EMPLOYMENT TRIBUNALS

Claimant: A Wojtyak.

Respondent: Fibreline Ltd

Heard at: Leeds
On: 30, 31 May 1,2, and 5 June 2023

Before: Employment Judge Shepherd

Members: Mr G Harker
Mr M Taj

Appearances:

For the Claimant: In person
Interpreter, Mr Brzoza
For the Respondent: Mr Caiden, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim brought by the claimant of unfair dismissal is not well founded and is dismissed.

2. The claims brought by the claimant of disability discrimination are not well founded and are dismissed.

REASONS

1. The claimant represented herself and the respondent was represented by Mr Caiden. This was a hybrid hearing whereby the respondent's witnesses gave evidence by remote CVP video link and Mr Caiden attended the hearing but then provided oral submissions by video link.

2. The Tribunal heard evidence from:

Agata Wojtylak, the claimant;
Ged Bishton, General Manager;
Richard Prudhoe, Managing Director;
Julie Holdsworth, Finance & Human Resources manager.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 284. The Tribunal considered the documents to which it was referred by the parties.

4. The claims brought by the claimant were for unfair dismissal, and disability discrimination. At a preliminary hearing on 12 April 2022 before Employment Judge Lancaster the complaints and issues were identified as follows:

The Complaints

1. The Claimant is making the following complaints:

1.1 Unfair dismissal;

1.2 Disability discrimination.
1.3 The tribunal does not have jurisdiction to hear a claim for personal injury arising from an alleged accident at work in 2018

The Issues

2. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 2 September 2021 may not have been brought in time.

1.2 Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.2.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 The Claimant was dismissed.

2.2 The reason or principal reason for dismissal was clearly capability (ill-health).

2.3 This is a potentially fair reason

2.4 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.4.1 The Respondent genuinely believed the claimant was no longer capable of performing their duties;
2.4.2 The Respondent adequately consulted the claimant;
2.4.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
2.4.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the claimant (the Claimant says that it should have done so because it was responsible for her injury);
2.4.5 Dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

- 3.6.1 What financial losses has the dismissal caused the claimant?
- 3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 3.6.3 If not, for what period of loss should the claimant be compensated?
- 3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 3.6.5 If so, should the claimant's compensation be reduced? By how much?
- 3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 3.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
- 3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 3.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 3.6.11 The statutory cap of fifty-two weeks' pay will apply.

3.7 What basic award is payable to the Claimant, if any?

4. Disability

4.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

- 4.1.1 Did she have a physical impairment:
- 4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
- 4.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

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

5.1 Did the Respondent treat the claimant unfavourably by dismissing her?

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

5.2.1 the Claimant's various sickness absences from September 2018, culminating in that between February 2021 and September 2021;

5.2.2 The Claimant's continuing unfitness for work as at September 2021;

5.2.3 The Claimant's inability to provide a return to work date within a reasonable period after September 2021?

5.3 Was the unfavourable treatment because of any of those things? Did the Respondent dismiss the claimant because of [e.g.] that sickness absence?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent currently says that its aims were connected to its eliminating concerns about the negative effects of her long absence upon the business and upon the Claimant's colleagues.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

6.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability?

6.2 A "PCP" is a provision, criterion or practice. Did the Respondent have relevant PCPs that put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

6.2.1 She could not stand as she was required to do when assigned to the feather department upon her return to work in May 2019;

6.2.1 she could not work the full 8 hour shift (as opposed to a maximum 6 hours) without being unable to walk properly at the end and having to lie down before getting into a car to go home;

6.2.3 she could not physically perform the different functions required in the other department to which she was occasionally moved when there was insufficient work in the feather department, without experiencing extreme discomfort and pain.

The allegations at 6.2.1 and 6.2.3 above have been struck out. The claimant said that she had appealed the striking out of these claims but she has not made an application to the Employment Appeal Tribunal and these are no longer issues that this Tribunal has to determine..

6.3 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage, and that she was placed at a material disadvantage as a result? From what date? The Claimant says that although she did not specifically raise her concerns about standing at work, it ought to have been obvious that she was struggling. She says that she specifically requested from HR that her hours not be increased above the 6 hours that she was doing within her extended phased-return-to-work period, but that she was nonetheless put back onto full-time hours from January 2020. She also says that it should have been obvious that her occasionally (5 or 6 times in 6 months) being required to work in another department placed her at a physical disadvantage because of the system of work, such that on each such occasion she was off sick or hospitalised immediately afterwards.

6.4 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.4.1 Moving her to another department. She says that she should have been moved to do sewing, which she had taught herself to do although she was not formally qualified;
6.4.2 Allowing her to continue to work only up to 6 hours (she was only paid for the hours actually worked);
6.4.3 Not requiring her to transfer to the other department.

6.5 Was it reasonable for the Respondent to have to take those steps [and when]?

6.6 Did the respondent fail to take those steps?

7. Harassment related to disability (Equality Act 2010 section 26)

7.1 Did the Respondent (Mr Bishton) do the following things:

7.1.1 Shout at the Claimant in a hostile manner on 16 February 2021

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability (in that the context was the Claimant struggling to climb the stairs, which Mr Bishton stopped her from doing)?

7.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7.6 [The Claimant has mentioned that this may be discrimination against "immigrants" but there has been no formal request to amend to add a complaint of race discrimination, and it would be substantially out of time.]

8. Remedy for discrimination or victimisation

8.1 What financial losses has the discrimination caused the claimant? The Claimant has been advised that her current schedule of loss at more than £500.000 is unrealistic.

8.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.3 If not, for what period of loss should the Claimant be compensated?

8.4 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.5 Has any proven discrimination itself *caused* the claimant personal injury and how much compensation should be awarded for that?

8.6 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.8 Did the Respondent or the Claimant unreasonably fail to comply with it ?

8.9 If so is it just and equitable to increase or decrease any award payable to the Claimant?

8.10 By what proportion, up to 25%?

8.11 Should interest be awarded? How much?

5. Following a preliminary hearing on 15 November 2022, Employment Judge Miller made a reserved judgment with reasons it was determined that the claimant was disabled within the meaning of section 6 of the Equality 2010 by reason of back pain from 21 September 2019 until the termination of her employment.

Background/facts

6. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

7. The claimant was employed by the respondent as a Production Operative from 9 June 2014.

8. The claimant was absent from work by reason of sciatica from 13 September 2018.

9. On 13 May 2019 the claimant provided a statement of fitness for work from her GP indicating that she would be fit for work subject to no heavy lifting above 5 kg.

10. It was proposed to move the claimant to the feather department, that being the best department to avoid heavy lifting. The average weight to be lifted in that department was 1.9 kg. The claimant agreed to a change of department in those discussions and she returned to work on 14 May 2019 working reduced hours of 4 per day as part of a phased return to work.

11. On 7 June 2019 the claimant agreed to increase her hours to 6 per day from 10 June 2019.

12. It was found in the judgement of Employment Judge Miller that the claimant was disabled from 21 September 2001.

13. On 23 October 2019 Julie Holdsworth, Human resources Manager wrote to the claimant stating:

> "I understand you have now visited your doctor in Poland. I also understand that there is some improvement in your health.
> We need you to return to full-time working as of the 2 January 2020.
> We feel we have been more than accommodating as we have adjusted your hours from May 2019, we now need you to return to full-time work."

14. On 2 January 2020 the claimant's hours increased from 6 to her normal contractual 8 hours. She remained working in the feathers department throughout 2020

15. The respondent's employees were placed on furlough as a result of the Covid 19 pandemic.

16. On 29 June 2020 the respondent's employees returned to work.

17. On 27 of January 2021 the claimant was certified as unfit to work for two weeks due to back pain. She returned to work on 10 February 2021.

18. On 10 February 2021 the claimant was invited to a meeting to take place on 18 February 2021 to discuss her recent absence due to back problems. It was indicated that the respondent wished to discuss how the claimant was feeling, her long-term prognosis and future role at the respondent.

19. On 15 February 2021 the claimant, accompanied by her husband (who also worked for respondent at the time) met with Julie Holdsworth. This was an impromptu meeting when the claimant and her husband approached Julie Holdsworth. The meeting was covertly recorded by the claimant. The Tribunal had sight of the transcript of that meeting. It was indicated that the respondent needed to make sure someone there to do the job rather than coming back 2 to 3 weeks and then to go back on the sick**.** The claimant agreed that it was a problem for the business. It was indicated that was what was to be talked through with Richard Prudhoe, the Managing Director, at the meeting arranged for 18 February 2021.

20. On 16 February 2021 the claimant was climbing some stairs in order to go to see Ged Bishton, General Manager. The claimant said that Mr Bishton was hostile and shouted at her and that she should not endanger other people. Ged Bishton said that it was a noisy area. He agreed that he had raised his voice as he was concerned about the situation and he did not want the claimant or anyone else to be injured. It was a short but heated exchange. At the end of which they sat calmly together on the stairs and it ended with Ged Bishton offering to give the claimant a lift home. She declined because her husband was available to take her home.

21. On 17 February 2021 the claimant provided a statement of fitness for work stating that she was unfit by reason of back pain.

22. On 18 February 2021 the claimant met with Richard Prudhoe. The claimant agreed to the respondent contacting the claimant's GP.

23. On 8 April 2021 the claimant's GP wrote to the respondent indicating that there was no likely fixed return to work date and she was awaiting an assessment at the musculoskeletal clinic.

The claimant attended further welfare meetings on 23 April 2021, 30 April 2021 and 21 May 2021.

24. The claimant was referred to Occupational Health and a report was provided on 23 June 2021. In that report it was indicated that the claimant was unfit for work due to her back pain and its impact on her daily living. It was indicated that she was going to see a specialist assessment and, it was likely that, with appropriate treatment, including surgery, the claimant should be capable of returning to work.

25. I September 2021 Julie Holdsworth wrote to claimant indicating that, she should attend a meeting on 16 September 2021 to discuss long-term sickness and likely return to work. It was indicated that the claimant's position was in jeopardy and she has a right to be accompanied.

26. The claimant attended a meeting with Richard Prudhoe on 16 September 2021. It was indicated that the claimant's condition was not improving, she could not confirm when she would get treatment and it was likely that they would have to terminate her employment.

27. On 17 September 2021 Richard Prudhoe led the claimant stating:

> "Thank you for attending keep in touch meeting yesterday. As we discussed at the meeting your 28 weeks sick leave have now passed. During this time, we have tried to be supportive and constructive in helping you. We have held regular meetings to discuss your condition and investigate options moving forward.
> At the meeting yesterday you agreed that your condition had not improved at all. And that you are unable to give any indication of when you may start any treatment. You indicated it could be years.
> Regrettably under the circumstances we feel that the only course of action is to bring this process to a conclusion and to terminate your employment due to incapacity to do the job. This decision has not been taken lightly, but we feel that in the circumstances it is right course of action for all parties.
> You are entitled to 7 weeks' notice. Your notice period will start from 20th September and your final date of employment will therefore be 5th November. You will have accrued 8.5 days used holiday at this date. Your accrued holiday will be required to be taken as part of this notice..
> I am sorry to give you this decision in writing, we will normally have requested that you attend a meeting to explain and inform you of this decision. But your clear discomfort in physically walking we felt it inappropriate to ask you to come back for another meeting.
> I wish you well in the future and hope that you are able, over time, to get treatment that eases your condition"

The Law

Time limits

28. Section 123 of the Equality Act 2010 states:

> (1) ...Proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> ...
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) a failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

29. The Court of Appeal made it clear in **Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686,** that *i*n cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as oppose to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

30. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the tribunal that it should do so, and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre [2003] EWCA Civ 576** per Auld LJ *at para 25)*.

31. The Tribunal’s discretion to extend time under the ‘just and equitable’ formula is similar to that given to the civil courts by section 33 of the Limitation Act 1980 for extending time in personal injury cases (**British Coal Corpn v Keeble, [1997]IRLR336)**. Under section 33, a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. The length of and reasons for the delay;

2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time; the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant;

3. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

4. The extent to which the claimant acted promptly and reasonably once he knew of his potential cause of action. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor.

5. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Unfair Dismissal

32. Capability is a potentially fair reason for dismissal under S.98(2) of the Employment Rights Act 1996. It is for the employer to show the reason for dismissal and if it does show that the reason was a potentially fair reason the tribunal will then go on to determine whether the dismissal was fair in the circumstances pursuant to S.98(4).

33. In cases of capability dismissals involving ill health the Tribunal will consider whether the ill health relates to the employee's capability and whether it was a sufficient reason to dismiss. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in **Iceland Foods Ltd v Jones [1982] IRLR 439**. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether dismissal had been within "the band of reasonable responses" available to the employer.

34. In the case of **BS v Dundee City Council [2013] CSIH 91** the EAT stated that it is important for employers to consider:

(a) The nature of the illness;
(b) The likelihood of it recurring;
(c) The length of past absences and the intervening periods of attendance;
(d) What reasonable adjustments have been offered and what could be offered, such as alternative work; and
(e) The impact of the absences on the business and other employees.

Discrimination arising from Disability

35. Section 15 of the Equality Act 2010 states:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequences 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 now, and could not reasonably have been expected to know, that B had the disability.

Duty to Make Reasonable Adjustments

36. Section 20 of the Equality Act 2010 states:

> "(1) Where this Act imposes a duty to make reasonable adjustments of 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 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 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 the 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".

37.Paragraph 20 (1) of Schedule 8 provides:

" 20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) In any other case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

38. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out in **Environment Agency v Rowan [2008] ICR 218**, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

39. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT; Project Management Institute v Latif [2007] IRLR 579, EAT.**

Discrimination arising from the consequence of a disability

40.Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

41. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**:

42. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

Harassment

43. Section 26 of the Equality Act provides

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

44. The test is part objective and part subjective. It requires that the Tribunal takes an objective consideration of the claimant's subjective perception. was reasonable for the claimant to have considered her dignity to be violated or that it created an intimidating, hostile, degrading, humili my electronic document that just ating or offensive environment.

45. In the case of **Grant v HM Land Registry [2011] IRLR 748** the Court of Appeal said that:

> "Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

46. In the case of **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT stated

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Burden of Proof

47. Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

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

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

48. Guidance has been given to Tribunals in a number of cases. **In Igen v Wong [2005] IRLR 258** and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

49 .To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

50. In **Project Management Institute v Latif (2007) IRLR 579** The EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore, the burden is reversed only once potential reasonable adjustment has been identified. It will not be in every case that the

claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

51. In **Romec v Rudham (2007) All ER 206** the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In **Cumbria Probation Board v Collingwood (2008) All ER 04** the EAT stated "it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage" the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.

52 .In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ** the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

53. In **Noor v Foreign and Commonwealth Office 2011 ICR 695** Richardson J stated: "Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"

54. The Tribunal had the benefit of written and oral submissions provided by Mr Caiden on behalf of the respondent and oral submissions from the claimant. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Unfair Dismissal

55. The Tribunal is satisfied that the reason for the claimant's dismissal was the potentially fair reason of capability.

56.The letter of dismissal was clear. The claimant had been absent by reason of long-term sickness for approximately seven months. She had been to numerous absence review meetings. The medical evidence provided that the claimant was unfit to return to her role. The Occupational Health report indicated that, with treatment, she should be capable of returning in 2 to 3 months. There was no prospect of the claimant starting treatment and Mr Prudhoe was of the view that the claimant was no longer capable of performing her role or, indeed, any role within the factory. The claimant had confirmed

that she was still unfit to return to work and the reason for termination was that of capability.

57. The respondent consulted with the claimant, she had four absence review meetings, the respondent obtained medical information from the claimant's GP and Occupational Health.

58. The medical advice was that there was no foreseeable return to work without specialist treatment and there was no evidence that any such treatment was likely to occur in the future. Indeed, the respondent concluded that the claimant had said that it might take years.

59. The claimant had been informed on numerous occasions that this Tribunal had no jurisdiction to hear a claim of personal injury arising from an alleged accident at work in 2018. This was stated in the case summary from the Preliminary Hearing before Employment Judge Lancaster on 12 April 2022. The claimant continued to raise the issue of the respondent's responsibility for her injury.

60. In the case of **RBS v McAdie [2007] EWCA Civ 806** the EAT made it clear that the question the Tribunal should ask was whether it was reasonable for the respondent to dismiss the claimant on the date of dismissal in the circumstances. The fact that an employer had caused, illness may be one factor in deciding fairness but it is not determinative.

61. In this case, there was no credible evidence that the respondent was responsible for the injury. The claimant had previously been off work by reason of sciatica. The fit notes at the time identified the claimant's condition as sciatica. At the meeting on 23 October 2018 the claimant indicated that flying to Poland may have caused it. In an email dated 22 October 2018 the claimant stated that her sciatica had not improved at all.

62. There was no accident report completed or grievance brought at the time. It was not mentioned in the meeting with Richard Prudhoe following which the decision to dismiss was made.

63. There was no credible evidence that the respondent caused or contributed to the claimant's incapability. Even if there had been, it would not mean that the decision to dismiss on grounds of capability was outside the band of reasonable responses. The Tribunal is satisfied that the respondent could not reasonably be expected to wait any longer for the claimant to be fit to return.

64. The letter of dismissal did not include notification of a right of appeal. In the case of **Moore v Phoenix Product Development Ltd UKEAT/0770/20/00** the EAT held that fairness would usually require that an employee is given the right to appeal internally. However, when it is quite clear that nothing further can be done to improve the relationship, an appeal may be futile. In this case the Tribunal is satisfied that the provision of a right of appeal would make no difference to the dismissal.

65. In the case of **Holmes v Qinetiq Ltd UKEAT/0206/15/BA** the EAT held that in a case where no disciplinary procedure was invoked because, apart from the effects of his illness, the Claimant was able to perform his job and there was no suggestion that his conduct or performance gave rise to a disciplinary situation or involved culpable conduct. That meant the employer was not required to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal has given very careful consideration to this. It is clear the provision or notification of a right of appeal made no difference. The claimant was incapable of working and remains incapable.

66. In this case there were four absence review meetings. The respondent contacted the claimant's GP and obtained an Occupational Health medical report. The Tribunal is satisfied that the level of consultation and the respondent's enquiries into the claimant's medical condition was within the band of reasonable responses.

67. The Tribunal is satisfied that, had the dismissal been found to be unfair, any compensatory award would be reduced in accordance with the principles set out in the case of **Polkey v AE Dayton Services Ltd [19878 ICR 142** to reflect the chance that the claimant would be dismissed in any event. The Tribunal finds that in this case the claimant was incapable of work and any compensatory award would be reduced to nil.

Discrimination arising from disability

68. The dismissal was by reason of the claimant's long-term absence which was something arising in consequence of her disability.

69. The Tribunal has considered whether the dismissal was a proportionate means of achieving a legitimate aim.

70. The legitimate aim is managing employee absence and ensuring productivity, customer service and effective and profitable working practices within the business, ensuring staff morale and reasonable workloads and working conditions of other employees avoiding cost inefficiencies and otherwise promoting the business interests of the respondent.

71. The claimant had been absent from work for seven months with no end in sight and Richard Prudhoe said this had an adverse impact on staff in the feather department and the business. He said claimant sickness absence could not go on indefinitely.

72. Richard Prudhoe's witness statement to the Tribunal stated:

> "As a company, we not only have to ensure effective and profitable working practices, but our customers' Just in Time delivery requirements and short lead times require a flexible multiskilled team. Under these challenging business conditions we need to ensure that our staff has reasonable workloads and

> working conditions, as this will impact on productivity and staff morale. Mrs Wojtylak's absence from work, which had been going on for seven months with no end in sight, was having an adverse impact on staff in the feather department and business as such Mrs Wojtylak's sickness absence could not go on indefinably."

73. The Tribunal accepts this clear and credible evidence. It was referred to by Mr Caiden as falling under the general rubric of 'Operational Needs'. The Tribunal is satisfied that this was a legitimate aim.

74 The claimant said that she had spoken to ACAS and she was told that some employers might wait three or four years before dismissing an employee for sickness incapacity. The claimant's sick pay had run out. It was submitted by Mr Caiden that keeping someone on the books in these circumstances could not be stated as the to be at no cost even when sick pay was no longer payable. If that were true, no employer could dismiss a 'disabled 'employee.

75. There was no medical evidence to show that the claimant was likely to return to work in the future. The claimant remains incapable of any work at the date of the Tribunal Hearing. The treatment was an appropriate and reasonably necessary way to achieve those aims.

76. There was nothing less discriminatory that could be done. The claimant was incapable of doing any work in the factory. In the circumstances, the needs of the respondent outbalanced those of the claimant. The claimant simply could not continue to work.

Reasonable adjustments

77. This claim is substantially out of time. There was no evidence as to why it would be just and equitable to extend time.

78. The PCP was a requirement for the claimant to work eight hours in the feather department. This PCP was applied in January 2020. The claims of reasonable adjustments were in respect of omissions not continuing acts. It was submitted that time would run from about March 2020 and the time limit would have expired in June 2020. However, the claim was not presented to the Tribunal until 6 February 2022. This means that it was presented some 20 months out of time. There was no explanation as to why there had been this delay and it was submitted that there was prejudice to the respondent in respect of the availability of evidence.

79. The only remaining claim of failure to make reasonable adjustments before the Tribunal was in respect of the PCP within the identified issues which was stated to be:

> "She could not work the full 8 hour shift (as opposed to a maximum 6 hours) without being unable to walk at the end and having to lie down before getting into a car to go home."

80. This was discussed during the hearing. The PCP was the requirement to work the full 8 hour shift. The disadvantage was that that she was unable to manage this without having to lie down before getting into a car to go home.

81. The claimant had agreed to move to the feathers department and had a phased return to work on 14 March 2019. The hours increased to her contractual hours on 2 January 2020. This followed the statement of fitness for work provided by her GP which stated that the claimant may be fit for work taking into account the advice of "No heavy lifting above 5 kg". There was no other medical evidence indicating or recommending that the respondent should consider any alteration to the claimant's hours of work. The respondent had provided her with light work and a phased return to work.

82. The claimant's attendance was without significant lengthy absences from 2 January 2020 to the end of January 2021. She did have two weeks off work but she continued to work until the end of January 2021.The claimant's hours had increased to 8 hours on 2 January 2020.

83. The respondent's evidence was clear that the claimant did not suggest any further reasonable adjustments or state that she was unable to work 8 hour shifts.

84. During the hearing the claimant raised the point that she could have been transferred to the sewing department. The clear and credible evidence given on behalf of the respondent was she did not have the requisite skill or experience to carry out that work

85. When giving evidence to the Tribunal, the claimant said that she could have remained working 8 hours in the feathers department and it was being sent to the carding or fibre department which led to her incapacity and which was the reason for her dismissal.

86. The Tribunal is not satisfied that the claimant has established that the PCP placed her at a substantial disadvantage and, if it had, then the respondent did not know or could not be reasonably expected to know of that disadvantage. The claimant indicated in the covert recording of the meeting on 15 February 2021, that she wanted to work her normal eight hours.

87. The claimant was provided with a phased return to work. She agreed to move to the feathers department. The only suggestion in the medical evidence was that she should lift no more than 5 kg. This was complied with by moving the claimant to the feather department. There was no credible evidence that any alteration in her hours of work would have ameliorated any substantial disadvantage.

Harassment

88. The claim of harassment is in respect of the incident on 16 February 2021(although the claimant witness statement refers to 26 January 2021) when the claimant was attempting to climb some stairs to go to see Ged Bishton, the General Manager. The claim to the Tribunal was presented on 6 February 2022.

89. The claim was a long way out of time. The claim should have been presented by 15 April 2021. It was over 9 months out of date, no explanation was provided by claimant for this delay. The Tribunal has no jurisdiction to hear this claim and it was not shown that it was just and equitable to extend time. The claim is about a one-off event and the prejudice to the respondent is that it was only able to provide a general denial. The Tribunal heard was no evidence from other witnesses with regard to the allegation of harassment. no complaint was made at the time. It took place on 16 or 26 February 2021 and the effective date of the claimant's termination was 5 November 2021.

90. This was a one-off event. The claimant was being helped up the stairs by another manager. We were told by Ged Bishton that, in hindsight, that manager agreed that he should not have tried to help her. It was in the heat of the moment. The Tribunal accepts that Ged Bishton raised his voice because of the noisy atmosphere and that he was concerned about the health and safety of the claimant and other employees.

91. The claimant said that she and Ged Bishton then sat on the stairs after the incident talking more calmly and that Ged Bishton had offered her to drive her home but she refused as her husband was to take her home.

92. It is clear that Ged Bishton's shouting or raising his voice was because of a concern of the claimant and others being exposed to potential injury by her going upstairs. It did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

93. Ged Bishton raised his voice above the noise in the factory and was concerned about the welfare of the claimant and others. Any offence was unintended.

94. This was a transitory event and ended in a calm and relatively amicable manner. Taking into account the claimant's perception and all the circumstances of the case, the Tribunal is satisfied that it was not reasonable for the conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for claimant.

95. The Tribunal has a great deal of sympathy for the claimant. She has a serious and debilitating back condition She said that she remains incapable of carrying out any work at present . Her pain and discomfort was obvious during the course of the Tribunal Hearing.

96. In all the circumstances, the claims brought by the claimant are not well-founded and are dismissed.

Employment Judge Shepherd

10 June 2023