the part of the respondent to make reasonable adjustments and that this amounted to discrimination.

Discrimination arising from Disability

145. S.15 of the 2010 Act is in the following terms:

"***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) Sub-section (1) does not apply if A shows that A did not know and could not reasonably have reasonably been expected to know, that B had the disability."

(The terms of this section are such that the disabled person does not require to show that his or her treatment was less favourable than that experienced by a comparator).

146. The Explanatory Notes to the 2010 Act state that s.15 is "*aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing detriment which arises because of his or her disability and providing an opportunity for an employer or other person to*

defend the treatment." The Notes give the example of an employee with a visual impairment who is dismissed because he cannot do as much work as a non-disabled colleague. This would potentially amount to discrimination arising from a disability and if the employer sought to justify the dismissal, it would need to show that the dismissal was a proportionate means of achieving a legitimate aim.

147. The claimant's solicitor specified the alleged unfavourable treatment arising from his disability by way a Minute of Amendment (P.28). We have already dealt with the majority of these allegations in relation to the direct discrimination complaint. However, we were mindful that for there to be direct discrimination the treatment had to be "less favourable" which entails a comparison, whereas "unfavourable treatment" in terms of s.15 requires no such comparison. Instead, it requires the treatment to be "*measured against an objective sense of that which is adverse as compared with that which is beneficial*" **Williams v. Trustees of Swansea University Pension & Assurance Scheme & Another 2017 EWCA Civ 1008**.

148. "Unfavourable treatment" is not defined in the 2010 Act, but the EHRC Employment Code states at para. 5.7 that it means that a disabled person "*must have been put at a disadvantage*".

"Suspension"

149. The claimant was treated unfavourably when he was suspended (i.e. "sent home") but, for the reasons already given the Tribunal was of the unanimous view that the suspension was justified. At the time of the claimant's suspension on 10 March 2017 the respondent had a risk assessment, an Occupational Health report to the effect that it was not safe to allow the claimant to continue working in the brewery and the claimant himself had expressed safety concerns. The suspension in all the circumstances was

proportionate and the legitimate aim was ensuring not only his own safety in the workplace but also that of others.

"Imposing Limitations on the Claimant's Access to Work Assessment"

150. As we recorded above we did not find, in fact, that there was any unfavourable treatment.

"Not taking any of the steps detailed in the Employee Retention Report"

151. In the view of the majority of the Tribunal, this was unfavourable treatment and, for the reasons given in relation to the finding by the majority that the respondent had failed to make reasonable adjustments, the majority was of the view that this was not justified – it was not "a proportionate means of achieving a legitimate aim".

152. The dissenting member, however, was of a different view. For the reasons already given, he did not consider that it was unfavourable, and, in any event, he was satisfied that it was justified. It was proportionate

153. However, the majority view prevails and accordingly the decision of the Tribunal is that this constituted discrimination arising from disability.

"Not changing the way things were done"

154. There was a lack of specification as to what this meant. The Tribunal was of the unanimous view, therefore, that the claimant had failed to establish the nature of the unfavourable treatment in this regard and this aspect of the complaint is not well-founded.

"Dismissing the claimant from his employment"

155. The relevant case law (**Dominique v Toll Global Forwarding Ltd EAT 0308/13**, for example) demonstrates a close link between the reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of discrimination arising from disability and any failure to comply with the reasonable adjustments duty must be considered "as part of the balancing exercise in considering questions of justification".

156. This link was also recognised by Lord Justice Elias in **Griffiths v Secretary of State for Work and pensions [2017] ICR 160, CA**, when he said: *"An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified".*

157. In the view of the majority, that was exactly the position in the present case. The respondent's failure to make reasonable adjustments led directly to the claimant's dismissal. This was unfavourable treatment and for the reasons already given in relation to reasonable adjustments, it could not be objectively justified.

158. As the dissenting member found that there was not a failure to make reasonable adjustments, it follows that in his view the dismissal was objectively justified.

159. However, the majority view prevails, and the Judgment of the Tribunal is that this constituted discrimination arising from dismissal.

"Not offering the claimant an Appeal with his dismissal letter"

160. The Tribunal was of the unanimous view that this was unfavourable treatment and that it could not be justified by the respondent. The respondent is a large employer with the benefit of employees with HR expertise. Affording an employee an appeal against dismissal is a fundamental requirement of a fair disciplinary procedure. This failure constituted discrimination arising from disability.

"Not hearing the claimant's Grievance"

161. While the Tribunal was of the view that it would have been prudent to have considered the claimant's grievance, he was not entitled, contractually, to pursue such a course of action, as by that time he was no longer an employee. The Tribunal was of the unanimous view, therefore, that this did not constitute unfavourable treatment.

Remedy

162. Helpfully, the claimant's solicitor produced an updated Schedule of Loss, which is referred to for its terms.

163. The majority was of the view that the respondent should be ordered to pay compensation to the claimant in terms of s.124(2)(b) of the 2010 Act. In assessing an appropriate award, the majority was mindful that, in terms of s.124(6), the amount of compensation to be awarded should correspond with the amount which could be awarded by the Sheriff Court under s.119. In short, the award should reflect the claimant's financial loss, provided he has taken reasonable steps to mitigate his loss.

164. The respondent's solicitor submitted that the claimant had failed to take reasonable steps to mitigate his loss after his dismissal. He also maintained that his refusal to consider another post with the respondent was a failure to mitigate. He also submitted that the claimant's decision to commence a College Course *"broke the chain of causation".*

165. The majority was of the view that there was some merit in the submission by the respondent's solicitor, for the period post dismissal; and there was a lack of documentary evidence of the claimant's attempts to find alternative employment. The majority decided to restrict the award for financial loss to a period of 30 weeks' post dismissal.

166. However, the majority was not persuaded that he had failed to mitigate by not considering alternative roles with the respondent. In cases of discriminatory dismissal, the duty to mitigate only arises after dismissal (**Savoia v Chiltern Herb Farms Ltd [1981] IRLR 65**). In any event, we heard no evidence about what these "alternative roles" were, other than a vague suggestion that he might do some "desk work" or "be office based". No specific alternative roles were suggested to him by the respondent. The onus was on the respondent. They failed to establish, in this regard, that the claimant had not taken reasonable steps to mitigate his loss.

167. While recognising that being disabled, having a visual impairment and having been dismissed by reason of capability, would mean it would be more difficult for him than most to secure alternative employment, the majority was of the view that, in all the circumstances, it should have been possible for the claimant to secure suitable alternative employment within a period of 30 weeks from the date of his dismissal. He received 4 weeks' pay in lieu of notice. Based on agreed net weekly pay of £416, his financial loss for the 26 weeks after expiry of the notice period amounts to **£10,816**.

168. However, in that 26-week period he received ESA Allowance for 10 weeks at the rate of £73.10, a total of £731; and for 7 weeks at the rate of £109.65, a total of £767.55.

169. The total of the benefits which he received was £1,498.55. This requires to be deducted giving an award of compensation of **£9,317.45**.

Injury to Feelings

170. We heard little evidence about this, either from the claimant himself, or by way of medical evidence. He only spoke of being "upset and distressed".

171. Looking at the matter broadly, as we are entitled to do, based on the evidence the majority was of the view that an award in the lowest band in **Vento v. Chief Constable of West Yorkshire Police [2003] IRLR 102** should be made and that an award of **£2,500** was appropriate.

172. Interest also must be applied to that award, at the rate of 8% for the 61-week period from the date of the claimant's dismissal on 24 May 2017 until the "day of calculation", namely 31 July 2018. This amounts to **£235**, making the total award for injury to feelings, inclusive of interest **£2,735** and the total award of compensation **£12,052.45**

173. Finally, it is worth recording, we believe, that the Tribunal was minded, unanimously, to make a recommendation under s.124(2)(c) of the 2010 Act that the respondent take immediate steps to deliver equality and diversity training to all appropriate members of staff. However, the scope for making such a recommendation was significantly curtailed in 2015 by an amendment to s.124 which means that such a recommendation cannot now be made for the purpose of preventing someone else, other than the claimant, suffering similar discrimination and, of course, the claimant is no longer employed by the respondent. That is regrettable as, in our view, such a recommendation would have been entirely appropriate. The respondent's witness, Fiona Hunter, "Head of People", was not involved at the time, but she said in evidence that she felt *"discomfort"* at the failure in the dismissal letter to advise the claimant of his right of appeal. An employer with a staff of some 800 and an in-house HR Department should feel more than *"discomfort"* at the lack of awareness evidenced of their legal obligations to consider reasonable adjustments for an employee they recognised as disabled. We trust that the respondent will have regard to our comments and to the

concerns which we have expressed about the lack of knowledge of those employees dealing with such important matters and take appropriate action.

Employment Judge Hosie
Date Signed: 31 July 2018
Date Sent to Parties: 2 August 2018