EMPLOYMENT TRIBUNALS

Claimant: M.Griffiths

Respondent: Britvic Soft Drinks Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL WITH WRITTEN REASONS

Heard at: Hybrid at Birmingham and via CVP

On: 6,7,8,9,14 (In Chambers) and 16 November 2023

Before: **Employment Judge Algazy KC**

Panel: **Mr I. Morrison**

Mr J.Kelly

Appearances

For the claimant: **in Person**

For the respondent: **Mr G. Anderson (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim for constructive unfair dismissal is unfounded and is dismissed.

2. The claim for direct disability discrimination is unfounded and is dismissed.

3. The claim for failure to make reasonable adjustments is unfounded and is dismissed.

4. The claim for harassment related to disability is unfounded and is dismissed.

Oral reasons having been given, the parties were reminded of Rule 62(3) of Schedule 1 of the 2013 Rules regarding written reasons not being produced unless requested and/or subsequently requested in accordance with Rule 62(3).

At the conclusion of the Hearing, this, and the fact that Written Reasons are published on the Employment Tribunal website, was explained to the Claimant who confirmed his request for Written Reasons which are duly set out below.

WRITTEN REASONS

INTRODUCTION

1. The Claimant was employed by the Respondent, latterly as a Shift Team Leader until his resignation on notice on 15 September 2022. He brings claims for constructive unfair dismissal and disability discrimination (direct, failure to make reasonable adjustments and harassment). The matters complained of arose during and following a period of sickness absence for work related stress.

2. The Claimant was not legally represented. In accordance with the Court of Appeal guidance in **Mensah v East Hertfordshire NHS Trust [1998] IRLR 531** and other appellate authority on the topic, the Tribunal sought to assist the Claimant, a litigant in person, with the Tribunal process throughout the proceedings. This included explaining the purpose and importance of cross-examination and even suggesting questions that might be put and the manner of putting them.

3. The Claimant had been unwell on day two of the hearing but returned on day three. Following enquiries made by the Tribunal, it was decided that the Claimant was not well enough to proceed on that day and the hearing was further adjourned for the Claimant to seek such medical evidence as he wished and in order for him to recover. On day 4 the Claimant attended without the benefit of any medical evidence but assured the Tribunal that he was fit and well enough to continue with the case. We proceeded on the basis of that assurance.

4. The Claimant gave evidence on his own behalf and called no other witnesses.

5. The Respondent was represented by Mr G Anderson of counsel and called two witnesses. They were Emma Hutchinson ('EH'), Production Unit Manager ('PUM') and Paramjeet Pahdi, (PP), Director of Operations.

6. There was an agreed bundle running to 235 pages, Numbers in these reasons in square brackets refer to that agreed bundle. The Respondent produced written closing submissions.

THE ISSUES

7. The issues in this case, subject to one minor agreed correction, were identified and reduced to a List of Issues ('LOI') following a Case Management Hearing before EJ Wedderspoon on 2 May 2023 . Reference to the Issues in these reason are references to the Issues and numbering in the LOI. A copy is annexed hereto [52-57]

CREDIBILITY

8. The Respondent made detailed and focussed submissions concerning the credibility of the claimant at paragraphs 22 to 28 of it's closing submission. In order not to overburden these reasons, we do not set out those matters in full.

9. We find considerable force in those submissions and accept them. They also coincide with the Tribunal's own assessment of the Claimants credibility.

10. One matter was of particular note, and it concerned the Claimant's position in respect of whether he had, in fact, seen a psychiatrist or a psychologist before his resignation and when he done so. It emerged for the first time in cross examination that he had consistently misled the Respondent about this issue. Indeed, the deception extended to Occupational Health ('OH'), to whom he reported having had 3 sessions of talking therapies, and even to his sister. In his evidence to the Tribunal, he initially insisted that he had seen a psychologist before he resigned but that it had taken a little while to set up and he had to wait until July for an appointment. Indeed, he was 'certain' that there were 3 telephone consultations, and they were all prior to his resignation and after 5 July 2022.

That evidence was retracted within minutes of it being given, the Claimant explaining that he had totally mixed up the dates and that it was the following year that he had seen a psychologist.

11. This did not reflect well on the Claimant as a witness of truth before the Tribunal, nor as an accurate historian of events.

12. The Respondent concluded its observations on the Claimant's credibility with this submission on the Claimant's evidence:

> *'29 C's evidence was signally unimpressive. For the reasons set out above, it ought not to be accepted without external corroboration.'*

13. With regard to the witnesses called by the Respondent, their evidence was clear and compelling and was not shaken in any material way in cross examination by the Claimant. The Tribunal took particular care to remind the Claimant on a number of occasions of the significance and importance of cross examination. After the Claimant had indicated that he had finished his questioning of each of the Respondent's witnesses, the Tribunal invited the Claimant to reconsider and to ensure that he had really asked all the questions that he wanted to and that he had made appropriate challenges.

14. In consequence we approached the evidence of the Claimant with considerable caution where it was unsupported by contemporaneous documentation. However, the Tribunal considered each conflict of facts or disputed factual issue on its own merits and did not adopt a blanket approach to the evidence of the parties.

THE FACTS

15. The Claimant's employment with Britvic commenced on 12 October 2013 when he was employed as a Technical Operator [98 - 101]. More recently he was employed as a Shift Team Leader in the Canning department which was a managerial role. MG had line management responsibility for two production lines and had nine colleagues directly reporting into him. Originally, he was responsible for production lines 7 and 15 and reported to Tony Downes ("TD") who was the Canning Production Unit Manager. In April 2022, MG moved to Red Shift working on Lines 8 and 9 and reported to EH.

16. In an email addressed to Lee Davies ('LD') and copied to EH dated 2 May 2022, [106] MG indicated that he was commencing a period of sickness absence. The email included the following passages:

> *'So after our (your) conversation I have thought about it and because of my constant hate of the job, I am asking that you do something immediately please − I've spent today contemplating if I am able to do*

the job I am paid to do, and the answer is "No"!!
So to cut a long story short, you see me as a Filler Op and I don't agree − I'm going to take some time off due to "hating" what I'm employed to do − I think they call it stress − I will get a Fit Note to Emma when my Surgery Opens tomorrow.
Sorry, but everything's gotten out of hand and until you (and possibly Paramjit) realise you're paying overtime rates rather than normal rates for the number of staff we require, then it's all a waste of time!!
This is so fucked up and I can't do it anymore, Sorry!'

17. The Respondent did not immediately hear from the Claimant following this email. They had contacted his next of kin and also spoken to his colleague and friend, Brian Conaboy, to check on his wellbeing. On 6 May 2022, MG sent an email to LD [105] in which he advised that he did not want to receive emails from anyone other than HR going forward. Thereafter Estelle Wilson, Employee Relations Manager, tried to communicate with MG about his sickness absence [104-105].

18. On 10 May 2022, the Claimant emailed Estelle telling her that his doctor had advised him not to speak to anyone from Britvic and therefore Britvic should not expect any communications from him until he had had a consultation with his psychiatrist the following week [104]. He attached a copy of a fit note from his GP to his email, signing him off work until 8 June 2022 with "stress and anxiety – work related" [88]. There was no evidence of any appointment with a psychiatrist, or a psychologist, presented to the Tribunal.

19. The stance adopted by the Claimant impacted on the Respondent's ability to arrange an Occupational Health appointment. One was arranged for 17 June 2022. However, MG failed to attend the appointment on that date, so a further appointment was made for 27 June 2022.

20. Health Partners (Britvic's occupational health providers) undertook a telephone assessment of MG on 27 June 2022 and produced a medical report the same day [107 -109]. The OH report included these observations:

    - MG felt that difficulties in the workplace had had a detrimental impact on his health;
    - MG's perceptions of his employment circumstances appeared to be driving his illness;
    - MG was fit to work his contractual hours but might benefit from a phased return; however
    - MG had declined that suggestion as he felt he should be returning to a role other than the shift team leader role in which case he would be able to undertake his full contractual hours with immediate effect
    - MG was unlikely to be disabled within the meaning of the EqA 2010.

21. MG called EH on 6 July 2022 stating he wanted to return to work on 21 July 2022 as a Shift team Leader on Red Shift. EH took a note of the call [122]. In the call, MG made a number of untrue references to having spoken to and received advice from a psychologist . One such remark was *"my psychologist has said not to go back on days, but to start on 21 July nights, still on red shift as team leader."*

22. EH wrote to MG the same day inviting the claimant to a Medical Management Meeting ('MMM') on 14 July 2022. Thereafter, a series of MMMs were held with the Claimant.

23. The first MMM was held on 14 July 2022, as arranged, and was attended by EH and LD [111]. MG said that he was *"back to normal - wanting to go to work, enjoying work and ready"* and that his anxiety and stress had been caused by the fact that he was selling his house and renting a flat at the same time. He also said that the psychologist had agreed that the *"root cause was more than likely down to doing nothing about the house and blaming everything on work because I did not want to blame myself. Also advised not to return to work on a day shift but to return on nights".*

24. The next day, the Claimant produced a timeline of relevant events [119A] which perpetuated the story that he had actually seen a psychologist. The dates given were 6 and 10 May 2022 and 5 July and MG gave detail about the contents of the conversations that had allegedly taken place.

25. The next MMM was on 19 July 2022 and MG took EH through his timeline. MG explained that he had been prescribed diazepam by his GP at the end of May 2022 but that he had stopped taking it after a week and it was making him sick and that he had not been on any other form of medication since then. There was no reference to this in the medical evidence placed before the Tribunal.

26. MG confirmed that he felt very positive about returning to work in the Shift Team Leader role and he said he would carry out his duties to the best of his ability. EH asked MG to confirm what he wanted to do given previous indications that he wanted a change of role (see Paragraph 26 of EH's W/S). MG said that he would retract those statements if he could and that they were made when his mind-set was not right.

27. It was at this meeting that EH raised 3 particular concerns regarding the Claimant's management of Red Shift. These matters had come to light during MG's sickness absence. As EH put it, *'Although I cannot stop you returning as STL in canning, your absence has allowed me to deep dive into red shift, here are some of my concerns'* [117]
    Those concerns were

    a. quality investigations had not been completed or followed up

b. absence and medical management processed had not been followed in the case of MG's direct reports;

c. 1-2-1s and performance check-ins had not been completed.

28. On the first day of the Hearing, in answering questions from a member of the Tribunal panel, MG suggested that such a discussion had not taken place on 19 July 2022. Rather, that had been on the 29 July 2022. This had not been raised earlier when the Claimant was being cross-examined. The Claimant resiled from that position when he resumed his evidence 3 days later stating that he now couldn't be sure about the date.

29. The Claimant accepted the validity of the concern at point c, regarding the 1-2-1s but challenged the correctness of points a and b. However, he accepted in cross-examination that he didn't raise objection to those 2 other complaints at the time that the Performance Improvement Plan ('PIP') was being implemented, nor in his grievance or indeed at any other time.

30. According to EH, whose evidence we accept, TD had discussed the possibility of MG being placed on a PIP earlier in 2022 in the course of his management of MG for similar reasons, but the PIP had not proceeded at that juncture [155-156].

31. There was a further reconvened MMM on 29 July 2022. EH offered MG the option of returning to his previous role with a PIP to support him in returning or taking a Technical Operator role. MG chose to return to his role with the PIP and also declined the offer of a phased return [118]. The notes [119] record the following exchanges:

'EH Since our last Medical Management meeting, have you thought about what shift too along with role?

MG I feel from speaking with Brian (Blue Shift Team Leader) and Niall (yellow shift team leader), that it would be best to be on these shifts due to Brian off for an operation and Niall leaving the business

EH I understand you reason to support the department but I would like to understand what is best for you so we can support you?

MG I would be happy to join any shift, as I have been on all shifts before. I would like to join yellow

EH Thank you, this will be the shift and will provide a fresh start for you in your role as a Team Leader. However, as you manager I would like to ask you to return on days so I can ensure that you are ok and have more readily available support if/when required.

……

EH Throughout your return the following actions will be put in place:

- *Blockly check- ins to ensure you have the correct support*
- *121 schedule with myself to be defined*
- *Performance improvement plan (PIP) to start on 12th August*

Do you understand why these actions are in place?

MG yes'

32. MG returned to work on 2 August 2022 in line with the agreed return to work plan but had still not completed the stress risk assessment given to him on 29 July 2022. MG completed the assessment on 4 August 2022 and was reviewed by EH to document the required actions. This is recorded in an email dated 7 August 2022 [123]

33. When completing the stress risk assessment, MG said that he felt that a second Shift Team Leader was required on all shifts. EH confirmed to MG that Britvic did not have the headcount resource to allocate a second Shift Team Leader (all four shifts in the Canning department had only one team leader) but said that recruitment was continuing, and that he would be kept updated. As an interim measure, full overtime was approved to support Red Shift wherever possible, with the pool of cover being from other Team Leaders in wider units (Production, Manufacturing and Raw Materials), including Production Unit Managers, with a large amount of cover being provided by EH and TD. This necessitated EH working weekends when she was not ordinarily due to work.

34. On 12 August 2022, EH and MG sat down to discuss the implementation of the PIP as agreed. The PIP is documented in a dedicated form [124-131] and records in a table the three areas in which MG needed to show some improvement, the actions he agreed he would take, when he would do so, and the support he said he needed.

35. On 25 August 2022 MG raised a grievance [132]. It stated:

'*I would like to raise a grievance against Lee Davies and Emma Hutchinson:*
The reason- not following company policy procedures'

36. The grievance essentially took a procedural point based on the correct application of the PIP.

Nothing was said about:

- the reasons for the implementation of the PIP;or
- Any concerns surrounding the presence of one Shift Team Leader only on shift

37. The grievance ends with these words:

> "*Not happy at all with this and they're lucky I'm in a stable state of mind to continue working for Britvic – I'm sure the papers would love this if it goes belly up for me*!".

38. PP, the Respondent's Director of Operations) was appointed to deal with C's grievance. In order to investigate and consider the Claimant's grievance, PP Interviews:

- MG on 2 September 2022 [136]
- EH on 9 September 2022 [150]
- LD on 9 September 2022 [144]
- TD on 12 September 2022 [155]

39. In his interview with PP, MG indicated that he had applied for another post with the Respondent:

> *"MG: I am not sure if you are aware but I have applied for the Raw Materials TL job?*
>
> *PP: why is that then? Is it because you don't want to work with EH/LD or because you want to work in Raw Materials?*
>
> *MG: Both really – I don't want to work with them – but I will if I have to – but I wouldn't be happy. With the EWM stuff – I think in raw mats I would learn a lot, I really would – I love that kind of stuff – I know if I leave production, that I can still help them out if they need me to, I wouldn't be gone."*

40. By a letter dated 14 September 2022, PP wrote to the Claimant with the outcome to his grievance [158-160]. The grievance was not upheld, and the letter notified the Claimant of his right to appeal.

41. The Claimant did not avail himself of the right to appeal and instead resigned the next day,15 September 2022, giving four weeks' notice. The one-page resignation letter [162] raised a number of matters which the claimant alleged constituted repeated repudiatory breaches of contract:

(i) A failure to follow company policies when issuing him with a PIP which led to him being sent home due to stress and anxiety;

(ii) An insufficiency of Shift Team Leaders at the Rugby site which meant he was expected to do the job of two people; and

(iii) The fact that his grievance had not been upheld.

42. In his witness statement at paragraph 41, the Claimant puts the matter this way as regards the grievance outcome:

> *'The main points ("deep dive" whilst off with work related stress/anxiety and no conclusive evidence I had done anything) of the initial grievance had not even been addressed in the outcome letter'*

43. The grievance letter had, however, put the emphasis on the grievance not being upheld:

> '*As you have not upheld my grievance, I now consider that my position at Britvic Soft Drinks Limited is untenable and my working conditions intolerable, leaving me no option but to resign in response to your breach'*

44. There is no reference to any complaint of disability discrimination being raised.

45. The Claimant's employment terminated on 13 October 2022 and the Claimant issued his claim on 11th November 2022 following ACAS conciliation between 14 October 2022 and 3 November 2022.

THE LAW

Constructive Dismissal

46. The statutory definition of what is known as constructive dismissal is contained in Section 95(1)(c) of the Employment Rights Act 1996 ("ERA").

> **"(1) For the purposes of this Part an employee is dismissed if (and, subject to subsection (2) … only if) –**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct**".

47. The law in this area is well-established. Lord Denning in **Western Excavating v. Sharp [1978] ICR 221** said this:-

> "**If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."**

Sharp also decided that post breach affirmation is not consistent with a constructive dismissal claim. An employee:

> **"….must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".**

48. The test is an objective one:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

Per Lord Nicholls in **Malik v Bank of Credit and Commerce International S.A [1998] AC 20 @35C**

49. The resignation needs to be, at least in part, in response to the employer's fundamental breaches - See **Meikle v Nottinghamshire CC [2005] ICR.**

50. **Omilaju v. Waltham Forest London Borough Council** [2005] ICR 481 provides guidance on so called "Final Straw" cases:

- The final straw may be relatively insignificant, but should not be utterly trivial
- It should contribute something to the cumulative breach
- If the final straw is unreasonable, but unrelated to the cumulative breach, then it may not be relied upon
- If the final straw does not contribute to an earlier breach, then the Tribunal need conduct no further examination of the claim; the claim will fail
- An entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer; the test of whether the employee's trust and confidence has been undermined is objective.

51. Underhill L.J. suggested the following approach in **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1

“In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?”

The Statutory Test for disability

52. Section 6(1) of the Equality Act 2010 (‘EqA”) provides that:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

53. The statutory test is augmented by Schedule 1 EqA 2010 and the EqA Guidance, ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (‘**the Guidance’) .** This should be considered by the tribunal insofar as it appears to it to be relevant – see paragraph 12 of Schedule 1 to the EqA.

54. The guidance includes:

Paragraph A5:

> *A disability can arise from a wide range of impairments which can be:*
> *……*
> *• mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;*
>
> *• mental illnesses, such as depression and schizophrenia;*

Paragraph A7:

> *It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.*
> *…..*
> *What it is important to consider is the effect of an impairment, not its cause….*

55. The statutory test breaks down into four conditions per **Goodwin v Patent Office** [1999] ICR 302 at p308:

    a. **The impairment condition:** Does the Claimant have an impairment which is either mental or physical?

    b. **The adverse effect condition**: Does the impairment affect the Claimant's ability to carry out normal day-to-day activities and does it have an adverse effect?

    c. **The substantial condition**: Is the adverse effect (upon the Claimant's ability) substantial?

    d. **The long-term condition**: Is the adverse effect (upon the Claimant's ability) long term?

56. The Tribunal should be aware of the risk that disaggregation should not take one's eye off the whole picture - See **Goodwin** at p308.

The Correct Approach

57. The foundation of a proper analysis is the identification of the day-to-day activities, including work activities, that the Claimant could not do, or could only do with difficulty: **Elliott v Dorset County Council** UKEAT/0197/20/LA(V) at [82].

58. In respect of the importance of following a systematic analysis, the Tribunal also had regard to **J v DLA Piper** [2010] ICR 1052 and the passages highlighted by the Respondent in closing submissions:

> **'39…. The distinction between impairment and the effect is built into the structure of the Act, not only in section 1 (1) itself, but in the way in which its provisions are glossed in Schedule 1. It is also reflected in the structure of the Guidance and in the analysis adopted in the various leading cases to which we have referred, which have continued to be applied following the repeal of paragraph 1 (1) of Schedule 1 (see, e.g. the decision of this tribunal (Langstaff J presiding) in Ministry of Defence v Hay (2008, ICR 1247: see Paras 36 to 38 (at pages 1255 – 1256)). … Both this tribunal and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is too often confusion and error.'**
>
> **…….**
>
> ***"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act*. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—"adverse life events*". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians (…) and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress".***

The impairment condition

59. We were taken to **RBS plc v Morris** UKEAT/0436/10/MAA, 12 March 2012, in which Underhill P (as he then was) dealt with the question of disability in mental health cases:

> '**55. The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression**….'

The adverse effect condition

60. Section D of the guidance provides illustrative examples what might be considered day to day activities.

The substantial condition

61. The substantial condition is defined in section 212(1) of the EqA. It requires that the interference with the Claimant's abilities be **"more than minor or trivial".**

The long term condition

62. EqA Schedule 1, paragraph 2 provides that a long-term effect of an impairment is one:
    - which has lasted at least 12 months; or
    - where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
    - which is likely to last for the rest of the life of the person affected

63. In considering the question of whether the effects are at a certain point in time "likely to last a year or more" the Tribunal must interpret "likely" as meaning "could well happen **- SCA Packaging Ltd v Boyle** [2009] ICR 1056. The question needs to be asked at the date of the discriminatory act and not the date of the hearing of the Tribunal - **All Answers v W** [2021] IRLR 612 at paragraph 26.

Burden of proof and the "reason why"

64. Guidance given by the EAT in **Barton v. Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 352,** as developed and refined by the Court of Appeal in **Igen Ltd v. Wong and others [2005] IRLR 258** & **Madarassy v. Nomura International plc [2007] IRLR 246**, suggests that the burden of proof in a discrimination claim falls into two parts.

65. However, Underhill J. (as he then was) said this in **A Gay v Sophos plc UKEAT/0452/10/LA:**

> **27 "It is now very well-established that a tribunal is not obliged to follow the two-stage approach: see Laing v Manchester City Council [2007] ICR 1519 , at paras. 71-77 (pp. 1532–3) (approved in Madarassy). If it makes a positive finding that the acts complained of were motivated by other considerations to the exclusion of the proscribed factor, that necessarily means that the burden of proof, even if it had transferred, has been discharged."**

66. The President of the EAT, as she then was, Simler J. opined in **Pnaiser v. NHS England and another [2016] IRLR 170:**

> **38 "Although it can be helpful in some cases for tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible"**

Reasonable adjustments- SS 20 & 21 EqA

67. Section 20 EqA 2010 provides insofar as is material:

> **"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.**
> …
> (5) **The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

68. Paragraph 20 of Schedule 8 of the EqA 2010 provides:

> **"20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **(a)in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
>
> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

69. According to Section 212(1) EqA '**substantial'** means more than trivial. This is a question of fact to be assessed on an objective basis and is not a high threshold to satisfy.

70. The Claimant is required to establish a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has not been complied with.

71. An employer has a defence to a claim for breach of the statutory duty (and, in fact, is relieved of any legal obligation to make reasonable adjustments) if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP.

72. That proposition has to be considered against the backdrop of paragraph 6.19 of the EHRC Employment Code:

> "**For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to**

be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment."

73. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment - **Royal Bank of Scotland v Ashton UKEAT/0542/09/LA & 0306/10/LA** per Mr. Justice Langstaff at paragraph 24.

74. In **Ishola v Transport for London [2020] EWCA Civ 112,** the Court of Appeal decided that a "provision, criterion or practice" under the Equality Act 2010 can only be established where there is some form of continuum in the sense of how things generally are or will be done by the employer. Though this will apply to some one-off acts in the course of dealings with an individual employee, it will not apply to one-off acts where there is no indication that the same decision would apply in future.

75. The court held that if an employee is unable to make out a claim for direct discrimination or discrimination arising from disability related to an act or decision of the employer, it would be artificial and wrong to convert the employer's act or decision into the application of a discriminatory PCP. This was not the aim of the reasonable adjustments or indirect discrimination legislation.

76. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. Though the Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission (which courts and tribunals are obliged to take into account in any case in which it appears to be relevant) confirms that these words should be construed widely, it is nevertheless significant that Parliament chose these words specifically and did not choose "act" or "decision" instead.

77. **Project Management Institute v Latif** [2007] IRLR 579 paragraph 54 is authority for the proposition that an employee must also raise facts from which it could be reasonably inferred the duty has been breached and "**there must be evidence of some apparently reasonable adjustment which could be made**"

Harassment related to disability

78. Insofar as is material section 26 EqA provides:

"26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
….
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

79. There are three essential elements of a harassment claim under S.26(1):

•unwanted conduct
•that has the proscribed purpose or effect, and
•which relates to a relevant protected characteristic.

See **Richmond Pharmacology v Dhaliwal** [2009]ICR 724, EAT

80. The following propositions emerge from the Authorities and commentary in this area:

a. Decisions relating to work can amount to 'unwanted conduct'- **Prospects for People with Learning Difficulties v Harris UKEAT/0612/11.**

b. 'Unwanted conduct' can take place even when the claimant is not present - IDS Employment Law Handbooks, Volume 5, Chapter 18 notes 3 first instance examples**: Mussilhy v Currie Motors UK Ltd ET Case No.2375566/11, Gardner v Tenon Engineering Ltd ET Case No.2374878/11, Dawkins v Benham Publishing Ltd and ors ET Case No.2401159/12.**

c. Unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour'. Unwanted is essentially the same as 'unwelcome' or 'uninvited' – See paragraphs 7.7 and 7.8 of the Equality and Human Rights Commission's Code of Practice on Employment.

d. The context in which a remark is given is always highly material. **See Grant v H. M. Land Registry [2011] EWCA 769** & **Heafield v Times Newspaper Ltd. UKEATPA/1305/12/BA.**

e. The EAT in **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor** [2020] IRLR 495 held at paragraph 25:

> **"Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."**

CONCLUSIONS

Disability

81. The time frame that concerns the Tribunal is the period shortly before the Claimant's return from sickness absence to the rejection of his grievance. Taking the most generous interpretation, that is from around 19 July 2022 to 14 September 2022. It is for the Claimant to establish a relevant disability. It may not always be necessary to adduce expert medical evidence- "**There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment"** see **Morris** (op cit). However, if there is little or none, the evidence that is relied on by a Claimant must be cogent and credible.

82. What then is the evidence before this Tribunal on the contested issue of disability? The Claimant has produced his GP records or at least a selection of those records [92-96]. He has chosen to adduce 4 pages of what is a 28-page document. The earliest substantive entry is 22 October 2023 [96]. However, the first page identifies "**Problems"** under 3 headings **'Active', 'Significant Past' and 'Minor Past'** and goes back to 1963. There is a complete absence of any entry that assists the Claimant in establishing any kind of mental impairment.

83. There were some other potentially relevant documents which the Claimant did not refer to in his evidence or submissions but the Tribunal considered all the

available evidence. There is a GP letter dated 8 February 2023 which the Claimant did not refer to in his evidence. It contains these paragraphs:

> *'I can confirm that he has not suffered with any anxiety problems prior to May 2022 when his anxiety started through work related problems.*
>
> *He then had a period off work on returning he discovered his company were assessing his performance, which led to him resigning from his position through stress and anxiety this had caused.*
>
> *He is being referred to a counsellor phycologist and has been prescribed medication Propranolol 40mg once daily to help him with his anxiety now'*

The May 2022 reference is not reflected in the contemporaneous GP records.

84. There is a 2-page record of telephone consultations with a person described as 'primary care mental health liaison worker' in July 2023 [97C – 97D]. We do not find that this assists us in deciding the issue of disability at the relevant time. The Claimant did not seek to rely on any particular passages in support of the disability issue. Insofar as it makes reference to mental health difficulties going back to the Claimant's divorce 8-9 years ago, this would appear to contradict the GP letter cited above which expressly states that MG did have any anxiety problems before May 2022.

85. We turn to consider the Claimant's witness statement. Here too there is a dearth of any evidence that goes to supporting any of the four conditions necessary (per **Goodwin**) to prove a relevant disability.

86. There is potentially some evidence in respect of the **Goodwin** criteria which comes from another document which the Tribunal took into account, namely an undated Mental Health Statement [97A – 97B] produced by MG at some point between 28 July 2023 and 22 August 2023 (see last paragraph).

Conclusion on disability

87. We consider firstly, the impairment condition. We conclude that there is no evidence, or at the very least no convincing evidence, that the Clamant had a mental impairment at the relevant time. This is for two principal reasons. Firstly, in the circumstances of this case and in light of our conclusions on the credibility of the Claimant, we are not prepared to accept the Claimant's uncorroborated account of his condition at the material time insofar as it has actually been described at all. The medical evidence adduced is not supportive of his claims. Secondly even taking the totality of the evidence in the round and at face value, we do not accept that the Claimant has come close to establishing a mental impairment within the meaning of the EqA 2010. Rather the evidence points to

symptoms caused by adverse life events. For those reasons and for the additional reasons set out in the closing submission of the Respondent at paragraphs 37 and 38, which we do not repeat here, we reject the Claimant's case on the disability issue.

88. For the sake of completeness, based on our findings of fact, we would have rejected the Claimant's case on disability in any event as he has not established long term substantial adverse effect.

89. Furthermore, the facts do not give rise to a conclusion that, in respect of the relevant period, the Respondent either knew or ought to have known that the Claimant had a mental impairment and that such impairment had a substantial adverse effect on his ability to carry out day-to-day activities which would last 12 months or longer.

Constructive unfair dismissal

90. We turn our attention to this claim next given that it is relied on in respect of the direct discrimination and harassment claims.

91. **Issue 2.1.1.1: Held the claimant responsible for errors/underperformance without investigation as to who was responsible**.

We reject this contention on the facts. There was an investigation by EH, the so called "Deep Dive". Indeed, a consistent theme advanced by the Claimant was that he was singled out for investigation though that was roundly rejected by EH in her witness statement and her oral testimony. In answer to a question from the Panel, she explained what she meant by the expression she said:

> *"We do this for all shifts - data and updates on MY HR- the absence and recording system – we would do this across all shifts as a part of regular management oversight role- I'd say typically weekly- I personally do it weekly as well as my peers"*

EH was clear about which issues could be laid directly at MG's door and those she was uncertain about – see paragraph 41 of her witness statement.

92. **Issue 2.1.1.2: Placed the claimant on a PIP without good reason**

We again reject this allegation on the facts. The Tribunal finds that the Respondent held genuine concerns surrounding the Claimant's performance that amply justified placing the Claimant on a PIP. The Claimant accepted that one of the concerns identified by EH at the 19 July 2022 MMM was well founded and he never challenged the appropriateness or fairness of the other 2 matters raised on that occasion as reasons for placing him on the PIP. Furthermore, In the MMM on

29 July 2022, MG said that he understood why the various measures attendant to his return to work were being put in place, including the PIP [118].

93. **Issue 2.1.1.3: Failed to warn the claimant about underperformance prior to placing him on a PIP contrary to company procedures**

This allegation has not been made out. The evidence of EH, which we accept, was that she was told by TD that he had discussed performance issues when he was the Claimant's manager. TD himself confirmed the fact of such discussions in his interview with PP as part of the Claimant's grievance – see [156]. In addition, there was the MMM on 19 July 2022 during which such performance matters were discussed. Finally, we reject the approach that the Claimant sought to adopt with regard to the PIP policy as imposing some sort of preliminary barrier to imposing a PIP. We accept the Respondent's submission on this aspect of the claim at paragraphs 49 - 53. We also note that in his cross-examination of EH, the Claimant was putting to her that she had failed to follow policy by not giving him a preliminary time frame in which to improve – that "requirement" simply does not appear in the PIP policy.

94. **Issue 2.1.1.4: Returned the claimant to the yellow shift where he was responsible for 4 canning lines following his absence from work due to stress**

As we have set out above, at the MMM on 29 July 2023, the Claimant specifically chose to return to the yellow shift notwithstanding entreaties by the Respondent that he consider what was best for him rather than the company [118-119]. This was in spite of the fact that he knew that the existing Shift Team Leader was leaving. MG chose to return to his role with the PIP and also declined the offered of a phased return. In fact, he spent two blocks on Blue Shift together with the relevant Shift Team Leader.

95. **Issue 2.1.1.5: Failed to provide the claimant with any support (namely another person) upon his return to work following an absence from work due to stress**

Insofar as this allegation seeks to go beyond the suggestion of failing to provide another person on the Claimant's shift ('any support"), we reject it – see e.g. paragraph 42 of EH's witness statement.

96. It is correct that the Respondent was down one Shift Team Leader. However, that must be seen against the background that:

- There were occasions prior to his going off sick when MG would be the sole STL
- MG's preference was for night shifts even though some support was available from PUMs on day shift

- The Respondent was actively recruiting

This was not a willful "failure" on the part of the Respondent targeting the Claimant.

97. **Issue 2.1.1.6: The operations director failed to address the claimant's main concerns during the grievance process**

It is plain on the face of the grievance [132] that the principal concern advanced was a straightforward procedural issue. We also observe that, as a matter of fact, this complaint is not advanced in the Claimant's resignation letter which relies rather on the fact that the grievance was not upheld.

98. PP was cross examined about the 2 issues he complains of at paragraph 41 of his witness statement - *"deep dive" whilst off with work related stress/anxiety and no conclusive evidence I had done anything"*

99. PP pointed out that he made a number of references relevant to his finding that the Claimant had not been singled out or bullied in respect of the investigation e.g. bullets 1 and 3 on [158] and bullets 1 and 2 on [159]. The Claimant's response to those answers were that the specific words "deep dive" were not referenced. We cannot agree that the absence of those words diminishes in any way PP's specific findings that MG was not targeted by EH or LD.

100. In respect of the lack of reference to the alleged lack of conclusive evidence of wrongdoing, this was linked to the issue of the singling out of MG for the deep dive. It is difficult to see how this can be said to emerge as a freestanding "main concern" from the most generous interpretation of the grievance interview PP held with the Claimant [136-143]. In any event, even if PP was appraised that this was a significant concern for the Claimant, PP said this in his evidence to the Tribunal in cross examination as to whether he had asked for proof of underperformance issues:

> *"As Director I am aware of performance Issues re individual shifts and individual performance issues- So I am aware where I see opportunities or under performance*
> *So It is easy for me to see on a top line level"*

Conclusion on Constructive Unfair Dismissal

101. We have found that the allegations on which the alleged breach of the duty of trust and confidence have not been made out save in the very limited sense as set out above in our findings of fact and our conclusions in respect of the issues. We find that the Respondent has not behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. It had reasonable and proper cause for its conduct.

There was no repudiatory breach by the Respondent. The claim for constructive dismissal fails.

102. We further determine that Issue 2.1.1.6, to the extent that it is established, falls to be considered as an entirely innocuous act on the part of the Respondent. This is so even if the Claimant genuinely, but mistakenly, interprets the act as hurtful and destructive of trust and confidence. The test of whether the employee's trust and confidence has been undermined is always objective.

103. We therefore find that the Claimant had affirmed the contract in respect of any earlier alleged breaches by the fact that he had applied for a new post with the company, would have continued working with EH and LD if he had to, and that he would be content to help out with Production if needed in any event.

Direct Disability Discrimination

104. We have already determined that the Claimant was not disabled within the meaning of the EqA. This claim fails without more. However, we go on to consider the position had we decided in favour of the Claimant on the disability issue.

Further Conclusions had disability been established

105. The Claimant here relies on the same six issues advanced in respect of his unfair dismissal claim and our findings above stand in respect of this claim. But even if the Claimant had established that those acts/omissions took place, there is not even prima facie evidence from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that the Respondent had committed an act of discrimination which is unlawful. The burden does not shift to the Respondent. Put another way, the “reasons why” the Respondent behaved as it did in relation those six issues are set out in our findings and are innocuous. They are, in no sense, because of the Claimant’s disability.

106. The Respondent also relies on the fact that, notwithstanding the Tribunal’s repeated explanations and warnings about the purpose of cross-examination, it was simply not put to the Respondent’s witnesses that their conduct was because of his disability. We wouldnot have held that failure against the Claimant as a Litigant In Person had that been the only reason for dismissing the claim for direct discrimination.

Failure to make reasonable adjustments

107. In addition to our finding on the disability issue and knowledge of disability, there are other obstacles in the way of this claim.

108. There is no evidential basis for shifting the burden of proof, nor a finding that, even if the PCP relied on was applied to the Claimant, either that the Claimant was put to a “substantial disadvantage” or that the Respondent had, or should have had, knowledge of any substantial disadvantage. For those additional reasons also, the claim for failure to make reasonable adjustments would have failed.

Harassment related to Disability

109. In respect of this claim, the same six issues relied on by the Claimant in the unfair dismissal and direct discrimination claims and we refer to our earlier findings in that regard and the reasons why the Respondent acted as it did.

110. There is no evidential basis for shifting the burden of proof, nor a finding that the impugned conduct was in any way related to the protected characteristic of disability.

111. Further, the Claimant did not adduce any, or any compelling or persuasive, evidence that those six issues had the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.

112. Accordingly, the clams all fail and are dismissed.

Jacques Algazy K.C.

Electronically Signed by EJ Algazy K.C.

On 16 November 2023

Sent to the parties on:

…….
For the Tribunal Office:

……..……..

ANNEXE

LIST OF ISSUES

1. **Time limits**

    1.1 Given the date the claim form was presented and the dates of early conciliation, some complaints may not have been brought in time.

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

        1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

        1.2.2 If not, was there conduct extending over a period?

        1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

        1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

            1.2.4.1 Why were the complaints not made to the Tribunal in time?

            1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

    2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Held the claimant responsible for errors/underperformance without investigation as to who was responsible;

2.1.1.2 Placed the claimant on a PIP without good reason;

2.1.1.3 Failed to warn the claimant about underperformance prior to placing him on a PIP contrary to company procedures;

2.1.1.4 Returned the claimant to the yellow shift where he was responsible for 4 canning lines following his absence from work due to stress;

2.1.1.5 Failed to provide the claimant with any support (namely another person) upon his return to work following an absence from work due to stress;

2.1.1.6 The operations director failed to address the claimant's main concerns during the grievance process.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was

calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3. **Remedy for unfair dismissal**

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

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

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

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular

whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

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

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

3.6.1 What financial losses has the dismissal caused the claimant?

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

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

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

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it ?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and

equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

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

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Disability**

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

4.1.1 Did he have a mental impairment: work related stress and anxiety and/or stress and anxiety?

4.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

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

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

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

4.1.5.2 if not, were they likely to recur?

5. **Direct disability discrimination (Equality Act 2010 section 13)**

5.1 Did the respondent do the following things:

5.1.1.1 Held the claimant responsible for errors/underperformance without investigation as to who was responsible;

5.1.1.2 Placed the claimant on a PIP without good reason;

5.1.1.3 Failed to warn the claimant about underperformance prior to placing him on a PIP (contrary to company procedures);

5.1.1.4 Returned the claimant to the yellow shift where he was responsible for 4 canning lines following his absence from work due to stress;

5.1.1.5 Failed to provide the claimant with any support (namely another person) upon his return to work following an absence from work due to stress;

5.1.1.6 The operations director failed to address the claimant's main concerns during the grievance process;

5.1.1.7 Constructively dismiss the claimant.

5.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

5.3 If so, was it because of disability ?

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

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 Required the claimant to be accountable for two canning lines

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he had just returned from a stress/anxiety ill health absence and this way

of working aggravated his stress/anxiety ?

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

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

6.5.1 Provided the claimant with support namely another person to man one canning line

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

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

7.1 Did the respondent do the following things:

7.1.1.1 Held the claimant responsible for errors/underperformance without investigation as to who was responsible;

7.1.1.2 Placed the claimant on a PIP without good reason;

7.1.1.3 Failed to warn the claimant about underperformance prior to placing him on a PIP (contrary to company procedures);

7.1.1.4 Returned the claimant to the yellow shift where he was responsible for 2 canning lines following his absence

from work due to stress;

7.1.1.5 Failed to provide the claimant with any support (namely another person) upon his return to work following an absence from work due to stress;

7.1.1.6 The operations director failed to address the claimant's main concerns during the grievance process;

7.1.1.7 Constructively dismiss the claimant.

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability ?

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

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

8. **Remedy for discrimination**

8.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the claimant?

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

8.4 If not, for what period of loss should the claimant be compensated?

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

8.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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

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

8.9 Did the respondent or the claimant unreasonably fail to comply with it ?

8.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

8.11 By what proportion, up to 25%?

8.12 Should interest be awarded? How much?

EJ Algazy KC

On 16 November 2023