EMPLOYMENT TRIBUNALS

Claimant: Mr R Poniatowski

Respondent: Wealmoor Limited

Heard at: West Midlands (Birmingham) Employment Tribunal

On: 10, 11, 12, 13 (deliberations) and 14 July 2023

Before: Employment Judge Childe

Mrs Hicks

Mrs Bannister

REPRESENTATION:

Claimant: In person

Respondent: Mr Williams (consultant)

JUDGMENT

1. The complaint of unfair dismissal under Part X Employment Rights Act 1996 is well-founded. The claimant was unfairly dismissed.
2. The complaint of breach of contract in relation to notice pay is well-founded. The claimant is entitled to be paid four weeks gross pay as damages for breach of contract.
3. The claimant's complaint that the respondent failed to make reasonable adjustments, and therefore discriminated against the claimant, in breach of section 21 Equality Act 2010 is well-founded and succeeds.
4. The claimant's complaint that the respondent subjected him to discrimination on the grounds of disability, in breach of s.15 Equality Act 2010, is well founded and succeeds.
5. The claimant's complaint that the respondent subjected him to indirect discrimination on the grounds of disability is dismissed on withdrawal.

Summary of the case

1. The claimant was absent from work for a period of nine months prior to his dismissal by the respondent due to his ill-health, which was also a disability as defined in section 6 of the equality act 2010.
2. The claimant says that the respondent failed to make reasonable adjustments prior to his dismissal. The claimant says his dismissal was because of his absence from work, which was connected to his disability. The claimant says his dismissal was discriminatory for this reason. The claimant says his dismissal was also unfair because the respondent did not get medical evidence on the claimant's likely return to work and any reasonable adjustments the respondent could make, prior to dismissing him.
3. The respondent's defence is that there were no reasonable adjustments it could make, the dismissal was a proportionate means of achieving a legitimate aim and the dismissal was fair in all the circumstances.

Introduction

4. The claimant originates from Poland. We heard evidence from the claimant and had the benefit of a Polish interpreter.
5. From the respondent we heard evidence from Leena Malde, head of HR and Matthew Beecham, site technical manager and head of technical.
6. We were referred to relevant documents in a bundle of documents which ran to 700 pages.
7. There was a slight delay on the morning of the first hearing in the Polish interpreter attending the tribunal and in her been provided with the bundle of

documents in the witness statements. The hearing did not start until the interpreter was present. We took the time to ensure that these documents were provided before the case commenced.

Issues to be determined

8. The tribunal spent a significant amount of time on the morning of the first day of the hearing clarifying and agreeing the issues with the parties. There was a case management order on file which set out the issues the Tribunal would address. The issues were further refined and agreed with the parties, prior to the hearing taking place.
9. The agreed issues to be determined by the tribunal are as follows:

Disability Discrimination

10. The respondent accepts that the claimant is a disabled person, as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, with the disabilities depression and lower back pain (sciatica).

Failure to make reasonable adjustments

11. The respondent accepts it knew about the claimant's lower back pain in May 2019 and the claimant's depression in August 2019.
12. Did the respondent have the following provisions, criterion or practice ("**PCP**"):
    a. requiring the Claimant in his job role to work 12-hour night shifts, carry out manual handlings of heavy objects up to 20kg, being in a standing position for much of the time, walking on site ("the **Job Description PCP**").

b. failing to provide specialist occupational health practitioner support to employees and relying solely on GP advice ("the **OH PCP**").

c. a requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions ("the **Attendance PCP**").

13. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, as follows, in connection with each disadvantage:

a. in respect of the Job Description PCP, the claimant found it difficult to perform his duties, if not impossible, due to the effects of his illness and disability.

b. in respect of the OH PCP, the claimant's prospect of returning to work was affected and had a specialist occupational health report been obtained he would have returned.

c. in respect of the Attendance PCP, the claimant lost his job in circumstances where he could have returned to work with adjustments.

14. The respondent accepts that they knew the claimant was likely to be placed at such a disadvantage from August 2019 at the latest.

15. What steps could have been taken to remove the disadvantage?

a. in respect of the Job Description PCP:

i. the claimant says the respondent could have offered him part time employment; and/or

ii. could have agreed to him working as a fork-lift truck driver only.

b. in respect of the OH Report PCP, the claimant could have got a professional occupational health report which would have provided

advice or information about the kind of duties the claimant was able to carry out.

c. in respect of the Attendance PCP:

iii. the claimant would have returned to work had he been offered: if offered a shorter shift or fork-lift tri work which could have assisted the claimant to stretch himself and sit down, to enable him to manage his back problem; and/or

iv. Should have adjusted the sickness absence policy and not dismissed him.

d. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Discrimination arising from disability

16. Did the following thing arise in consequence of the claimant's disability: the claimant's sickness absence between July 2019 and dismissal?
17. Did the respondent treat the claimant unfavourably by dismissing him?
18. Did the respondent dismiss the claimant because of that sickness absence?
19. If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim. The respondent relies on the following as its legitimate aim:

a. treating all employees the same, by subjecting them to the sickness absence procedure and dismissing when they are on long term sickness.

b. saving cost by not paying for occupational health reports and other professional reports.

20. The respondent accepts that it knew of the claimant's respective disabilities on the date set out in paragraph 11 above.

Unfair Dismissal

21. The respondent accepted that the claimant had been dismissed.
22. What was the principal reason for dismissal? The respondent says it was capability (long term absence)
23. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:
    a. The respondent genuinely believed the claimant was no longer capable of performing their duties.
    b. The respondent adequately consulted the claimant
    c. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
    d. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
24. Whether dismissal was within the range of reasonable responses.
25. If the respondent did unfairly dismiss the claimant:
    a. 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?
    b. If so, should the claimant's compensation be reduced? By how much?
    c. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

d. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Wrongful dismissal claim

26. The respondent conceded at the outset of the hearing that the claimant was entitled to four weeks' notice pay.

Indirect disability discrimination claim

27. Following a discussion of the claims and issues, the claimant withdrew his claim of indirect disability discrimination

Findings of fact

28. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.
29. The claimant was employed as a Quality Control Technologist for the respondent. The claimant worked at the Atherstone on Stour site. The claimant commenced employment on 8 December 2017.
30. The respondent is a fast-moving goods agricultural producer and supplier of fresh fruit and vegetables. The respondent employs approximately 1000 employees across three sites.
31. In 2020 the respondent had approximately 65 employees on long term sickness across the business. Leena Malde acknowledged that historically the staff on long term sickness had not been proactively managed and some staff had been off for up to four years. There were three members of HR staff

tasked with managing this long-term sickness absence. It was HR rather than management that dealt with the management of long-term sickness absence.

The Claimant's duties

32. We find the claimant was employed as a Quality Control Technologist for the respondent and he worked at the respondent's Atherstone on Stour site.
33. The claimant's working pattern was as follows. He commenced work at 5.45pm and worked until between 5.30am and 7.15am, depending on the season. He therefore worked on a shift pattern of between 9 ¾ hours and 13 ½ hours.
34. The claimant was required to carry out heavy manual handling by lifting produce boxes which weighed between 5-15 kg and potatoes which weighed between 20 and 25kg. The claimant drove a forklift truck and would bring in product using forklift truck. Once packed, the claimant would put the product on the pallets, and label the product to indicate which customer it was going to. The claimant would check the quality of their produce and the quality of the labelling.
35. The claimant would then take the produce to the cold store or to the dispatch area using a forklift truck.
36. The claimant worked in the cold as the factory environment was chilled. The temperature varied according to the room of the space. At its lowest it was about 3 degrees and at its highest about 12 degrees. In the main packing hall the temperature was between 10 and 12 degrees. In the chambers area it was between 3 and 10 degrees. In the dispatch area it was between 3 and 10

degrees. The respondent provided warm clothing to staff members to enable them to work comfortably and in this chilled environment.

37. In reaching the above finding of fact we accept the claimant's evidence on what his actual duties were. We found him honest and clear in his evidence on this point. We didn't hear from anyone else who worked on night shift with the claimant. We find the job description didn't reflect everything the claimant was required to do. We find the night shift was often short staffed and the claimant had to carry out other duties, not just that of a quality analyst. If the respondent was short staffed (which was often) the claimant worked on the production line. He rolled his sleeves up and got on with it.
38. We reject Leena Malde's account of what claimant did on the night shift. Leena Malde admitted she hadn't spent any time at all on the night shift where the claimant worked. Equally, we had no evidence to suggest that the company took steps at any point to discuss the claimant's role with him and to understand exactly what he did.

The claimant's sickness absence

39. On 6 May 2019 the claimant was absent from work due to back pain. The claimant did not return to work from this date.
40. Between May and November 2019, the claimant submitted regular sick notes to the respondent. Between 6 May and middle of October 2019 the respondent made no contact whatsoever with the claimant.
41. The respondent invited the claimant to a range of welfare meetings in October 2020. It took some time for this meeting to be arranged, but we find that the claimant actively engaged with the respondent to attend these meetings.

42. On 15 November 2020, five months after the claimant's absence from work, the claimant attended what was described as a welfare meeting with Michelle Gibbs HR Business Partner. We find that this meeting lasted approximately ten minutes. The claimant described his back condition and referred to his depression.
43. No discussion took place in this meeting about the claimant returning to work or reasonable adjustments. Michelle Gibbs recommended that the claimant talk to his GP about amended duties and a phased return to work. The claimant said in evidence he did not find this meeting helpful because it was quite short. We find the meeting minutes showed a general lack of interest in the claimant's well-being.
44. On 3 December 2019, the claimant provided the respondent with a GP report. The report confirmed that the claimant had had lower back pain since 8 May 2019 and had been diagnosed with depression on 5 August 2019. The claimant paid for this GP report himself and the respondent refused to reimburse him for this.
45. There was a dispute about whether the claimant moved to what was described as part time working in March 2019, carrying out four shifts over 9.5 hours. We have already made a finding of fact about the claimant's working pattern and duties. The claimant received this revised contract whilst he was absent from work due to illness. He did not sign it, nor did he acknowledge it. We find the claimant did not accept this contract. It did not represent the working pattern the claimant was required to carry out. It did not change the nature of the claimant's duties or working pattern that he was required to do prior to his absence due to illness.

46. On 4 and 12 December 2019 Michelle Gibbs wrote to the claimant's GP requesting further information about the claimant's medical condition. The following questions were asked:

    a. What is the reason for Rafal's ill health and attendance record? Please list their symptoms. If these symptoms amount to a recognisable underlying medical condition, please state what condition is, or is most likely to be, where appropriate giving the reasons for your diagnosis.
    b. How long do you believe their symptoms or condition will persist and what is the likely date of return to work? If this is impossible to assess, please say so. Otherwise, would you say that it is likely to be three months/ six months/ one year/ several years? Please be as precise as possible.
    c. What effect, if any, does this condition have on their normal day-to-day activities apart from work?
    d. Do you consider Rafal has, or will have, a disability under the meaning described in the Equality Act 2010 (i.e. an impairment which has, or is likely to have, a substantial and long-term adverse effect upon the ability to perform normal day-to-day activities)? If so, how long is it likely to last?
    e. Please detail any treatment and/or medication that Rafal is receiving and what, if any, side-effects such medication or treatment might have?
    f. Are there any reasonable adjustments we could make to accommodate any disability or facilitate a return to work? If we were to make these adjustments, when could they return to work?

g. Is Rafal likely to be able to render regular and efficient service in the future?

h. Is there any specific recommendation you wish to make which would help in finding an alternative role, if that is necessary?

47. We find that these were entirely appropriate and relevant questions to put to a medical practitioner, and that these required an answer to enable the respondent to effectively manage the claimant's long term sickness absence and return to work.

48. The medical evidence requested by the respondent was not received. Despite this, the claimant was invited to a final capability hearing on 14 January 2020, on 30 December 2019. The claimant was told that the respondent would move ahead with the medical capability meeting in the absence of the report.

49. The claimant was informed in the invite letter that if no return date could be established and no alternatives or adjustments agreed, his employment may be terminated on the grounds of ill-health.

50. The capability hearing took place on 14 January 2020 at 2 o'clock. Michelle Gibbs asked the claimant whether amended duties would help the claimant return to work and gave the example of no lifting. The claimant said '*yes happy to come back, not full-time but part-time*.'

51. We find that the claimant said his back pain was fluctuating. Sometimes it was better and sometimes it was worse. In reaching this finding we have accepted the claimant's evidence on this point. It was cogent and accurate. We haven't heard evidence from Michelle Gibbs, or indeed anyone else at the meeting, to counter this view. We do not accept Ms Malde's evidence that the claimant

said in this meeting his back condition was getting worse. The claimant's response was more nuanced, as we have indicated.

52. Michelle Gibbs advised the claimant to talk to his GP about a phased return and amended duties. Michelle Gibbs said the company would be able to accommodate that.

53. The claimant asked whether there was any chance or opportunity that he could come back to work. Michelle Gibbs said yes, '*if your doctor stipulates phased return or amended duties but you need to have a long discussion with your doctor about what you can and can't do*.' We find that the respondent placed the onus squarely on the claimant to obtain further medical evidence. It was also, in our view, unrealistic to think the claimant would be able to have a long discussion with his GP about this issue. In our industrial experience the average GP appointment lasts less than ten minutes.

54. We find that the claimant did raise the prospect of him returning to work and being allocated duties on the forklift truck during the meeting with Michelle Gibbs. The respondent disputes this was said as it wasn't recorded in the minutes at the time. We find that the minutes didn't capture everything that was said. The claimant was ill at the time and was absent from work due to depression. We also don't accept that in signing the minutes, the claimant was accepting that this issue was not discussed as suggested by Leena Malde.

55. The claimant gave clear and cogent evidence that this is what was discussed at the meeting, and we accept this was an accurate account. We have heard no evidence from Michelle Gibbs or indeed anyone else that was present at the meeting to support the respondent's position that this was not said. We

have already found as a matter of fact that the claimant was driving the forklift truck on the night shift, so this would, in our view, be a natural thing for him to say.

56. Michelle Gibbs concluded the meeting by saying that the company would make a decision about the claimant's future employment dependent on what information the claimant's doctor provided.

57. The claimant provided a sicknote on 24 January 2020 which said he was not fit to work due to depression and back pain.

58. Michelle Gibbs sent an email to the claimant on the same day to ask about a time frame within which the claimant could return to work and to ask when the GP report would be supplied. The claimant replied to say that the GP report would be provided in three weeks, but that he couldn't control that timeframe.

59. On 17th February 2020 Michelle Gibbs wrote to the claimant and said '*I would like to give you one more opportunity to get the medical report to me by 20th February 2020, failure to do so will result in Wealmoor being forced to make a decision from your previous medical capability hearing in the absence of this report*.' We find the respondent was placing the onus on the claimant to provide a medical report to enable it to make a decision about the claimant's future employment. The claimant had no control over the contents of this report or indeed when it would be provided.

60. The claimant's GP provided a medical report on 19th February 2020. The GP report provided consisted mainly of the claimant's historical medical notes with the GP being copied into the body of the letter. At the end the GP report said '*Lifting, bending, standing for long periods and working in the cold are all*

potentially likely to exacerbate his back pain.' The report also said that the respondent should contact the surgery if more information was required.

61. Other than the question about the medication the claimant was taking and the detail of his back pain and his depression, the GP report did not answer any of the important questions posed by the respondent on 4 and 12 December 2019. Michelle Gibbs appeared to accept this as she sent a follow-up email to the GP on 19 February 2020 complaining that the GP had not answered the respondent questions.
62. On 26 February 2020 Michelle Gibbs sent the claimant a letter notifying him of the termination of his employment. We find that Michelle Gibbs discussed her recommendation to dismiss the claimant with Leena Malde and Leena Malde agreed with what Michelle Gibbs was proposing.

Reason for dismissal

63. We find that the reason for the claimant's dismissal was the claimant's absence from work from May 2019 due to sickness and that the respondent had concluded there was no prospect of the claimant returning to work. The respondent classified the dismissal as being on the grounds of ill-health capability.
64. Leena Malde said that they had reached this conclusion relying on their interpretation of the GP report, particularly the statement "'*Lifting, bending, standing for long periods and working in the cold are all potentially likely to exacerbate his back pain*.'
65. The claimant did not appeal the decision to dismiss because he was too ill to do so.

Relevant law, analysis and conclusion

66. The parties discussed and agreed the issues to be determined at the start of the hearing and we have recorded these at paragraphs 9 to 27 above. We will refer to those issues in our analysis and conclusion.
67. We apply the relevant law to our findings of fact, to reach a conclusion on each of the relevant issues identified.

Failure to make reasonable adjustments

68. We begin with the claimant's claim that the respondent failed to make reasonable adjustments to his role.
69. The duty to make reasonable adjustments is found in sections 20 and 21 Equality Act 2010.
70. It is unique as it requires *positive action* by employers to avoid substantial disadvantage caused to disabled people by aspects of the workplace. To that extent it can require an employer to treat a disabled person more favourably than others are treated.
71. We take a methodical approach to this task. We first identify the provision criterion or practice ('**PCP**') upon which the claimant relies. We were careful to establish the PCP in the issues, at the start of the hearing.
72. We find that the respondent did have the following PCPs**,** for the following reasons:
    a. Firstly, the requirement that the Claimant work 12-hour night shifts, carry out manual handlings of heavy objects up to 20kg, being in a standing position for much of the time, walking on site ("the **Job Description PCP**"). We have found as a fact that the claimant was

required to work 12 hours shifts (sometimes more, sometimes slightly less), carrying out manual handling of heavy objects up to 20 kg and being required to stand up and walk for much of the time.

b. Secondly, the respondent failed to provide specialist occupational health practitioner support to employees and relying solely on GP advice ("the **OH PCP**"). Leena Malde said in evidence that the company's practice is to obtain a GP report for medical input into an employee's state of health. Then, rather than using an occupational health provider, the company carries out a risk assessment of the work environment themselves.

c. Thirdly, a requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions ("the **Attendance PCP**"). Leena Malde gave evidence that the respondent had a practice of reviewing individuals who could not maintain a certain level of attendance due to long-term ill-health and dismissing such individuals who could not return to work.

73. Turning now to substantial disadvantage. Our task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, we must consider why the PCP puts the claimant at the alleged disadvantage and ask ourselves what specific thing it is about the PCP that puts the claimant at the alleged disadvantage.

74. Considering each PCP in turn, we conclude as follows:

a. The Job Description PCP placed the claimant at a substantial disadvantage because he could not work a 12 hour shift, manually

handle objects up to 20 kg, and stand-up and walk for most of the time during the 12 hour shift, due to the effects of his disability.

b. The OH PCP placed the claimant at a substantial disadvantage because the respondent did not have the benefit of a report from an occupational health advisor who would be familiar with the working environment and would produce a risk assessment of the reasonable adjustments that the respondent could make to the claimant's role in working environment, to enable him to fulfil his role and manage his disability. The GP report obtained by the respondent did not provide this information. The respondent did not itself engage in this exercise, as we have found.

c. The Attendance PCP placed the claimant at a substantial disadvantage because he was dismissed for a failure to maintain a satisfactory level of attendance at work and the claimant was unable to maintain a satisfactory level of attendance due to his disability.

75. The respondent accepts that they knew the claimant was likely to be placed at such a disadvantage from August 2019 at the latest.

76. The next question is whether there were any reasonable steps which the respondent could have taken to avoid the disadvantage which were not taken. We focus on the practical steps to remove or lessen any disadvantage

77. Paragraph 6.28 of the equality and human rights commission code of practice on employment (2011) ("the **ECHR Code**") identifies the factors relevant to whether an adjustment is reasonable or not. These include:

a. the extent to which it is likely to be effective;

b. the financial and other costs of making the adjustment;

c. the extent of any disruption caused;

d. the extent of the employer's financial resources and the availability of financial or other assistance, and the type and size of the employer.

78. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the respondent.

79. We turn to look at what steps could have been taken to remove the disadvantage?

80. In respect of the Job Description PCP, the claimant says the respondent could have offered him part time employment; and/or could have agreed to him working as a fork-lift truck driver only.

Part time work and other adjustments

81. We find it would have been reasonable for the respondent to make the following adjustments to his role for the following reasons:

a. Offering the claimant part time employment, for example 3 to 4 hour shifts at a time. This would have been an effective adjustment as the claimant was unable to work 12 hour shifts due to his back condition but had said he could manage part-time work. It would have been possible to implement, with minimal disruption to the respondent's operation. Leena Malde said that the respondent could implement part time work easily and had done so previously by offering 3 or 4 hour shifts to people.

b. The removal of the requirement to carry out heavy manual handling of objects up to 20 kg. This would have been effective because the claimant was unable to lift such objects due to his back condition. There would be very little if any financial cost in doing so is the respondent's evidence was that they did not require a quality controller to carry out manual handling and this instead should be carried out by stock controller. We find that the claimant was only carrying out manual handling because of short staffing. The respondent could have addressed this by properly staffing the nightshift and we heard evidence from Matthew Beacham that the respondent had since provided such a stock controller on the nightshift.

c. Providing the claimant with regular short breaks, to enable him to sit for short periods. This would have been effective because the claimant was unable to stand for long periods and walk around for long periods and taking regular breaks would have removed this requirement. It would have come at little cost to the respondent. We heard evidence from the respondent that there were 30 employees on the nightshift. Those employees could have covered for the claimant on his short breaks. This would have caused minimal disruption to the respondent's activities.

d. Providing the claimant with a seat or a perching stool, to enable him to sit down from time to time whilst working. Again, this would have been effective because the claimant was unable to stand for long periods and walk around for long periods and having a seat or perching stool would have removed this requirement. The cost of a chair or stool

would have been modest. Indeed, the respondent is likely to already have a chair that could be used in this way.

i. We reject Leena Malde's evidence that this would have a significant impact on the respondent's operation due to heavy machinery operating on factory floor. No evidence was provided to support this proposition. It seems to us as a matter of common sense that a seat or perching stool could be made available to the claimant within the factory. A full risk assessment could have been carried out to determine whether a seat could have been safely available on the factory floor.

ii. We also reject Leena Malde's evidence that this would have a significant impact on the respondent's operation because there was a perception that sitting down equals being on a break. The perception of others that the claimant was on his break when sitting down or perching on a stool is not a relevant consideration when determining whether an adjustment is reasonable or not.

e. The claimant's duties could have been adjusted to remove the need to bend frequently. Leena Malde accepted in evidence that the quality controller role could have been adjusted to modify the need for bending. Simple steps could have been taken to alter the height of the pallets to enable the claimant not to have to bend. This would have been effective because the claimant found it more difficult to bend over, and removing the need to do so would have enabled the claimant to carry out his role

f. The claimant could have been given extra warm clothing, thermal clothing or heated clothing, to ensure that his body was kept warm in the cold environment. We have found as a fact that staff were already provided with some warm clothing. Providing the claimant with warm clothing would have been effective as the claimant found it more difficult to work in a cold environment due to his back condition, but if his body could be heated, this issue would be removed. The provision of such warm or heated clothing would have been relatively inexpensive and had minimal or indeed no impact on the respondent operation.

82. Leena Malde accepted that the respondent had not offered any of the above proposed adjustments. We find that this was a failure to make reasonable adjustments on the respondent's part.

Fork lift truck duties

83. We find it would have been reasonable for the respondent to adjust the claimant's duties to offer him work on the fork-lift truck only.
84. This adjustment would have been effective. The claimant would have been sat down on the fork lift truck and this would have removed the requirement for him to walk or stand up for long periods, which he was unable to do due to his back condition. He could have got off the forklift truck and stretched which would have assisted back condition. He would not have been required to do heavy manual handling, which he was unable to do because of his back condition. If warm clothing had been provided as we have already suggested,

he could have kept himself warm and would not have been cold, which exacerbated his back condition.

85. We reject Leena Malde's suggestion that it was not a reasonable adjustment to make because the claimant did not have a forklift truck licence.

86. We have found as a matter of fact that the claimant was already working on the fork-lift truck as part of his duties without the licence referred to. The licence was therefore not a barrier to the claimant driving the forklift truck for the respondent, on the nightshift. For this reason it would not be operationally disruptive.

87. If the respondent was now insistent that the claimant have a forklift truck licence to operate a forklift truck, the question became how long would it take to get such a licence and how much would it cost? Leena Malde did not know how much a licence would cost to obtain this and she told us that this was not looked into at the time. In the absence of any evidence from the respondent, we conclude that the cost and the time taken to obtain the licence would be quite modest, particularly given he was driving the forklift truck already, and the absence of a forklift truck licence did not mean offering the claimant forklift truck driving work was not a reasonable adjustment.

OH report

88. We find it would have been reasonable for the respondent to have got a professional occupational health report which would have provided advice or information about the kind of duties the claimant was able to carry out. It would have been an effective adjustment as the respondent would have been informed of its legal obligation to make reasonable adjustments and examples

of reasonable adjustments would have been proposed. Had these been implemented, the claimant could have returned to work. The financial cost of obtaining a report was modest. Leena Molde said it was between £300 - £400. It would not have disrupted operations.

Attendance

89. We find it would have been a reasonable adjustment to adjust the respondent's requirement that the claimant maintain a satisfactory level of attendance at work, whilst the above reasonable adjustments were implemented or at least trialled, instead of dismissing the claimant. In other words, the respondent should have delayed dismissing the claimant. This would have been effective as it would have enabled the claimant to trial a return to work, following reasonable adjustments. The financial costs to the respondent would have been negligible as the claimant would have been paid for work that he was carrying out for the respondent, whilst reasonable adjustments were implemented. It would have assisted the respondent operation, rather than being disruptive, as the claimant would be in work carrying out his duties. This is particularly so as the respondent gave evidence that it was short-staffed and had difficulty in recruiting permanent members of staff.
90. The respondent, in failing to carry out the above named adjustments to the claimant's role and working environment has failed in its legal duty to make reasonable adjustments under sections 20 and 21 Equality Act 2010.

Discrimination arising from disability

91. This claim is brought under section 15 of the Equality Act 2010.
92. In order for the claimant to succeed in his claims under section 15, the following must be made out:
    a. there must be unfavourable treatment;
    b. there must be something that arises in consequence of the claimant's disability;
    c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;
    d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim
93. Paragraph 5.20 of the ECHR Code says that employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.
94. Paragraph 5.2.1 of the ECHR Code says that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the claimant is justified.
95. As to justification, in paragraph 4.27 the code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-
    a. is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

b. if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances

96. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts.

97. Turning to the agreed issues, the first issue is whether the claimant's sickness absence between 6 May 2019 (it was inaccurately recorded as July 2019, but we have found as a fact that the claimant was absent from work due to sickness from 6 May 2019) and dismissal arose in consequence of the claimant's disability? We find it did. Leena Malde agreed in evidence that all the claimant's absences from this date were due to either back pain or depression.

98. The second issue is whether the respondent treated the claimant unfavourably by dismissing him. We find the respondent did. Dismissal was clearly capable of being unfavourable treatment.

99. The third issue is whether the respondent dismissed the claimant because of that sickness absence. The claimant was absent by reason of his disability which led to his dismissal. We have found that the reason for the claimant's dismissal was his absence from work from May 2019 due to sickness and that the respondent had concluded there was no prospect of the claimant returning to work. The respondent classified the dismissal as being on the grounds of ill-health capability. That reason was, in our view, sufficiently connected to his disability such that the treatment, his dismissal, was by reason of his disability.

100. The fourth issue is, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim?

101. The first aim relied on by the respondent is '*treating all employees the same, by subjecting them to the sickness absence procedure and dismissing when they are on long term sickness*.'

102. As we have already said, the duty to make reasonable adjustments requires *positive action* by employers to avoid substantial disadvantage caused to disabled people by aspects of the workplace. It can require an employer to treat a disabled person more favourably than others are treated. Having a policy where all employees are treated the same is discriminatory as it does not allow an employer to treat an employee with a disability more favourably than others, as required under the reasonable adjustment provisions of the equality act. In other words, it doesn't allow the respondent to treat individuals according to their personal circumstances, which includes whether they have a disability.

103. The respondent is and was required to make reasonable adjustments for the claimant and indeed for other staff with disabilities. This should have involved treating the claimant differently to other staff, by not dismissing him and by investigating and making the reasonable adjustments, examples of which we have already identified.

104. The respondent has therefore not established that treating everyone the same was a legitimate aim because it was of itself discriminatory.

105. The second aim relied on by the respondent is saving cost by not paying for occupational health reports and other professional reports.

106. We find that the impact of this aim was to make it more difficult for the respondent to achieve their legal obligations. We have found in this case that the failure to obtain an occupational health report was a failure to make reasonable adjustments. In the circumstances we found that the aim was not legal and was discriminatory. In our judgement the aim was therefore not legitimate.

107. We would add that we have already found the failure of the respondent to obtain an occupational health report was a failure to make reasonable adjustments. This is a classic case, and one which is referred to in sections 5.20 and 5.21 of the ECHR code, where the respondent could have prevented unfavourable discriminatory treatment by taking prompt action to engage with occupational health to identify and implement reasonable adjustments to enable the claimant return to work. The failure of the respondent to do so and therefore the failure to make reasonable adjustments, which could have led to the claimant returning to work and not been dismissed means that the respondent is unable to demonstrate its aim of not incurring the cost of an occupational health report is objectively justified.

108. If we are wrong on that, we go on to consider the issue of proportionality. Leena Malde told us that the occupational health report in the claimant's case would have cost £300-£400. As we have already found, an occupational health report in this case would have assisted the respondent to meet its legal obligations. The failure to obtain one was a failure to make reasonable adjustments. Given that factual matrix and the very modest cost of obtaining the occupational health report we find that the respondent did not act proportionately by choosing not to obtain an occupational health report on

this occasion. We take into consideration the likelihood that the information in such a report would have equipped the respondent with the knowledge needed to make reasonable adjustments to the claimant's role and to enable him to return to work, thus avoiding his dismissal. Judged in that context, the £300 to £400 was not only a modest investment but a very worthwhile investment.

109. We were invited by Leena Malde, in considering proportionality, to consider the cost to the respondent of obtaining 65 individual occupational health report at a cost of '*£15,600* minimum'. We were also invited to consider the cost of the respondent obtaining two medical reports (one from a GP and one from an occupational health provider) which was said to cost the respondent £25,000. We reject the proposition that proportionality should be assessed in this way. Leena Malde accepted that the reason the respondent had this number of individuals on long-term sickness absence was because they had not been managed appropriately. As a result, we do not know whether they all required an occupational health assessment or indeed a GP report, in the circumstances. It is not appropriate, in our judgement, to look at the cost of obtaining an occupational health or a GP report for anyone other than the claimant himself.

110. Turning to the final issue, the respondent accepts that it knew of the claimant's respective disabilities on the date in question.

111. In conclusion, the claimant succeeds in his claim for disability arising from disability.

Unfair Dismissal

112. The respondent accepted that the claimant had been dismissed.

113. The first issue is what was the principal reason for dismissal? The reason for the dismissal was the set of facts or beliefs held by the respondent that led to the dismissal of the claimant.

114. As we have already found, the reason for dismissal was the claimant's absence from work from May 2019 due to sickness and that the respondent had concluded there was no prospect of the claimant returning to work. The respondent classified the dismissal as being on the grounds of ill-health capability.

115. The claimant was therefore dismissed by reason of capability, which was a potentially fair reason for dismissal.

116. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

a. The respondent genuinely believed the claimant was no longer capable of performing their duties.
b. The respondent adequately consulted the claimant
c. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
d. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

117. We accept that the respondent genuinely believed the claimant was no longer capable of performing his role.

118. However, that genuine belief was not reasonably held. The respondent reached the view that there was no prospect of the claimant returning to work because it would exacerbate his health condition based on the following information in the GP report dated 19 December 2019 which said "*Lifting , bending, standing for long periods and working in the cold are all potentially likely to exacerbate his back pain*."

119. This sentence doesn't say that the claimant is not fit to return to work and in our judgement no reasonable employer would have reached this conclusion. What this sentence should have done is triggered a further investigation into what steps the respondent, as a reasonable employer, could take to adjust the claimant's duties to facilitate his possible return work by removing the barriers to his return to work (i.e. the requirement to lift, bend, stand for long periods and work in the cold).

120. In other words, a reasonable employer would have carried out further investigation and obtained further medical information, either from the GP, Occupational Health or another medical professional to determine what adjustments could be made to the claimant's role to enable him to return to work. The failure to do so rendered the investigation outside the range of reasonable responses open to a reasonable employer.

121. A highly relevant matter, which should have occurred to the respondent as a reasonable employer, was that the respondent had already asked the claimant's GP to provide information not only about reasonable adjustments that the respondent could make, but also a range of other very relevant and essential questions to enable the respondent to manage the claimant's absence effectively. These were the questions set out by Michelle Gibbs in

her letters to the claimant's GP on 4 and 12 December 2019. A reasonable employer, in our judgement, would have obtained the answers to these questions before reaching a view on whether the claimant was fit enough to return to work.

122. We reject Leena Malde's evidence that these questions had been answered by the claimant's GP, prior to the respondent taking the decision to dismiss the claimant. Her evidence was incredible on this point and flew in the face of the reality of what was set out in document itself. As we have said, in addition to the sentence about what the claimant could not do, all the GP provided was a copy of the claimant's medical history.

123. The GP did not provide a view on how long the claimant was likely to remain off work due to illness or what his likely return to work date was. No information was provided about the impact of the claimant's condition on his normal day-to-day activities. No information was provided about any reasonable adjustments the respondent could make to accommodate disability or facilitate return to work. No information was provided about whether the claimant was likely to render regular and efficient service in the future.

124. What was particularly striking to us was that the respondent, in the absence of this information, decided that the claimant must not be fit to return to work. The respondent did so without consulting with the claimant again before dismissing him. This is particularly surprising because the claimant had indicated that he wanted to return to work, at the formal capability hearing, either on a part-time basis or with other adjustments such as allowing him to

work on the forklift truck only. This was not a conclusion a reasonable employer could come to in the circumstances.

125. As we have said, the respondent failed to obtain details of the claimant up-to-date medical condition, before making the decision to dismiss the claimant on the basis he was not fit enough to return to work.

126. We therefore go on to consider whether dismissal was within the range of reasonable responses and we find that it was not. We find that no reasonable employer would have dismissed the claimant in circumstances where they had failed to properly determine whether the claimant was well enough to return to work or to determine the true medical position of the claimant. No reasonable employer would have acted unlawfully, by failing to make reasonable adjustments, by adjusting the claimant's role to enable him to return to work, prior to dismissal.

127. We go on to consider the next issue which is whether there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? We consider that without an up-to-date medical report as at the time of the claimant's dismissal, we are unable to carry out the investigation required to establish whether the claimant would have been dismissed in any event. To do so would be to speculate on the very failure to obtain a medical report and investigate the true medical position which we find to be one of the reasons for the unfairness of the claimant's dismissal.

128. The claimant's compensation should therefore not be reduced due to any procedural failings.

129. The next issue is if the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? The simple answer to this is no, the claimant did not contribute to his dismissal by reason of his absence from work due to a disability. It is therefore not just and equitable to reduce the claimant's compensatory award at all.

Wrongful dismissal

130. The respondent accepts that it failed to pay the claimant four weeks' notice, as required under his contract of employment. We therefore uphold this claim.

Employment Judge Childe

On 19 July 2023