Case Number 1304969/2021
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Horwell		**(1) Shenton Properties Limited**
		(2) Mr R Boyland

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 29 August – 1 September 2023
15 September 2023 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr TC Liburd**
Mr D McIntosh

Representation
For the Claimant: **Mrs M Horwell (Lay Representative)**
For the Respondents: **Mr N Siddall KC (Counsel)**

JUDGMENT

The unanimous Judgement of the tribunal is that:

1 The claimant's claim for disability discrimination (a failure to make adjustments) is dismissed for want of jurisdiction.
2 The respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of discrimination arising from disability, pursuant to Section 120 of that Act, is dismissed.
3 the claimant was fairly dismissed by the first respondent. His claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction & Background

1 The claimant in this case is Mr Jeremy Horwell who was employed by the first respondent, Shenton Properties Limited, from 21 September 2015 until 28 July 2021 when he was dismissed. The reason given at the time for the claimant's dismissal was redundancy. The second respondent, Mr Roger Boyland, is a director of the first respondent. The first respondent's wife, Mrs Kay

Brandeaux Boyland, is his co-director and together Mr and Mrs Boyland are the beneficial owners of the first respondent.

2 At the time of the commencement of employment, the claimant's role/job title was stated to be Head of House/Head Butler & Valet. It is common ground between the parties that at the beginning of 2017 the claimant's role changed. It is a matter of dispute between the parties as to the extent of the changes and precisely what his role was thereafter.

3 In May 2016, the claimant was diagnosed as suffering from skin cancer. Pursuant to Paragraph 7 of Schedule 1 to the Equality Act 2010 (EqA), from the time of that diagnosis the claimant is deemed to have been a disabled person as defined in Section 6 of that Act. The fact of the claimant's disability is conceded by the respondents; and it is further conceded that since May 2016 the respondents have had sufficient knowledge of the claimant's disability for both Section 15 EqA (discrimination arising from disability) and Sections 20 and 21 (the duty on an employer to make adjustments) to be engaged.

4 For the purposes of these proceedings, on 27 October 2021 the claimant gave up notice to ACAS under the Early Conciliation procedure. The ACAS EC Certificate is dated 3 November 2021.

5 By a claim form presented to the tribunal on 24 November 2021, the claimant brought claims for unfair dismissal and disability discrimination. As originally presented there were four strands to the disability discrimination claim:

(a) A claim for direct discrimination - the sole act of discrimination being the decision to dismiss the claimant.
(b) A claim for discrimination arising from disability - again the sole act of discrimination is said to be the decision to dismiss the claimant. The matters arising from disability are said to be the claimant's need for ongoing treatment and for regular checkups with his Oncologist.
(c) A claim for a failure to make adjustments in the respondent in September 2020 having allowed its premises at Shenton Hall in Warwickshire to be used by another employee for the purposes of quarantine during the COVID-19 pandemic.
(d) A further claim for a failure to make adjustments arising from the claimant's need to attend medical appointments.

6 The claims at Paragraph 5(b) and 5(c) above were subsequently withdrawn by the claimant and accordingly dismissed. This panel is therefore considering the claim for unfair dismissal together with the claims for disability discrimination set out at Paragraphs 5(a) and 5(d) above. An agreed final List of Issues dated 12 May 2023 was included in our hearing bundle pages 105 – 107.

7 The hearing was conducted face-to-face at the tribunal hearing centre in Birmingham save that on the final day of attendance by the parties, Friday, 1 September 2023, when the evidence had been concluded, and the tribunal was to hear closing submissions, for convenience in the face of industrial action by rail workers, any individual wishing to attend remotely was permitted to do so. The second respondent, Mrs Boyland, and Mr Siddall attended remotely together with the tribunal members Mr Liburd and Mr McIntosh. The claimant, Mrs Horwell and Employment Judge Gaskell attended in person on that day.

The Evidence

8 The claimant gave evidence on his own account; he did not call any additional witnesses. The second respondent gave evidence on his own account and on account of the first respondent; and Mrs Boyland gave evidence on behalf of the respondents also.

9 We were provided with an agreed hearing bundle running to some 403 pages and in addition approximately 20 pages of documents were added to the bundle by the claimant at the start of the hearing. We have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing.

10 The claimant was an unsatisfactory witness. Mr Siddall referred us to the guidance to be found in the judgement of Lewisham J (as he then was) in the case of ***Painter -v- Hutchinson*** **[2007] EWHC 758 (Ch)** as to the proper approach we should take in the assessment of witness credibility. Mr Siddall provided 12 examples from what the claimant has said at various times as to why his evidence should be treated with extreme caution. The following are the examples which we find to be most relevant and pertinent as to why we found the claimant to be an unsatisfactory witness:

(a) From the outset of this case the claimant has confidently asserted that his redundancy was an entire sham - there was no redundancy situation (it is relevant that the claimant had professional representatives when he pleaded his case). But by the time the claimant provided his witness statement, his case appeared to be that he had been unfairly selected for redundancy rather than Mr and/or Mrs Lock who by then were employed as resident housekeepers at Shenton Hall. When questioned by Mr Siddall as to whether he accepted that there was a redundancy situation and was simply questioning his selection or whether he maintained that the redundancy was an entire sham, the claimant became evasive. He would not answer the question and his case was reduced to "*I felt that I should not have been made redundant*".

(b) The respondent had prepared a document setting out a summary of those employed at or in connection with Shenton Hall over the period since the claimant's recruitment. This document had been prepared from several hundred pages of employee records. Those records have been made available to the claimant who had been invited to agree the summary document so as to minimise the number of documents which need to be included in the tribunal bundle. The summary been agreed in advance of the hearing. However, as soon as information from the summary became inconvenient to the claimant's case he suggested it had not in fact been agreed. In the claimant's witness statement he suggested that for many weeks/months at a time he had been the only indoor employee at Shenton Hall. The summary indicated that this had been the case for one four-month period only - and that, during the COVID-19 lockdown in 2020.

(c) Following surgery in September 2020 related to his cancer treatment, the claimant had written an email stating that he "*felt blessed*" by the support and understanding he had received from the respondents. He could provide no coherent explanation as to why he felt that some 10 months later he should be discriminated against because of his cancer treatment.

(d) When the claimant joined Mr and Mrs Boyland in France in the summer of 2021, he had a valid airline ticket to return to the UK on 16 July 2021. The claimant had a medical appointment booked for 2 August 2021, and at the time those returning from mainland Europe were required to quarantine upon entry to the UK. Accordingly, in order to attend the appointment the claimant would need to return on 16 July 2021 flight. In the event, the claimant did not inform Mr Boyland of the appointment until after his airline ticket had expired. The respondent was therefore put to the expense of a fresh airline ticket to facilitate the claimant's return on 18 July 2021. The claimant provided no coherent explanation for his failure to inform Mr Boyland of the appointment or for his failure to utilise the airline ticket in his possession. During cross examination, for the very first time, the claimant suggested that he had been willing to finance his own return airline ticket.

(e) The claimant was repeatedly asked to identify any material differences in his position in September 2020 following his surgery when he stated that he felt blessed by his employers support and understanding, and his position in July 2021 when he alleged that his need to attend a medical appointment was a material influence in the decision to dismiss the claimant. He repeatedly avoided the question.

11 There was some important evidence upon which we found Mr and Mrs Boyland to be less than credible. This evidence related to the question of remedy. It is their case that any remedy to which the claimant may otherwise have been entitled should be reduced or eliminated because of his breach of contract in his failure to properly maintain the accommodation which was

provided for him close to Shenton Hall. Neither Mr or Mrs Boyland had inspected the property following the claimant's vacation of it, and the only evidence they produced were invoices showing the cost of re-carpeting using very high quality carpets. The respondents have had the benefit of legal advice from the outset but they did not call any witness who could give direct evidence as to the condition of the property, nor did they even produce any witness statements or inspection reports regarding this. There was no evidence to show that the property had been re-carpeted on a like-for-like basis, and no evidence to show that they had made any allowance for fair wear and tear over the six years of the claimant's employment. It only emerged during cross-examination that following the claimant's vacation of the property it had in fact been made available not to other employees but to the Boylands' daughter.

12 Notwithstanding that area of concern as to the Boylands' evidence, we nevertheless find that their accounts of the claimant's employment and of the events leading to his dismissal was more coherent than the account given by the claimant. The evidence they gave was consistent with each other; it did not evolve under cross-examination; and it was consistent with contemporaneous documents.

13 Accordingly, in relation to those events, where there is a clash of factual evidence between the claimant on the one hand and the Boylands on the other, we prefer the evidence of Mr and Mrs Boyland. It is on that basis that we have made our findings of fact.

The Facts

14 Although there are huge differences between the claimant and the Boylands as to their perceptions of what happened, the facts of the case can be very simply stated.

15 Mr and Mrs Boyland described themselves as an international professional couple; they are clearly very wealthy and at all times material to this claim they maintained homes in Warwickshire, London, Geneva, the south of France and Barbados.

16 The claimant's employment commenced on 21 September 2015. He was retained as Head of House/Head Butler & Valet and was based at Shenton Hall, the Boylands' Warwickshire property, which is a large house with 38 rooms. Although from the outset the claimant may have been required to travel with the Boylands and be present at their other homes from time to time, he was principally based at Shenton Hall. When he was recruited, his wife, Mrs Marianne Horwell, was also recruited. It is not in dispute that they were employed as a couple with responsibility for all aspects of housekeeping at the Hall.

17 In December 2016, some 15 months also after their employment commenced, Mrs Horwell resigned with immediate effect. The circumstances of Mrs Horwell's resignation are immaterial to this case. Fully recognising that they had been employed as a couple and that there would be significant difficulties in his fully complying with their duties alone, when Mrs Horwell resigned, the claimant offered his resignation.

18 Mr and Mrs Boyland did not accept the claimant's resignation - indeed they agreed to recruit (and to provide accommodation for) a replacement housekeeping couple. At the time of the claimant's dismissal this position was held by Mr and Mrs Lock. Instead of accepting the claimant's resignation, what happened was that the claimant's duties were significantly amended with greater emphasis on his role as Butler and Valet. Principally thereafter, claimant's duties involved him being with the Boylands wherever they were - including working in Geneva, the south of France, London and Barbados. The claimant was particularly involved at times when the Boylands were entertaining guests at any of their homes.

19 The Boylands were formally resident in Geneva and held joint Swiss and British citizenship. For tax reasons they could not spend more than 120 days per annum in the UK.

20 It is clear that the claimant was held in the highest regard. He was viewed by Mr Boyland as extremely talented in his ability to present a home and to serve the Boylands and their guests. We accept Mrs Boyland's evidence that her relationship with the claimant was beyond that of employer/employee or mistress/servant. They shared many interests and were very close. In his evidence, the claimant sought to downplay the closeness of this relationship even suggesting that it was impertinent of Mrs Boyland to telephone him and express her personal sympathies when it became necessary to have the claimant's pet dog put down. Our finding as to the closeness of this relationship is important as to the events which unfolded in the summer of 2021.

21 However, after Mrs Horwell's resignation, the claimant and Mrs Horwell remained resident in the accommodation provided to them near to Shenton Hall. And, when the claimant was not engaged in specific duties at one of the Boylands' other homes, then he would be at Shenton Hall. We have seen a number of emails from the claimant to Mr and Mrs Boyland in which he sets out in considerable detail the work he has performed at Shenton Hall almost on a daily basis. It is clear from this that the claimant did not have day-to-day duties to perform at the Hall. He agreed during cross-examination that he busied himself on high-end maintenance duties such as cleaning and polishing silverware. There is no doubt that the claimant was conscientious, and kept himself busy at

all times. But it is informative that he felt it necessary during his periods at Shenton Hall to provide such a detailed account of the work he was doing.

22 In May 2016 (before his wife's resignation and his own offer to resign), the claimant was diagnosed with an aggressive form of skin cancer. Since then he has required regular medical supervision and treatment including Oncologists' appointments. In September 2020, the claimant underwent surgery for the removal of a small tumour under his left armpit. It was following this procedure that he wrote the email stating how blessed he felt. The claimant was allowed as much time off as he needed for the purposes of his medical treatment and although a strict interpretation of his employment contract would not entitle him to be paid whilst off work he was always paid in full.

23 In September 2020 shortly before the claimant was due to have surgery, one of the Boylands' French employees visited the UK and was required to quarantine because of the risk of bringing the COVID-19 virus to the UK from mainland Europe. The Boylands permitted this employee to stay at Shenton Hall for the period of his quarantine. It is the claimant's case that allowing this was a breach of the respondents' duty towards him to make reasonable adjustments because he was placed at a particular disadvantage because of his impending surgery which would have been delayed had he tested positive for COVID. In the claimant's pleaded case, it was stated that the employee was permitted to quarantine whilst the claimant was in residence at Shenton Hall - in evidence, the claimant accepted that he was never in residence. He lived in his own home not far from the Hall. The claimant therefore modified his complaint to say that he was placed at risk by the French employee's presence because of the requirement for him to work at the Hall. Mrs Boyland's evidence, which we accept, is that the claimant was told that if he was uncomfortable by the French employee's presence he need not attend work during the period of the quarantine. We also accept the evidence of Mr and Mrs Boyland that Shenton Hall is a very large property and there really would be no difficulty in two individuals maintaining appropriate social distancing during the period of the quarantine. The claimant made no complaint at the time. The first time he articulated this complaint was when he provided further particulars of his claim in March 2022, 18 months after the events complained of.

24 In March 2021, the Housekeeper at the Boylands' London property was made redundant. The claimant took an active part in implementing the decision. The claimant accepted that the housekeeper's position in London was very similar to his own position at Shenton Hall which was identified a few months later. The claimant's only response was to suggest that the housekeeper's redundancy was also a sham redundancy. There is nothing to suggest that that housekeeper was in any way disabled.

25 A Cook employed at the Boylands' residence in France was also diagnosed with cancer. The claimant accepted that the Cook had been supported throughout her cancer treatment; she is now in remission; and remains in the Boylands' employment.

26 Whilst the UK was part of the EU, the claimant could work freely in France and in Switzerland (although Switzerland is not a member of the EU it has a bilateral agreement with the EU - there is no corresponding bilateral agreement between Switzerland and the UK). Following the UK's exit from the EU, the Boylands were advised that the claimant could not lawfully work in France or Switzerland.

27 We accept the Boylands' understanding that the claimant could lawfully work in Barbados albeit that he had been instructed to state, when entering Barbados, that the purpose of his visit was a vacation. Mr Boyland's evidence was that there were only three alternatives available when stating the purpose of the visit namely: vacation; on business; or visiting a relative. None of these was strictly accurate: but as the claimant was in service to a family which was on vacation, Mr Boyland's understanding was that this definition was the most appropriate.

28 In the 18 months or so prior to the claimant's dismissal there were three significant events which profoundly affected the claimant's relationship with Mr and Mrs Boyland and his ability to continue working for them as he had until then:

(a) Mr and Mrs Boyland were of advancing years (in their late 70s); their desire and ability to travel was inevitably diminishing; and they decided to put their Barbados home on the market for sale. They would no longer be visiting there for 3 to 4 months each winter. Because of the tax implications already identified, the fact that they would no longer visit Barbados would not mean they could spend any more time in the UK.
(b) The COVID-19 pandemic profoundly restricted their ability to travel even within Europe. It also affected the ability of the claimant and other members of their household to travel.
(c) On 31 December 2020, the UK formally exited the EU. Thereafter it was the Boylands' understanding on the basis of legal advice that the claimant as a British citizen could not lawfully work in the Boyland's homes in France or Switzerland.

29 Because of the matters set out in Paragraph 28, by the summer of 2021, Mr and Mrs Boyland had become concerned as to whether the claimant's continued employment with them was really viable. The Boylands had been in the UK for a short stay in September 2020, but since then they had not seen the claimant and he had not been working in his capacity as Head Butler or Valet

with them. They accept that he had been making himself busy around Shenton Hall. The Boylands decided to ask the claimant to visit them in France in the summer of 2021. It was their intention that his future employment would be discussed. They agreed that Mrs Boyland, being particularly close to the claimant, would conduct the discussions.

30 The claimant went to France on 16 June 2021. The Estate Manager at the Boylands' property in France had booked a return airline ticket for him to return on 16 July 2021. This was the claimant's first visit to France since the UK exited the EU. It is the Boylands' case that the claimant went to France as a tourist as it was not lawful for him to work in France. The claimant disputes this stating that he had gone there to work for the Boylands as in previous years. In our judgement, the claimant was uniquely in a position to adduce evidence before us as to the basis upon which he entered France in June 2021 - and he was well aware of the dispute between himself and the Boylands regarding this. But the claimant did not adduce such evidence. Reluctantly, under cross-examination, the claimant accepted that he had certainly not expressly sought a working visa for his visit. Be that as it may, it is common ground between the parties that whilst in France the claimant did some work for the Boylands although the extent of this is disputed, and the Boylands remain adamant that this was not the intended purpose of his visit. Before going to France, the claimant had given an indication to Mrs Boyland that he had no medical appointments booked in the UK prior to December 2021.

31 We accept Mrs Boyland's evidence that, between the claimant's arrival in France and 15 July 2021, she attempted on three or four occasions to initiate a discussion with him about his future employment. The claimant refused to engage: he became agitated even bordering on aggression whenever she raised subjects such as COVID, Brexit, or the Boylands' advancing age. The claimant disputes that any such conversation took place. He states that it is absurd to suggest that he could avoid any conversation with his employer; still less that he would become agitated or aggressive. It is in this regard that our findings with regard to the relationship between Mrs Boyland and the claimant is important. Put simply, because of the closeness of the relationship, Mrs Boyland found it extremely difficult to address the issue of the claimant's continued employment.

32 On 15 July 2021, Mrs Boyland was to attempt to further discussion with the claimant. However, she was concerned and anxious that he would become agitated and possibly aggressive as he had on previous occasions. For this reason, Mr Boyland accompanied his wife to the guesthouse where the claimant was staying. When she went to speak to the claimant, he remained in sight although not within hearing of the conversation. After a short time, it became evident that the claimant was very agitated and he was shouting. Mr Boyland joined the discussion and heard his wife attempting to explain the effects of

Brexit on the claimant's role. Mr Boyland intervened and stated bluntly "*I don't have a job for you in the UK, we are not there*…", he went on to say that in view of Brexit and COVID "*there was a possibility of redundancy*". The Boylands then left the guesthouse, as they walked back to their home they decided that the time had come to launch a formal redundancy consultation process.

33 The following day, the claimant asked to speak to Mr Boyland. At this meeting the claimant informed Mr Boyland for the first time of the medical appointment in the UK on 2 August 2021. As we have previously observed, we find it inexplicable that the claimant had not made reference to this earlier and that he had allowed his return airline ticket valid for that day to expire. In response, the Mr Boyland arranged for an airline ticket for the claimant to return to the UK on 18 July 2021. It is the claimant's case that Mr Boyland became angry when told of the medical appointment. Mr Boyland is adamant that his reaction was short of anger: but he admits to being exasperated by the claimant's behaviour. It was not the fact of the medical appointment which caused the exasperation but the fact that the claimant had not informed them earlier; had not used the return airline ticket which had been booked for him; and appeared to have lied to Mrs Boyland to the effect that is next medical appointment was not until December 2021.

34 On 17 July 2021, Mr Boyland wrote to the claimant formally initiating a redundancy consultation process. In this letter, Mr Boyland makes reference to the claimant's impending return to the UK to attend the medical appointment. It has been suggested that this indicates a possible link between the medical appointment and the decision to initiate the consultation. In our judgement, this connection is simply not made out. If the claimant had not been returning to the UK than the consultation process would have gone ahead with the claimant still in France.

35 In evidence the claimant is placed before us a series of WhatsApp messages passing between him and another employee. The claimant's purpose in producing this evidence was an attempt to demonstrate that the Boylands were unconcerned about the legality of working arrangements in France or Switzerland even to the extent of smuggling employees across the border. In fact, the WhatsApp messages do not demonstrate this at all. They do however demonstrate that, throughout his time in France in June/July 2021, the claimant was well aware of the possibility that he would be made redundant. We find that there were two sources for this awareness: the first was Mrs Boyland's repeated attempt to raise matters with the claimant - attempts with which he refused to engage; and the second would be his own assessment as to the viability of his ongoing employment in the light of the fact that he was not occupied full-time at Shenton Hall; that the Boyland's were giving up their Barbados residence; and that the claimant could no longer lawfully work for them in France or Switzerland.

36 There were two redundancy consultation meetings: it was necessary for these to be held by telephone as the claimant had unexpectedly returned to the UK for his medical appointment. The meetings took place on the 23 July 2021 and 28 July 2021. The conversations were covertly recorded by the claimant without Mr Boyland's knowledge or consent. The claimant has provided no coherent explanation for his failure to ask permission to make the recordings. It is clear that Mr Boyland explained that he and his wife had no intentions of returning to the UK in the foreseeable future; that they were giving up their home in Barbados; and that the claimant could no longer work for them in France and Switzerland. For this reason, it appeared that the claimant had no viable role in their employment.

37 In the second meeting, the claimant did ask why he was being made redundant rather than Mr and Mrs Lock. Mr Boyland fully explained that in his view the Locks carried out an entirely different function and that what they did was, as had once been the case for the claimant and his wife, a role which needed to be occupied by a couple. The claimant accepted this.

38 In fact, the claimant did not really challenge the reasons for his redundancy but felt that after his years of good service he should receive more by way of compensation than a statutory redundancy payment.

39 Following the second meeting, Mr Boyland wrote to the claimant advising him that he was dismissed by reason of redundancy with immediate effect. The claimant was paid in lieu of notice and during his notice period was allowed to remain in occupation of his accommodation.

40 Following the claimant's dismissal, Mr and Mrs Boyland were considering the future of Shenton Hall as they could not foresee a return there. It so happens that in August 2021 Mr and Mrs Lock were dismissed for misconduct. Had they not been dismissed in such circumstances, we accept the Boyland's evidence that it is likely that they too would have been made redundant. Thereafter Shenton Hall was mothballed until 2022.

41 Since the claimant's dismissal, the Boylands have not employed anyone in the role of Head Butler or Valet.

The Law

42 **The Equality Act 2010 (EqA)**

Section 15: Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if

(*a*) A treats B unfavourably because of something arising in consequence of B's disability, and
(*b*) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21: Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment.

(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123: Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period.
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

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

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

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

43 **The Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 139: Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

44 **Decided Cases – Application of Time Limits**

Robertson-v-Bexley Community Centre **[2003] IRLR 434 (CA)**

It is of importance to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule.

Adedeji-v-University Hospitals Birmingham NHS Foundation Trust **[2021] ICR D5 (CA)**

The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay.

45 **Decided Cases – The Duty to Make Adjustments**

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of [EqA] impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the

employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer, or
(b) the physical feature of the premises occupied by the employer, and
(c) the identity of non-disabled comparators, and
(d) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled.

46 **Decided Cases – Discrimination Arising from Disability**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts (or the something arising from disability) had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

47 **Decided Cases – The Burden of Proof**

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant’s evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

48 **Decided Case – The Reason for Dismissal**

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

49 **Decided cases relating to the creation of a pool for selection**.

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair.

Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

50 **Decided Cases relating to consultation and procedure**.

Williams and Others –v- Compair Maxam Limited **[1982] IRLR 83 (EAT)**
Polkey –v- AE Dayton Services Limited **[1987] IRLR 503 (HL)**
R –v- British Coal Corporation and anr ex parte Price **[1994] IRLR 72**
King and Others –v- Eaton Limited **[1996] IRLR 199 (CS)**
Graham –v- ABF Limited **[1986] IRLR 90 (EAT)**
Rolls-Royce Motor Cars Limited –v- Price **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will not normally act reasonably, unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment.
The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed.
Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.
If vague and subjective criteria are adopted for the redundancy selection there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

51 **Decided Cases – General test of fairness**

Iceland Frozen Foods Limited –v- Jones **[1982] IRLR 439 (EAT)**
Sainsbury's Supermarkets Ltd. –v- Hitt **[2003] IRLR 23 (CA)**

In applying the provisions of Section 98 (4) ERA the employment tribunal must consider the reasonableness of the employer's conduct, and not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to a given situation within which one employer might reasonably take one view, another quite reasonably take another. The function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band it is unfair.
The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee is fairly and reasonably dismissed.

The Claimant's Case

Failure to Make Adjustments

52 It is the claimant's case that the respondents operated the following PCP from August to September 2020 (this is taken from the agreed List of Issues):

> "*The requirement for other staff to quarantine at Shenton Hall whilst the Claimant was in residence"*

53 It is the claimant's case by reason of his suffering from cancer (and at that time awaiting surgery) he was placed at a substantial disadvantage by this PCP because the consequences for him would be particularly severe if the COVID-19 virus were introduced into Shenton Hall.

54 The adjustment contended for is that staff should have been required to quarantine at an alternative property.

Discrimination Arising from Disability

55 As is conceded by the respondent, the claimant contends that his dismissal was an act of unfavourable treatment.

56 It is the claimant's case that a significant contributory factor to the reason for his dismissal was his need for cancer treatment and/or regular checkups with his oncologist these were matters arising from his disability.

Unfair Dismissal

57 It is the claimant's case that there was no potentially fair reason for his dismissal. He does not accept that he was dismissed for redundancy. It is his case that the dismissal was a sham.

58 The claimant's response to the suggestion that it was now illegal for him to work in France or Switzerland was simply to state that it had always been illegal for him to work in Barbados (something which Mr and Mrs Boyland do not accept and upon which we have heard no evidence). He suggested that wealthy people often ignore the law and can find ways around it.

59 Although departing from the List of Issues, in his witness statement, and during the course of his evidence before us, the claimant appeared willing to accept that maybe there was a redundancy situation but that he was unfairly selected for redundancy rather than Mr and/or Mrs Lock.

The Respondents' Case

Failure to Make Adjustments

60 It is the respondent's case that the tribunal has no jurisdiction to consider the claim for a failure to make adjustments. This claim relates to a specific incident in September 2020: the claim was not presented to the tribunal in until March 2022 some 18 months after the incident complained of and well outside the three month time limit. It is the respondent's case that there is no basis upon which we could conclude that it was just and equitable to allow the claim to proceed out of time.

61 In any event the respondent contends that the PCP as pleaded by the claimant was never applied to him. As the claimant conceded during his evidence, he was never "*in residence*" at Shenton Hall.

62 Even if the tribunal were to permit an amendment to the pleaded PCP so as to refer to the claimant's attendance at Shenton Hall in the course of his employment, the respondent contends that the claimant cannot establish that even the amended PCP was applied to him because he was specifically told that he was not required to attend work during the relevant period in the week prior to his booked operation.

63 Finally, the respondent contends that the claimant cannot establish the disadvantage complained of. He was not required to go to the Hall at all during the relevant time; and in a building the size of Shenton Hall it was clearly possible to exercise appropriate social distancing.

Discrimination Arising from Disability

64 It is the respondent's case that it is clearly established on the evidence that the decision to at least consider the claimant's redundancy had been taken and was articulated on 15 July 2021 before the claimant made reference to the need to return to the UK for his medical appointment on 2 August 2021.

65 The respondents had been aware of the claimant's cancer diagnosis and of the need for regular treatment and checkups since May 2016. The claimant agreed that the respondents had fully supported him during his treatment and as recently as September 2020 he stated that he "*felt blessed*". The respondent's case is that it is utterly absurd to suggest that suddenly, in July 2021, five years post diagnosis, the respondents decided that they could no longer tolerate the claimant's illness or the need for treatment. The respondent also points to the

treatment of the French Cook with a cancer diagnosis; and the decision to dismiss the London Housekeeper who was not disabled.

Unfair Dismissal

66 It is the respondent's case that the claimant was dismissed in a genuine redundancy situation. The need for the services of a Head Butler/Valet had diminished because the Boylands were no longer intending to use their home in Barbados and the claimant could not legally work in France or Switzerland. The Boylands would certainly not be increasing and for the foreseeable future would be decreasing the amount of time they would spend in the UK.

67 The respondents contend that there was a meaningful consultation process which perhaps did not achieve what it could because the claimant failed to engage. It is suggested that the claimant's decision to covertly record the conversations is an indication that he was negatively predisposed to the discussions.

68 As to the claimant's selection for redundancy, Mr Boyland remains clear that Mr and Mrs Lock undertook quite different functions from the claimant and that would be wholly inappropriate to pool the claimant for consideration alongside them.

Discussion & Conclusions

The Failure to Make Adjustments

69 The claimant complains about a 10 day period in September 2020. Pursuant to the time limit set out in Section 123 EqA to bring such a claim in time it would be necessary for him to commence ACAS Early Conciliation by December 2020. The claimant did not commence ACAS Early Conciliation until September 2021 in respect of the second respondent and not until October 2021 in respect of the first. Accordingly, even by reference to the ACAS EC Certificates the claim has been presented some nine or 10 months late.

70 But further, when the claim form was originally presented this claim for failure to make adjustments is not discernible from it. It was not stated until the claimant provided further particulars of his claim in March 2022 - some 15 months late. During the relevant period the claimant had the benefit of legal advice and representation. He confirmed in evidence that the claim was presented in accordance with his instructions. It is clear to us therefore that the claim has been presented out of time. We will only have jurisdiction to hear it if we are satisfied that it is just and equitable to allow it to proceed.

71 No basis has emerged in evidence for us to conclude that it would be just and equitable to allow the claim to proceed out of time. The claim is quite distinct from the later alleged discrimination which did not occur until July 2021. Accordingly, our judgement is, that we have no jurisdiction to hear the claim for failure to make adjustments which is accordingly dismissed for want of jurisdiction.

72 For the sake of completeness however, we have considered that claim on its merits also. The PCP pleaded by the claimant was simply never applied to him - he accepted in evidence that he had never been in residence at Shenton Hall. Even if the PCP were modified to reflect Shenton Hall as his workplace only, the PCP would still not have been applied to him because he was not required to attend the Hall at the relevant time.

73 Finally, the claimant has not established the disadvantage about which he complains. He was not required to go to the Hall during the relevant period and in any event, the Hall is so large that it should have been quite possible for the two individuals to avoid contact with each other and maintain safe social distancing.

Discrimination Arising from Disability

74 In our judgement, the suggestion that the decision to dismiss the claimant was made because of the need for him to attend for medical treatment and checkups simply does not bear scrutiny. The respondents had been aware of the claimant's condition for over five years by the time of his dismissal. On the claimant's own account they had been supportive throughout. No credible reason has been advanced as to why there should be such a dramatic change of approach.

75 It would be sufficient to establish the claim if the fact of the claimant's medical appointment in August 2021 had played a material part in the decision taken in July 2021. Clearly the claimant's announcement of that appointment had caused annoyance and was contemporaneously closely linked to the redundancy process. But it is clear on the evidence that what had caused Mr Boyland's annoyance was not the fact of the claimant's medical appointment (indeed Mr Boyland is to be commended for the prompt response to being advised of the appointment and ensuring that the claimant was able to return to the UK in time to quarantine and attend the appointment). The annoyance was caused by the claimant's failure to mention the appointment at an earlier time and his failure to mention it in time to make use of the return airline ticket which had already been provided for him to return on 16 July 2021.

76 The claimant's position was under consideration before Mr Boyland was aware of the medical appointment, and indeed the possibility of redundancy had

been specifically referred to on the previous day 15 July 2021. Furthermore, the WhatsApp messages are such that we are satisfied that the claimant understood the position: because it was clear to him he could no longer be fully occupied and/or because of Mrs Boyland's efforts to discuss matters with during June/July 2021.

77 Accordingly, we are satisfied that the claimant's disability and the matters arising from it - namely the requirement for medical treatment and Oncologists' appointments played no part whatsoever in the decision to dismiss him. The claim for discrimination arising from disability is, in our judgement, without merit and is dismissed.

Unfair Dismissal

78 It is the claimant's case that there was no redundancy situation, that his alleged redundancy was a sham. But the circumstances leading to the decision that he was redundant are in our judgement clear and obvious. Since Mrs Horwell's resignation more than four years earlier, the claimant had not been occupied with duties specific to Shenton Hall - he been occupied with duties specific to Mr and Mrs Boyland. The need for someone to carry out those duties was diminishing by reason of the Boylands' age; their response to COVID; and their decision to give up their home in Barbados. The ability for the claimant to provide those duties to the Boylands was diminishing by reference to the fact that he could no longer work in France or Switzerland. It is difficult to see how this combination produces anything other than a classic redundancy situation.

79 This situation was, in our judgement, the sole reason for the claimant's dismissal. He was dismissed by reason of redundancy which is a potentially fair reason under the provisions of Section 98 ERA.

80 Consideration was given as to whether it was possible to modify the claimant's duties so as to keep him fully occupied at Shenton Hall. We are satisfied that Mr Boyland properly considered whether the claimant could be retained at the expense of Mr and Mrs Lock, but as the claimant recognised back in 2016 the housekeeping duties were carried out by the Locks as a couple and the claimant was not able to provide those duties alone. Following his wife's resignation, his duties had been modified at that time to his advantage. Mr Boyland was in our judgement entitled to find that there was no satisfactory way of modifying them back. The question of pooling with other employees is one for the employer to consider and provided proper consideration has been given it is not something with which the tribunal should interfere.

81 In our judgement, there was a satisfactory consultation process. It was not conducted as the Boylands would have wished because of the need for the

claimant to return to the UK for the medical appointment of which the Boylands were unaware until 16 July 2021. Nevertheless, it was conducted by telephone; the meetings were recorded by the claimant; we have had the opportunity to view the transcripts of the recordings; and our judgement is that a proper consultation process was undertaken.

82 Judged by the test of reasonable responses, we are satisfied that the decision to dismiss the claimant in the circumstances was fair. Accordingly the claimant's claim for unfair to is not well-founded and is dismissed.

83 Accordingly, and for these reasons, the claimant's claims are dismissed in their entirety.

84 Because of our decision with regard to liability in respect of all of the claims, it has been unnecessary for us to consider the powerful arguments made on behalf of the respondents with regard to remedy.

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Employment Judge Gaskell
15 September 2023