Case Number: 1400453/2022

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Christopher Lee **v** **Mitie LTD**

Judgment

Heard at: **Havant Justice Centre** **On: 14,15 and 16 August 2023**
In chambers 17 August 2023

Before: **Employment Judge Rayner**
Mrs C Date
Mr J Shah

Appearances
For the Claimant: In Person, with assistance of Mrs G Gillam, Blind Veterans UK.
For the Respondent: Mr. Terence Finn, Counsel

Reserved Judgement

1. **The claimant was unfairly dismissed.**
2. **the claimant was discriminated against on grounds of disability in that**

    a. **the claimant was discriminated against for a reason arising from his disability in that he was dismissed, contrary to section 15 Equality Act 2010**

    b. **The respondent failed to make reasonable adjustments for the claimant , contrary to section 20 and 21 Equality Act 2010.**

Reasons

1. The parties attended in person at a hearing at the Havant justice centre on the 14th 15th and 16th of August 2023. following hearing of the evidence it was agreed that the decision would be reserved and written reasons provided.

2. The claimant, Mr. Lee, was employed by the respondent between January 2018 and September 2021 as a security guard.

3. He made a claim to the employment tribunal on the 8 February 2022, alleging that he had been unfairly dismissed and discriminated against on grounds of disability. His ACAS certificate is dated the 29th of November 2021 and he initially approached ACAS on the 19 October 2021.

4. The Respondent resisted the claims in grounds of resistance dated 8th of March 2022.

5. The claim was listed for a preliminary hearing by telephone on the 4 October 2022 and at that hearing the case was listed for a five day hearing and the issues in the case were defined as follows:

1. Unfair dismissal

1.1 Was the claimant dismissed? This is admitted.

1.2 What was the reason for dismissal? The respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

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

1.3.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

1.3.2 The respondent adequately consulted the claimant;

1.3.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.3.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

1.3.5 Dismissal was within the range of reasonable responses.

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.5 Did the respondent adopt a fair procedure? The claimant makes no particular complaints about the procedure.

1.6 If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

2. Disability

2.1 The respondent admits that the claimant was disabled at the material times by reason of sight loss.

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

3.1 Did the respondent treat the claimant unfavorably by him dismissing him.

3.2 Did the following things arise in consequence of the claimant's disability?

3.2.1 The claimant's inability to perform the roles which the respondent had.

3.3 Was the unfavourable treatment because of any of that thing? The claimant's case is that is he could not do those roles because of his sight loss.

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 the continuance of the business and the contracts the respondent had.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the claimant and the respondent be balanced?

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

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

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

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

4.2.1 That the claimant should be able to see to do his existing role as a security officer at Portsdown Technology Park, or

4.2.2 The claimant should work permanent nights in a role at Portsmouth University, or

4.2.3 The claimant should work at Southampton docks, which were very busy and a long distance from the claimant's home.

4.3 The respondent accepts that the claimant was required to perform one of those roles to avoid dismissal.

4.4 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was unable to do those roles because of his disability, he also found it difficult to travel to Southampton docks due to his sight loss?

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

4.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

4.6.1 appointing the claimant to the supervisory role which was being vacated by Stephen Carr

4.6.2 offering him a role working on day shifts;

4.6.3 offering a role in a less busy place;

4.6.4 offering a role closer to home, if it did not involve nights or require standing on a gate

4.6.5 offering an office based role.

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

4.8 Did the respondent fail to take those steps?

5. Remedy

Unfair dismissal

5.1 The claimant wishes to be reinstated to their previous employment or re-engaged to comparable employment or other suitable employment. Should the Tribunal order reinstatement? The Tribunal will consider, in particular, whether such an order is practicable and, if the claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

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

5.3 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?

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

5.4.1 What financial losses has the dismissal caused the claimant?

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

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

5.4.4 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?

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

5.4.6 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

Discrimination

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

5.6 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

5.12 Should interest be awarded? How much?

Findings of fact

6. The claimant was employed by Mitie as a security guard.

7. The claimant first started to suffer with problems in his left eye in or around October 2020. on the 4th of January 2021 he was seen at his local hospital because his eyesight had deteriorated he States and we accept that his eyesight deteriorated over the next few weeks. On the 3rd or 4th of January 2021 the claimant reported in sick because he was suffering with complications with his eyesight. He had lost 100% of vision in his left eye and around 75% of vision in his right eye. at some point in January, he was diagnosed with a condition called bilateral Non -Anterior Arteritic Ischemic Neuropathy. He was told the condition was permanent and that his lost

eyesight was irretrievable. Following that appointment his sight in his right eye started to deteriorate and he was registered as being sight impaired by the consultant on the 21 January 2021 and was registered as disabled with Portsmouth City Council on the same date.

8. The claimant was signed off on sick leave until the end of March 2021. The claimants first sick note was sent to the respondent on the 20 January 2021. The first sick note stated that the claimant was signed off work with elevated blood pressure and visual issues.

9. The claimant says and we accept that he provided his sick notes and the yellow card issued by Portsmouth city council stating that he was registered disabled, and letters from the hospital to the respondent on the 2 March 2021. On the 15 March 2021 he wrote to Mr B Houseman, asking if he had received the documents that he, the claimant, had sent in, and asking whether they had been passed on to occupational health. The claimant said in his e-mail to Mr Houseman, *as you can appreciate I am still left in a state of limbo.*

10. The claimant said he would like the situation resolved as he could not survive on SSP forever and that he would love to be able to come back to work and either for reasonable adjustments to be made *to keep me and my colleagues and visitors safe* or where adjustments could not be made, he said he would be very grateful if Mr Houseman could try and push things along as *he'd like to be able to put this to bed as soon as possible.* The claimant was being realistic about the future we find, and whilst wanting to return to work, thought that it may not be possible.

11. Mr Houseman replied to him on the 15 March that he had sent a chasing e-mail.

12. We find that the information sent to the respondent put them on notice that the claimant was likely to be a disabled person within the meaning of the Equality Act 2010.

13. The letter from the department of ophthalmology at Portsmouth Hospitals University trust gave the diagnosis, and the casualty report from the eye unit, where Mr. Lee had been seen on the 4th of January 2021 reported loss and blurred vision in his left eye and again referred to optic neuropathy in the right eye, and stated that the onset of the problem had been for one to six months.

14. Whilst the condition had not, in March 2021 lasted for 12 months, the respondent knew or ought to have known that the claimant was partially sighted or sight impaired and was registered as a disabled person under the Care Act 2014. They knew what his diagnosis was and any investigation at all either with the claimant or with his own doctors would have led to them being told that the claimant's condition was not one which was going to improve and in fact may deteriorate.

15. The respondents knew or ought to have known by March 2021 that the claimant was not able to carry out ordinary day-to-day activities which required full sight, such as driving, they knew of his diagnosis, that it was irreversible and incurable and therefore it was highly probable that it would be lasting for 12 months. They also knew or could reasonably have been expected to know, that Mr Lee would not be able to do all the tasks in his job description because a number of them would require him to be able to see, or to be with someone who could see.

16. On the 22 March 2021 the claimant was contacted by Optima Health asking for consent to speak to the claimants GP and other specialists to obtain further information about his health. The claimant says that he subsequently received the same request on four separate occasions and when he checked back with Optima was told that the initial request had been sent to the wrong people.

17. A referral to occupational health was made , by Mr Houseman the operations manager, on the 15 March 2021, on the basis of the claimant's current absence from work. The duties of his role as a security officer were described as *walking; driving; night; shift working; computer and display screen equipment work; standing; manual handling and amp; lifting; security detail; prolonged sitting and telephony work*.

18. The claimant met an occupational health adviser Joan Rogers on 22 March 2021.

19. Until the claimant chased the respondent in March 2021 no steps have been taken to refer the claimant to occupational health or to otherwise find out what the claimant was still capable of doing and what he was not able to do.

20. On the 24 April 2021 the claimant again contacted Mr Houseman because he had not been paid sick pay that month. He asked for assistance. In response Mr Houseman wrote back to the claimant saying that he had sent a chasing e-mail in respect the sick pay and asking how the claimant was doing. He stated that he understood that occupational health was going to get in touch with the claimant's doctors and asked the claimant whether or not this had happened.

21. On 26 April the claimant wrote back to Mr Houseman about his pay and said that he was not too bad in himself. He said he was taking a cocktail of drugs to keep his

blood pressure in check, his eyesight was steady and he was getting used to not having a car to get about. He also said that he had not heard from occupational health since the phone call. He said he had submitted the form giving them authority to speak to his doctors on two occasions and that he was not going to chase them up. He said, not unreasonably , that it was up to occupational health to submit a report and have discussions with Mitie about possible reasonable adjustments. He also said at the moment *it just seems to be out of sight out of mind not working not getting paid*.

22. By 10 May 2021 the claimant had forwarded his sick notes and told the respondent, that his GP had advised that he would be issuing sick notes from then on, on a 2 monthly basis.

23. The claimant requested a copy of the report produced by optimum health on the 15 June 2021. He followed up with an e-mail to Mr Houseman highlighting that he had not received a reply from him or human resources and that he was awaiting a copy of his occupational health assessment

24. On the 17 June 2021 the claimant received a further letter from Optima health offering him a second appointment on the 1 July 2021.

25. The claimant received a copy of the occupational health assessment report on the 2 July 2021.

26. The report stated that there were no reasonable adjustments that could be made and that the claimant was not fit to return to work.

27. In his evidence, the claimant said that at the time, he was unclear how she could have made such an assessment or come to her conclusions as she had never visited the claimant's place of work or visited the claimant in order to assess his capabilities.

28. We agree with the claimant that at this point in July 2021 no one from the respondents and discussed with the claimant what he was capable of doing or indeed considered whether there were things that he could not do but might be able to do with reasonable adjustments or the provision of auxiliary aids for example.

29. By July 2021 we find that the respondent had done nothing except refer the matter to occupational health, with the most basic of referrals.

30. We observe that the respondent is a national employer with numerous contracts for staffing in a very wide range of work areas and workplaces. They must have had to deal with making reasonable adjustments for disabled employees on numerous occasions.

31. Mr. Mayers said that he had responsibility for client relationship management full responsibility for P and L direct management of 4 operations Manager and a wider team of 500 staff.

32. Mr Houseman gave evidence that he had responsibility for operational guarding in the SW region, covering Newbury, Bracknell, Basingstoke, Portsmouth and Bournemouth area.

33. We were told by the respondent witnesses that they had received training on disability matters.

34. Despite this we have no evidence before us that anybody from the respondent ever sought to take any advice from anybody other than the occupational health advisor as to what sort of adjustments might be appropriate to assist a partially sighted disabled employee return to the workplace. There is no evidence before us that the respondent had any form of coordinated policy or practise for managing or assisting an employee who became disabled during the course of his employment.

35. The claimant states that although he had not heard anything from occupational Health he received a letter telling him that there would be a second appointment on the 1 July 2021.

36. He wrote to Mr House again on the 27 June 2021 about the lack of sick pay and received a reply on the 29 June telling him that the money would be paid into his account on the 30 June 2021.
37. The claimant received a copy of the final Occupational Health Assessment report on the 2nd of July 2021.

38. There was no further action until the 2 August 2021. On the 2 August two things happened

39. Firstly, the claimant raised a grievance against Mitie, which he sent to Mr Richard Breech.

40. In his grievance he noted he had been employed at Kinetec Portsdown Technology Park since January 2018, and referred to his diagnosis in January 2021 with an untreatable eye disorder which left him registered disabled as slight impaired.

41. He said he felt he had been treated unfairly if not forgotten about completely by the organisation. The reasons he gave for his grievance were that he had no welfare checks from Mitie; that he had had to initiate all contact with management; that he had had to initiate a meeting with occupational health and then to chase up a copy of the report; to initiate a second meeting; that on several occasions he had to chase up his statutory sick pay; that on several occasions he emailed his operations manager and received no replies or receipt of any documents sent to him; that Human Resources had never spoken with him to discuss his situation, including no discussion of possible redeployment or any reasonable adjustments to allow him to return to work. He also said there had been a lack of and a failure in communication which had left him without ESA which is a continuation of SSP, leaving him with no income.

42. In his grievance he said that the last six months of uncertainty had affected his fragile mental health. He said he felt he was being discriminated against due to his disability and stated he did not feel that enough had been or was being done to resolve his situation and that he has been more than patient for six months.

43. The second thing that happened is that Dr Andrea Voisian an occupational physician wrote a report addressed to Mr B Houseman in respect of the claimant.

44. In that report she stated that she had spoken with the claimant by phone on the 1 July 2021 and that she had received a letter from the ophthalmology consultation. She identified that he suffered from a condition that affected both his eyes and that he had no vision in the left eye and only a third vision in the right eye. She also referred to his hearing loss and use of a hearing aid and the prescribed treatment to manage diabetes and high blood pressure. In her report she said Mr. Lee was not fit to return to work due to loss of sight and was unlikely to return for the foreseeable future. She said *there are no adjustments that I can suggest facilitating this*. In respect of the outlook, she said that there was no treatment currently available for the eye condition and the eyesight was not expected to recover. The other medical conditions he suffered from were likely to be reasonably well managed with treatment. She also expressed the opinion that his eye condition; diabetes and high blood pressure were likely to be considered as disabilities within the meaning of the Equality Act 2010.

45. In his evidence to us, the claimant comments that when he received the occupational health report, he did not understand how she could have come to the conclusions she reached as she had never visited his place of work or witnessed him in order to understand what his capabilities were.

46. We note that the occupational health practitioner stated that there were no adjustments that she could suggest to facilitate his return to work. We observe, as the claimant has observed, That the occupational health. Practitioner did not at any stage carry out any sort of assessment. Or review of what the claimant could do as opposed to what he could not do. We find that at no stage was there any

conversation as to what he was able to do or what he might be able to do were he to be provided with auxiliary aids, for example.

47. For example it was quite evident that the claimant was capable of dealing with the telephone and a computer at that point because he was sending emails and managing to deal with emails which he received. We would expect an OH practitioner to be fully aware of a range of assistive technologies including voice recognition technology and read back facilities which may have assisted the claimant to carry out some form of work using computer screens.

48. Following the claimant raising his grievance, the claimant received an e-mail from Mr. Martin House which followed on from an earlier telephone conversation.

49. In that e-mail, Mr House identified that no reasonable adjustments had been identified by occupational health that they as an employer could consider, regarding a return for him back to his security role. He then referred to the employee sickness absence procedure which covered the key principles, including long term absence and said that they would hold a review meeting the following Friday in order to review how to progress, including exploring whether there was any other medical evidence to consider.

50. He also made reference to exploring redeployment opportunities and sent the claimant a link to careers at Mitie, on which he said all vacancies were advertised. He asked the claimant to review and see what might be of interest to him.

51. The reason for the meeting, was for Martin House ;Andy Mayers and the claimant to discuss the list of roles and duties that the claimant believed he could do. It was suggested that the claimant provide a wish list, including things like his preferred location, hours of work, pay, tasks and duties to assist in exploring what might be possible. Again, we note that there was no assessment of what he might be able to do, and no steps taken by the employer to identify a suitable vacant role.

52. The meeting then took place only 17 August.

53. In a follow up e-mail Mr House noted that the Claimant had reviewed the Mitie careers website and had thought there was nothing suitable for him to consider. Mr House also noted that the claimant had not been able to come up with a wish list of what sort of role he thought he could perform. Mr House then set out a number of possibilities including work on an APB contract with Southampton cruises. He noted that the claimant had said that the travel from his home in Portsmouth to Southampton would make that a nonstarter, due to the commute, as the claimant was no longer able to drive and would be reliant on public transport.

54. Mr House also referred to Portsmouth university, the largest security contract in the geographical area and possible work in the Northampton head office, which whilst geographically unsuitable, was a possibility because of a number of admin type functions which were based there, and which might be done remotely.

55. At that point Mr House was interested in one of the teams that focused on SIA licence renewals and said that he would reach out to the manager of that team to

see whether there were any opportunities which the claimant could be considered for.

56. The expectation was that the claimant might be able to work from home. There were also discussions about what support the claimant might need and Mr. Martin House noted *you advised you hadn't as yet explored the options however you stated organisations such as blind veterans and RNIB would be able to support.* Reference was also made to a scheme called Access to Work as an option for the respondents to explore but Mr House stated that they would first need to identify a role, to consider as a starting point.

57. Mr House noted that the claimant had asked for his grievance to be dealt with formally and stated that a meeting would therefore be set up to deal with it.

58. He then said, *in terms of the review process the focus is still on exploring what if any roles can be found which may be suitable for you to perform. Only once we've exhausted this process would we then move to the next step which would be a formal capability review meeting to assess whether your employment should be ended on the grounds of ill health and or capability*

59. On 18 August 2021 Mr House contacted the claimant and said he had *picked up with the manager of the team in Northampton* about what if any roles they had available for the claimant to consider and that unfortunately they didn't currently have anything available to put forward.

60. Also on the 18 August 2021, Andy Meyers emailed the claimant saying that he had requested information from the ABP in Southampton around the roles and duties and that he would forward them as soon as he received them. The claimant responded saying *my only concern is getting there and if there are any reasonable adjustments that can be made for example not walking off the edge of the dock and landing with a splash. Also, I like being the face of security as I am very security aware and oriented I would not want to be stuck indoors. Ideally I would be looking for something in Portsmouth as this would be easier to get to*.

61. The claimant explained to us when giving evidence and we accept, that whilst he expressed a preference for not being stuck indoors, he was not at this point ruling out that possibility. He said and it is understandable, that he was at a very low point at that stage and that no one was talking to him about what might be possible or what he might be able to do, and no one was discussing with him how any existing roles might be adjusted so that he could do them.

62. From the evidence before us we find his fact that he was right about this. Although some steps were being taken to see whether or not there were any available roles which he might be able to do, no one had considered what the claimant could do as opposed to what he could not do. We have already observed that at this point in time it was clear that the claimant was able to deal with working on a computer screen because he had been able to search the mighty career site; he was clearly able to communicate effectively by e-mail. There were also sources of advice and support which the claimant had referred to but which nobody at the respondent appears to have pursued at all.

63. On the 20 August 2021 Mr Meyers wrote to the claimant, that he had spoken to the team at ABP Southampton and they had advised that the claimant could attend at the port when it was in operation, to understand what happens; how busy it is and so on. He said it was also an opportunity for the claimant to trial travelling to and from the site to see if it was manageable. Again we observe that there was no suggestion at this point that any adjustments might be possible for the claimant, such as considering whether there was any possibility of assistance with travel, or of adjusting his hours of work or the start and finish time of work. The expectation appeared to be that the claimant would need to demonstrate that he could do the job in spite of his disability rather than considering whether any role could be adjusted for the claimant as a disabled person.

64. The claimant responded the same day stating that he did not think it was practical. He said, *even if I was to work part time, a lot of time would be spent travelling, still making it a long day. Also I feel that even with reasonable adjustments I could still be a danger to myself and my colleagues. They have their own safety to think about without keeping an eye on me. Hopefully Emma will have some good news. If not I am prepared for the worst.*

65. We find that this was a reflection of the claimant struggling to find a way forward. We find that the respondent took no steps to reassure the claimant that his safety would be a priority or to reassure the claimant that adjustments would be looked at to ensure that nobody else is safety was compromised.

66. Mr House gave evidence to the employment tribunal by video link because he was on annual leave at the time of the hearing.

67. He agreed that during the course of the initial discussion, the claimant had raised the possibility of him, the claimant, taking over from his then manager. The manager was at that point considering taking retirement in the near future.

68. The claimant told us and we accept that Mr Stephen Carr, who was a security officer at Mitie security at the same site as the claimant, had been openly talking about retiring early because of his own poor health.

69. We accept that he did talk to the claimant in the spring of 2021 and we accept the claimant's evidence that following the claimant becoming disabled, Mr Carr had suggested that the claimant could do his job, or part of his job.

70. We have not seen a job description for the role that Mr Carr occupied but we accept the claimant's evidence that a substantial part of the role involved paperwork and computer-based work.

71. Mr Housman accepted that the claimant had also raised this as a possibility in the initial discussion he had held with him in August 2021.

72. He said that since Mr Carr had not, at that point, formally resigned or indicated his wish to take retirement there was no vacancy which could be discussed.

73. He said in his witness statement that the role could not have been offered to the claimant as the role was the go-to for leave/holidays, to do same duties as a security office which the claimant was no longer able to do. He said that as Mr Carr's role involved rostering and assignment instructions, with the claimant's partial blindness he would not be able to do this because of the heavy screen involvement required. He did not appear t have based this on anything except his own perceptions.

74. He then said, *in an ideal world having someone like the claimant fill Mr Carrs role would have made my life easier but it was not feasible with the claimant's disability*. He does not explain why the role could not have been adjusted, or what it was about the claimant's disability that made the role unfeasible.

75. He also accepted that no one had approached Mr Carr to find out whether or not he was thinking about retirement or indeed to discuss possibility of Mr Carr reducing his hours of work and the claimant taking on some of his responsibilities and duties by way of a phased return to work. There was no discussion whatsoever with Mr Carr about his future intentions and no consideration about whether or not some form of arrangement might be reached to facilitate the claimant remaining in work.

76. This means that there was no discussion about whether or not adjustments could be made to the role, when it became available, so that the claimant could do it. No consideration was given to any auxiliary aids that might be available, or whether the role itself could be adjusted or could be done on a part-time basis for example, or whether cover might be managed in a different way.

77. In the circumstances we find this extraordinary. If the claimant was right that Mr Carr himself had talked to the claimant about the claimant doing some of his job, and we find that the claimant was honest in his evidence about this and we accept it, then there was an obvious solution to both the claimant’s situation and Mr Carr's situation.

78. Whether it was a solution which would be practical or not required somebody to have a frank discussion with Mr Carr to find out whether he was intending to retire and if so when he wished to do so.

79. Whilst we accept that an employer may not wish to approach somebody out of the blue and ask them whether they are planning to leave or retire, we accept the claimant 's evidence that in this case Mr Carr was talking openly about his intention and wish to retire, and suggesting that the claimant could do his job, and that the claimant had told his employer this. In those circumstances we consider it would have been entirely reasonable for the respondent to have at least made some initial inquiries of him.

80. Had the respondents considered this, we have no doubt that Mr Carr would have told the Respondent what he told the claimant that he was planning to hand in his notice of retirement, and that the claimant could do his job.

81. At this hearing the respondent witnesses have asserted that Mr Carr's job would not have been suitable for the claimant, in part because Mr Carr was required to cover the absences of other security guards, and it was asserted that the claimant could

not have done this. This was not a consideration at the time. It was simply never thought about at all.

82. Whilst we accept this may have been a part of the role, and whilst it may have been difficult for the claimant to do that part of the job, we have no evidence before us as to what happened if more than one person were on leave or sick at the same time or indeed what happened if Mr Carr himself was on leave or absent on sick leave.

83. Nor do we have any evidence before us about how regular an occurrence the requirement to cover for another security guard in fact was.

84. Both matters would have been relevant to any consideration about whether or not adjustments could be made to the role, and whether those adjustments would have been reasonable, so that the employer might have been required to make them, and so that the claimant could remain at work.

85. We all agree that whilst the respondents may well have seen this as a potential difficulty, adjustments to the role were possible. Within an organisation such as Mitie, which provides staffing across a vast range of sites and service areas, it must have been possible to organise an alternative mechanism for covering occasional absences. We all agree that because of the potential and imminent retirement of Mr Carr and the possible suitability of his role for the claimant, and the possibility of making adjustments to the role ought to have been explored further at the time and was a reasonable step for them to have taken.

86. The respondent asserts that they could do nothing because Mr Carr had not made any formal application to retire. We disagree. Whilst the respondent could not of course put any pressure whatsoever on Mr Carr to make changes to his employment, there was nothing to prevent them from discussing his future plans and for discussing the possibility of the claimant stepping into his role, or an adjusted role, at some point in the future. It may well have been reasonable for them to extend the time before deciding to termination the claimant's employment, so that the opportunity could have been taken up by Mr Lee on a trial basis.

87. During the course of the hearing, the employment judge ordered the respondent to disclose the precise date of Mr Carr's resignation. The letter was produced and shows that Mr Carr retired with effect from the 24 December 2021 but that he gave his notice on the 22 October 2021.

88. We all agree that on that timeframe, a short deferral of the decision about the claimant's work, and a trial period might have been a reasonable adjustment for the employer to make.
89. In fact what happened next was that the claimant was invited to a grievance hearing and a capability hearing.
90. In the event both hearings took place on the same day, with the grievance hearing taking place at 10 AM and the capability meeting taking place at 11:30 .
91. both took place on the 27 August 2021.
92. at the grievance meeting there was a discussion about what process had been followed by the respondent and the claimant raised his concerns that nothing had been done at all to assist the claimant until he started to chase matters. we found as a matter of fact that it was not until the claimant began chasing matters that there

was any meeting with him at all to discuss any form of reasonable adjustment. nonetheless the respondent rejected that part of the claimant's grievance on the grounds that steps had been taken by managers to identify whether or not there were adjustments which could be made. this was not the grievance raised by the claimant his grievance was that no steps had been taken up until the date when he raised his grievance and in that respect he was right. the claimant did not receive his grievance outcome until sometime after the outcome of the capability hearing and the decision to dismiss him.

93. the capability meeting followed on shortly after the grievance meeting. we were concerned that both meetings had taken place on the same day because of the potential impact on the claimant. both meetings were important to the claimant. the respondent witness Mr Meyers who had conducted both saw no issue with having both meetings one after the other.

94. the capability meeting lasted about an hour and a half. the claimant was asked how he was feeling and was asked about the nature of his condition and whether or not his eyesight would deteriorate further. he confirmed that it might get worse but would not get better.

95. they also discussed the roles at Southampton and Portsmouth and the claimant explained why neither was suitable for him.

96. Mr Meyers then asked the claimant whether there was anything else that the claimant wanted to raise claimant raised the possibility of a termination package.

97. There was no discussion at that meeting of any other steps the respondent might take, for any other roles that might be available for the claimant.

98. following the meeting the claimant received a notice of termination of employment only 14 September 2021.

99. The letter stated that the claimant's health was not likely to improve in the foreseeable future and that he was currently unfit to resume his duties either in a reduced or full capacity and that this was unlikely to change. reference was made to the occupational health report and reference was also made to the claimant's view expressed within the capability meeting that there was no further support that mighty could offer to the claimant to support him in returning to work in those circumstances the respondent stated that there was no alternative other than to terminate employment on grounds of ill health and capability.

100. the claimant 's contract was terminated with effect from the date of the letter and the claimant was paid in lieu of notice.

101. payment received an outcome to his grievance letter on the 23rd of September 2021. some parts of his grievance were upheld in respect of failings around statutory sick pay but his complaint that at the point of filing his grievance there had been no discussion to explore redeployment or reasonable adjustments to enable him to return to work was not upheld.

The Key Legal Provisions

102. The claimant alleges that the respondent failed to comply with the duty to make a reasonable adjustment for him.

103. The duty to make a reasonable adjustment arises under section 20 and 21 of the Equality Act 2010.

104. A failure to comply with the duty amounts to discrimination under the Equality Act 2010 (EqA). As recognised by Baroness Hale in the seminal case of *Archibald v Fife Council 2004 ICR 954, HL*, the duty is unique because it requires a degree of ‘positive action’ from employers to alleviate the effects of provisions, criteria or

practices (PCPs), as well as the non-provision of auxiliary aids or the physical features of the workplace, on disabled employees. In contrast to other areas of discrimination law, the duty to make reasonable adjustments can require an employer to treat a disabled person more favourably than it would treat others.

105. We remind ourselves that an employment tribunal is obliged to take the Equality and Human Rights Commission's statutory Code of Practice on Employment ('the EHRC Employment Code') into account in any case in which it appears to be relevant — S.15(4)(b) Equality Act 2006.

106. Section 20 EqA provides that the duty to make adjustments comprises three requirements:

106.1. a requirement, where a provision, criterion or practice (PCP) 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 — S.20(3)

106.2. a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(4)

106.3. 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 — S.20(5).

107. The employer's duty is to 'take such *steps* as it is reasonable to have to take' to alleviate the substantial disadvantage to which the disabled person is put, in each of these three requirements. We remind ourselves that the words steps is not to be unduly restricted, as the Court of Appeal made clear in *Griffiths v Secretary of*

State for Work and Pensions 2017 ICR 160, CA. The case concerned a PCP but Lord Justice Elias makes clear that his judgment will apply equally to the other two requirements:

> 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.'

108. The task of the tribunal when determining a reasonable adjustments claim such as this one, is to first consider the nature and extent of the substantial disadvantage relied on by the claimant, then to make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage, and assess the reasonableness of the adjustment (i.e. 'step') that it is argued could and should have been taken in that context.

109. We remind ourselves that the duty to comply with the reasonable adjustment requirement begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage — *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*. In that case, the claim concerned a failure to deploy the claimant to another role.

110. Whilst it is not part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made. it will always be good practice for the employer to consult, and it will potentially jeopardise the employer's legal position if it does not do so, there is no separate and distinct duty on an employer to consult with a disabled worker. (see per Mr Justice Elias then President of the EAT, *Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT*)

111. Although, it is good practice to consult with a disabled person over what adjustments might be suitable, the duty to make reasonable adjustments is on the employer. As a result, the fact that a disabled employee and his or her medical

advisers do not or cannot postulate a potential adjustment will not, without more, discharge that duty.

112. We remind ourselves that the duty to make adjustments is on the employer. In *Cosgrove v Caesar and Howie 2001 IRLR 653, EAT*, a case in which neither the claimant herself or the claimant's medical advisers could suggest any adjustment which might allow her to return to work, the EAT found that just because a claimant could not suggest any adjustment , that did not without more, mean that the duty to make adjustments had been compiled with

113. In that case, if the employer had turned its mind to adjustments, there were possibilities, such as a transfer to another office or a change in working hours, that might have facilitated a return. In these circumstances it was an error of law to treat the claimants' views and those of her doctors as decisive on the issue of adjustments when the employer had given no thought to the matter itself.

114. We also bear I mind in this case in particular that in some circumstances, the duty to make reasonable adjustments can even extend to creating a new post that takes account of an employee's disability, and was a step that was found to be reasonable in *Southampton City College v Randall 2006 IRLR 18, EAT*. The Eat said that , since the respondent was doing a redundancy exercise, they effectively had blank sheet of paper and could have devised a job which would take account of the effects of [R's] disability (but harness the benefits of his long career and successful record. The EAT held that the legislation does not preclude the creation of a new post in substitution for an existing one being a reasonable adjustment. This will of course depend on the facts of the case.

115. We remind ourselves that the creation of new role is different from making adjustments to a vacant or potentially vacant role, and that moving the claimant to a vacant post , and making adjustments to that post , can be a reasonable adjustment.

116. We have also reminded ourselves of the need to consider the reasonableness of any particular adjustment. this means that we must consider whether or not the

adjustment would or could have removed the disadvantage experienced by the claimant.

117. We remind ourselves that the question we must ask ourselves is whether or not there is a prospect of the disadvantage being alleviated. we do not have to conclude that there is necessarily a good or real prospect of an adjustment removing a disadvantage for the adjustment to be reasonable. (see for example *Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*).

118. A failure to consider the essential question whether a particular adjustment would or could have removed the disadvantage experienced by the claimant amounts to an error of law — *Romec Ltd v Rudham EAT 0069/07*.

119. Where a proposed adjustment would readily be implemented without imposing an unreasonable administrative or financial burden on the employer, then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.' (see *South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15).*

120. An adjustment will be reasonable if there is a chance that the adjustment proposed would be effective in removing or reducing the disadvantage the claimant is experiencing at work as a result of his or her disability, not whether it would advantage the claimant generally.

Discrimination Arising From Disability (S. 15 EQA)

121. One of the claims the claimant brings is of discrimination contrary to section 15 Equality Act 2010.

122. When considering a complaint under s. 15 of the Act, the ET will consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". This means that we must first consider what the *something* which arises in consequence of the disability is said to be, and second, identify what the unfavourable treatment which the claimant says was suffered was and whether any unfavorable treatment was because of that '*something*' (*Basildon*

and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there must be some causal connection between the '*something*' and the disability, it only needs to be a loose connection and there might be several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It does not need to be the only reason for the unfavourable treatment but it must have been a significant cause (*Pnaiser-v-NHS England* [2016] IRLR 170).

123. In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

124. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

Justification (s. 15/19)

125. If the Claimant is able to demonstrate the essential elements of the test within s. 15 (1)(a)/s. 19 (1) and (2)(a)-(c) , the Respondent has a defence if it can show that the treatment was "*a proportionate means of achieving a legitimate aim*". (s. 15 (1)(b)/s. 19 (2)(d)).

126. Proportionality in this context means 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it

impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT).

127. If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defense in the section (*Buchanan-v-Commissioner of Police for the Metropolis* UKEAT/0112/16).

128. It was important to remember that justification had to be considered against the PCP's impact upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ).

Unfair dismissal

129. The claimant claims unfair dismissal as well as discrimination. We must therefore identify the real reason for the dismissal. Here there is no dispute that the claimant was dismissed because of capability, which is a potentially fair reason.

130. Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA).

131. That provision states that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

131.1. 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

131.2. shall be determined in accordance with equity and the substantial merits of the case'.

132. As S.98(4) makes clear, it is not enough that the employer has a reason that is capable of justifying dismissal. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide — *Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*.

133. We remind ourselves that we must be careful to assess the question of reasonableness under S.98(4) in the context of the particular reason for dismissal we find established by the employer.

134. We remind ourselves that whether an employer has acted reasonably is not a question of law. The wording of S.98(4) has the effect of giving tribunals a wide discretion to base our decisions on the facts of the case before us and in the light of good industrial relations practice. As Lord Justice Donaldson put it in *Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542, CA*: 'Whether someone acted reasonably is always a pure question of fact. Where Parliament has directed a tribunal to have regard to equity…and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.' The appellate courts have, nevertheless, developed certain general principles, some of which have crystallised into principles of law. Thus, the broad, non-technical approach has led to the development of the 'band (or range) of reasonable responses' test as a tool for assessing the reasonableness of an employer's actions.

135. We also remind ourselves that it is for the *tribunal* to determine whether an employer acted reasonably under S.98(4) and not for a party to concede or agree — *Adama v Partnerships in Care Ltd EAT 0047/14*.

136. The test of whether or not the employer acted reasonably is usually expressed as an objective one — i.e. tribunals must use their own collective wisdom as industrial juries to determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' — *NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT*. Nonetheless, there is also a subjective element involved, in that tribunals must also take account of the genuinely held

beliefs of the employer at the time of the dismissal. However, what a tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. As the Court of Appeal explained in *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*, although members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer.

137. The fact that the standard of the hypothetical reasonable employer is so central to the S.98(4) assessment of reasonableness means that tribunals are able to take account of good industrial relations practice in making their decisions.

Discussion and Conclusions

138. In this case we were all struck by how little effort the respondent managers had made to retain the services of Mr. Lee.

139. We all understood that Mr Lee having lost his sight suddenly and irretrievably would be depressed and probably initially unable to identify how he may be able to continue working. The fact that, since his dismissal by the respondent he has received significant assistance from various charities which have enabled him to develop numerous skills and to live a full life, including becoming a participant in a popular national cookery competition, is not only testament to his own determination but is also an example of what is possible with help from the right quarter.

140. We have no doubt that the claimant's manager's initially wanted to assist the claimant. However, we also have no doubt that none of them were provided with any tools or support to enable them to assist someone who had only recently become disabled.

141. In respect of the duty to make reasonable adjustments and the section 15 discrimination allegations, we first considered the point at which the respondent knew or could reasonably have been expected to know that the claimant was disabled and whether that was also the point at which the respondent could be

expected to know that the claimant was placed at a substantial disadvantage by the policy, requirement or practise of the respondent.

142. In this case the PCP relied upon by the claimant is that he should be able to see to do his existing role as a security officer; that he should be able to work nights in a role at Portsmouth university or that he should work at Southampton docks which were busy in a long distance from his home. In effect the PCP was for the claimant to be able to do all the tasks of any role which might be vacant, whether that was the job he was currently employed within or whether it was an alternative vacant role which he might be interested in being redeployed to.

143. The reason why he was at a substantial disadvantage was because he was unable to do the roles because of his disability and he also found it difficult to travel to Southampton docks due to his sight loss.

144. We conclude that this means that there were some aspects of each role which he would not be able to do or would not be able to do without endangering his own or another's safety; he was not able to work permanent nights again because of his concerns about his site and working in a busy dockyard a long way from his home raised potential safety issues for himself and others but also posed a problem for the claimant because he could no longer drive and would need to use public transport.

145. We all agree that based on the findings we have made the claimant was a disabled person from the point of his diagnosis and sight loss. He informed the respondent of his illness immediately and by March 2021 he had sent both a card issued by Portsmouth City Council in respect of his disability and correspondence from his medical advisers which gave the respondent sufficient information for them to realise that the claimant was likely to be and indeed was a disabled person within the meaning of the Equality Act 2010. The respondent ought to have understood the substantial adverse impact that sight loss would have on the claimant’s ability to do ordinary day today activities, and ought to have recognised that the claimant's condition was a long term one, and therefore that it would last or was likely to last 12 months.

146. In addition, we conclude that the respondent knew or ought to have known by March 2021 that the claimant would be placed at the substantial disadvantage set out within the case management order of being unable to do some or all of those roles because of his disability and also that he would have difficulty travelling because he could no longer drive.

147. The duty to make reasonable adjustments therefore arose in March 2021.

148. We have therefore considered the proposed adjustments relied on by the claimant.

149. We all agree that it would have been possible to adjust any of the potentially vacant roles including the one that the claimant himself was doing, either by allocating some parts of the role to another person or by considering alternative working hours for the claimant.

150. In the context of the role in Southampton, which was very busy in a long distance from the claimants home, the real issue for the claimant was that he was not able to drive and simply did not feel confident using public transport. An adjustment to the role itself would not have been effective to remove the difficulty the claimant would have faced with travel over long distance on public transport.

151. In addition, he was also not sure how easy it would be for him to do any work at all in a busy dock environment. He was naturally concerned about health and safety for himself and for others. The respondent did not offer him a trial period and made no suggestions at all as to any adjustments that might be made to assist him. There was no discussion for example about which parts if any of that job he might be able to do and whether it might be possible to allocate some of the roles to another person for example. However on balance and on the basis of the evidence we have before us it does not seem that any of the adjustments would have made that role one which the claimant could do.

152. The claimant did not want to work nights at Portsmouth university and did not feel that he was able to do that role. We accept that the role might have been adjusted but in reality what the claimant wanted was a daytime role. The adjustments

suggested by the claimant we're offering him a role on day shifts in a less busy place a role closer to home or an office based role.

153. the respondent considered whether or not there might be any roles in the SIA licencing team. The evidence before us was that the manager of the team had said there were no suitable vacancies. We have no evidence before us as to whether or not there were vacancies which may have been suitable with adjustments. We have no evidence of any vacancy at all.

154. We are concerned that in reality what happened is that the managers at Mitie only took steps to find a job which a blind employee could do rather than trying to find a job which could be adjusted so that Mr Lee could do the role.

155. We conclude the reason why there was no discussion about auxiliary aids or any adjustments to other roles is that there was no understanding of the duties in respect of disabled employees at all by any of the managers. No one asked what he could do, or what he might be able to do, with adjustments or auxiliary aids, or physical change to the work space.

156. The report from occupational health gave no assistance whatsoever to the respondent's managers, and there was no suggestion of any further assessment or any other organisation which might be able to offer some assistance.

157. The Respondent managers knew there were such organisations because the claimant told them, but no contact was ever made by the respondent.

158. Mitie is a large well-resourced company. It has numerous contracts in the public sector and the private sector to deliver support service. It has the same duties to its disabled employees as any other employer. We would have expected far more active support and intervention from managers in a company this size, and far more than three suggestions of work, given the spread of the companies commercia interests and operations.

159. We have therefore considered Firstly whether or not there were adjustments to any of the roles we heard evidence about, which would have been reasonable. We have reminded ourselves that the first factor listed in para 6.28 of the EHRC

Employment Code that an employer may wish to consider when deciding what is a reasonable step to have to take is the extent to which taking a particular step would be effective in preventing the substantial disadvantage caused to the disabled person.

160. This is focussed on keeping the person in employment and we need to consider whether any adjustment would be effective.

161. Whilst we do not consider that any of the particular roles that were looked at could be themselves adjusted, we do consider that an adjustment or an offer of a role in a less busy place closer to home possibly being office based would have removed the disadvantage to the claimant.

162. This brings us to consider the role of the claimant's manager Mr Carr.

163. Firstly, we conclude that nobody in the respondent considered that the claimant was not capable of doing that job and that at least one manager considered the claimant would have been an asset to the organisation in that role had he not been blind.

164. The claimant raised the possibility of an adjustment by redeployment into a future vacant role when he raised the question of the vacant role that would arise upon the retirement of Mr Stephen Carr. We consider that the way this was handled, is evidence of the attitude of mangers, as well as being one of the failures to adjust.

165. We conclude from our findings that at the time of the claimants becoming disabled, and the duty to adjust arising, there was such a strong probability that a vacancy was going to arise in the foreseeable future. Mr Carr had himself spoken to the claimant about the possibility of the claimant taking on his role when he retired.

166. We conclude that the respondents must have known about it, and that when it was raised by the claimant following his own conversation with Mr Carr the respondents must have realised that this was a real possibility and that it was the equivalent of an actual future vacancy. Instead of investigating the possibility, they ignored it.

167. We were concerned by the lack of any active consideration by the respondent witnesses of this as a possibility for the claimant. If as was suggested they were genuinely interested in seeking to retain him in the company, this was an ideal opportunity.

168. We have considered whether consideration of this potential vacancy would its self-have been reasonable by way of adjustment, as well as whether or not the allocation of the claimant to the vacant role itself would have been a reasonable adjustment.

169. We have also considered the reasons for the failure of the respondent managers to investigate the possibility, as these are relevant to questions of proportionality and reasonableness of dismissal.

170. One suggestion from the respondent witnesses was that adjustments by offering the role could not be made because it would impact upon the contracting process or because there would be difficulties with the contract itself, in respect of staffing numbers. We understood this to be essentially a question about cost. Aside from the fact that we had no evidence before us that this had been any part of the thinking at the time when Mr Lee's position was being considered, we also have no evidence before us that it would in any event have impacted upon the contract. Whilst the cost of an adjustment can be a factor when considering reasonableness a company of the size and resources is of Mitie could be expected to manage any cost implications, and to deal with additional staffing needs. , We would have expected managers to to consider such matters seriously and at the appropriate time, and to have produced some evidence to us of cost or impracticability other than mere assertions. In the absence of any such evidence we conclude that it would have been possible to adjust the role, by allocating some duties to others, or by making alternative arrangements for cover, if required.

171. We all agree that this is an after the event justification.

172. We have also considered the comments of the respondent witnesses that they did not consider the matter because there was no actual vacancy. We have asked ourselves whether or not an employer is required, in the context of a duty to make

reasonable adjustments, or a section 15 claim, or in the context of unfair dismissal, to consider potential and future vacancies. We all agree that they can be so required.

173. Further in the context and factual matrix of this case, further investigation was reasonable for the employer, both by way of an adjustment to usual practice itself, but also, because the reality was that there was a known future vacancy, which the claimant had himself raised. We conclude that the respondent was knowingly ignoring the fact of this future vacancy.

174. We also conclude that it would have been a reasonable adjustment and a reasonable step, to delay determination of the capability process, whilst the vacancy and its suitability was investigated.

175. We all agree that in the early stages of the claimant's disability the respondent seemed content to simply leave the claimant where he was without taking any steps at all to manage his absence.

176. This had two consequences.

177. Firstly, but the claimant missed out on a number of months where there may have been vacancies arising which might have been possible for him. he also missed out on a period of time when the respondent might have been actively considering what sort of adjustments might assist the claimant in returning to work. for example a workplace assessment with an organisation such as access to work may well have led to recommendations of auxiliary aids which could assist the claimant to do at least part of his existing role.

178. Secondly, it leads us to conclude that as far as the respondent was concerned there was no particular urgency in managing the claimant's sickness absence or coming to any conclusion about his continuing employment. So of course, from the claimant's point of view there was a need to do something, but from the evidence we have heard the claimant himself would have been more than happy to delay or slow down the process if a possibility of taking over some or all of Mr Carr's job had been on the table.

179. The respondent only started to take serious steps in respect of the claimant once the claimant had raised his grievance and once he had made comments about disability discrimination.

180. We have therefore considered whether there was any financial impact on the respondent of adjusting their process by delaying decisions in respect of termination. We find there were not. The claimant was in receipt of statutory sick pay and therefore the financial impact to the respondent of retaining him on a contract was negligible. Any adjustment to their own internal process would, we conclude have been entirely reasonable insofar as it involved extending the period of time that they retained the claimant in in employment until Mr Carr indicated that he was going to retire or did in fact retire.

181. We all agree that ,from the facts we have found, any discussion with Mr Carr and the claimant and a person who had some understanding of the adjustments that might be made or the auxiliary aids that might be available to a partially sighted person, would in all probability have led to adjustments being suggested which could be implemented, which would be affordable and which would have removed the disadvantage of the claimant not being able to do a job.

182. We all agree that the claimant would in all likelihood have required a phased return to work in any event. he might also have being able to return to work on fewer hours depending on the adjustments that might be made to the role. however we all agree that once the respondent was aware of the vacancy and the possible date for retirement there would have been no good reason not to delay process is so that Mister Lee could either work alongside Mr Carr for a short period of time and so that any adjustments and auxiliary aids might be put in place and that he might receive any training required.

183. We conclude that an adjustment to Mr Carr's role would have been a reasonable adjustment in respect of the claimant and would have provided the claimant with an alternative role from the point at which Mr Carr retired.

184. We do not accept the respondent’s argument that to amend or adjust Mr Carr's role would have led to it being a wholly new role and therefore something outside the scope of the requirements placed on an employer by sections 20 and 21 of the Equality Act 2010. We remind ourselves that an employer is required to take all reasonable steps and we also remind ourselves that reasonable steps might include moving the claimant to a vacant post. That adjustment might well require an additional adjustment such as a delay to an internal process and in this case we find that that would have been reasonable.

185. In that context, we have also considered whether or not there were adjustments which might reasonably have been made to any of the other roles which the claimant considered. We accept that the role at Portsmouth university and the role at Southampton dockyards did not immediately appear to be roles in respect of which adjustments could be made but we do think that it is highly probable that had more effort being taken at an earlier stage and throughout the process by the respondent managers, and through the lens of what the claimant could do or would be able to do with adjustments rather than focusing on what he could not do, that a role for the claimant using computer screens based at home for example, could have been found for him.

186. On this basis we conclude that the respondent failed in its duty to make to make a reasonable adjustment for the claimant.

187. We move on to consider whether or not the claimant was subject to unfavourable treatment in that he was dismissed by the respondent.

188. The dismissal of the claimant was unfavourable treatment and it arose directly because of the claimants disability and the respondents view of his abilities within the workplace. The claimant's inability to perform the roles which the respondent had available without reasonable adjustments being made arose from the claimant’s disability.

189. The respondent says its legitimate aim was the continuation of the business and the contracts the respondent had. we do not understand why complying with a legal

obligation to make reasonable adjustments is in conflict with the continuation of the business and the contracts that the respondent had. if the respondent had exercised its duty towards the claimant the claimant would have assisted in the continuation of the business and the contracts. we consider that whilst the respondent's aim is a legitimate, that the failure to consider the alternative post which would arise upon the retirement of Mr Carr, was disproportionate.

190. It would have been proportionate to delay matters whilst inquiries were made, and it would have been proportionate to make inquiries of Mr Carr make inquiries of Mr Carr about his future intentions and retirement plans. it would have been proportionate to delay the internal process is whilst such inquiries were made and whilst consideration was given to what adjustments might be made to the role so that the claimant could do it. further it would have been proportionate to engage with the claimant at a much earlier stage in his disability related absence to ensure that there was a proper company wide search for suitable alternative employment and to ensure that all steps had been taken to identifying adjustments that might be made or aids that might be provided or changes to the physical premises which might be considered before deciding to dismiss the claimant for disability related reason.

191. We therefore conclude that the claimant was discriminated against for a reason arising from his disability in that he was dismissed and the respondent’s failure to do so was disproportionate1 dismissing a disabled employee in the circumstances that this employer dismissed him was unreasonable.

192. Lastly we consider whether or not the claimant was unfairly dismissed. we accept that the claimant was dismissed for a reason related to his capability and we accept that the respondent genuinely believed the claimant was no longer capable of performing his duties. from the facts we have found it is right that we all consider that the respondents were not reasonable in their belief that he was not capable of performing his duties and the main reason for that is that they had not carried out sufficient inquiries. whilst there may have been no benefit in seeking further medical information in this case as in any case where reasonable adjustments must be considered it is vital that the respondent makes proper inquiries about what assistance might be available to the disabled claimant to enable them to come back to work. in this case that would have included some contact with one of the many

organisations providing support to the blind and partially sighted as well as some form of workplace assessment to consider what the claimant could do rather than focusing on what he could not do.

193. we also conclude that the respondent could be expected to have waited longer before dismissing the claimant and that this was particularly important in the context of Mr Carr.

194. Again the respondent had not carried out all reasonable investigation or inquiries because no questions had been asked by anybody about Mr Carr and about whether or not a vacancy might be about to arise because of his wish to retire. any reasonable employer dealing with this disabled employee in these circumstances would we think have made those inquiries.

195. We all agree but in the circumstances the respondent did not act reasonably in treating the claimant’s capability as a sufficient reason to dismiss the claimant when they did.

196. We also all agree that the dismissal was not within the range of reasonable responses open to a reasonable employer faced with the facts in this case.

197. We conclude that the claimant was unfairly dismissed.

198. As a result of our conclusions in this case the claimant is entitled to a remedy. this matter will therefore be listed for a three-hour remedy hearing before the same judge and panel as soon as is possible

199. The parties are encouraged to try to reach agreement on remedy and are reminded that the services of ACAS remain available to them.

Employment Judge Rayner
Date: 13 November 2023

Judgment sent to the Parties: 05 December 2023

For the Tribunal Office

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.