EMPLOYMENT TRIBUNALS

Claimant: Mr D Cunniff

Respondent: DHL Services Ltd

Heard at: Manchester **On:** 9 – 13 September 2024

Before: Employment Judge Childe

Mr Wilson

Ms Worthington

REPRESENTATION:

Claimant: In person (represented by his sister Ms Cunniff)

Respondent: Mr Dunn (Counsel)

REASONS

Summary of the case and Issues to be determined

1. This is a claim for direct disability discrimination, harassment related to disability, unfavourable treatment because of something arising in consequence of disability, a failure to make reasonable adjustments for disability, victimisation and for unauthorised deduction of wages.
2. We spent some time at the outset of the hearing confirming the issues in dispute. They had helpfully been agreed and set out in an agreed format in the tribunal bundle. The list of issues is appended to this judgement. The only amendment to those issues is that it was agreed by the parties that issues 77 and 81, which relates to whether any of the discrimination claims are out of time, should be amended to refer to the date ***29 March 2022***, rather than 29 February 2022, as the original date of 29 February 2022 had been calculated incorrectly.
3. The claimant is a delivery driver's mate, working for the respondent on behalf of Argos' customers. A delivery driver's mate assists delivery drivers in their deliveries of Argos products. This claim is about what the claimant considers to be unlawful discriminatory treatment following the respondent making a

decision to require delivery drivers' mate's to install Argos products and to deliver products that might weigh up to 150 kg. The relevant period for this claim is March to July 2022.

Introduction

4. We had access to an agreed tribunal bundle which ran to 681 pages.
5. Witness evidence was provided by the claimant himself. From the respondent, we were provided with witness statements from Stephen England, the claimant's first line manager, Andrew Beckett, Northwest operations manager, Michelle Newton, payroll assistant, Ian Strong, grievance officer and Rachel Mellor, appeal officer.
6. We found the claimant's evidence to be unclear at times. On several occasions, the claimant conceded parts of his case, or explained that they were simply wrong. The claimant also made several serious allegations of discrimination. He said that occupational health had been completely ignored by the respondent, he said he had been the only person doing installations and that all reasonable adjustments had been refused by the respondent. These allegations were not correct and for this reason we treated his evidence with caution.
7. We found all the respondent's witnesses to be clear and they assisted the tribunal in determining this case.
8. At the outset of the hearing, we discussed any reasonable adjustments required for both the respondent and the claimant. Adjustments were made for the claimant, the claimant's sister and Mr England. We took regular breaks, permitted anyone to request to leave the tribunal to use the toilet or for any

other reason and ensured that Mr England was given more time to process any questions that were put to him.

9. There were occasions during the hearing where Ms Cunniff reported that she was in more pain than usual, and/or feeling ill. The tribunal checked with Ms Cunniff on each occasion to see if she was well enough to proceed with the hearing, with the adjustments in place and Ms Cunniff confirmed that she was.
10. The claimant agreed to the inclusion of an extra document at the outset of the hearing. This was an image of a security pass.
11. On the second day of the hearing Ms Cunniff referred to four separate emails that she wished to introduce into evidence. These emails related to August 2022, after the claimant had been suspended. They were not relevant to the issues and were therefore we did not permit them to be introduced into evidence.
12. On the third day of the hearing Ms Cunniff wished to introduce into evidence the notes of hearings between Mr England and Rachel Mellor, and Mr Beckett and Rachel Mellor respectively. The respondent agreed that these documents should be introduced into evidence and the tribunal therefore allowed them to be included in the evidence. At this point we had already heard evidence from Mr England. The claimant was given the opportunity to further question Mr England on the contents of the document relevant to him. The claimant declined to do so. The claimant did question Mr Beckett on the contents of the document relevant to him.

Findings of fact

13. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.
14. The respondent is a global logistics company.
15. The claimant was originally engaged to work for the respondent via an agency from 20 July 2021 until 30 November 2021. The claimant worked as a home delivery drivers' mate on the respondent's contract with Argos at its Heywood site ("the Site"). During this time, the claimant would assist home delivery drivers with the delivery of heavy-duty goods such as washing machines and fridge-freezers.
16. On 1 December 2021 the claimant commenced employment directly with the respondent, as a home delivery drivers' mate working on the respondent's contract with Argos at the Site. The claimant was contracted to work five eleven hour shifts per week from Tuesday to Saturday.
17. The claimant was regarded by Mr Beckett and Mr England as a good employee. He was able to carry out over time and was seen as a good worker by them both.
18. On 1 January 2022, following a lengthy consultation period, it was collectively agreed with Unite the Union that all home delivery drivers and home delivery drivers' mates working on the respondent's contract with Argos (including the claimant) would take on the additional responsibility of installing the heavy duty goods into customer's premises ("the Installations"), for which they would receive a 4% pay rise. Prior to this date, Argos had contracted with a third party to provide the Installations.
19. The claimant never did Installations. The claimant agreed this in evidence.

20. Whilst the claimant did not qualify for this uplift as he was not doing the Installations, we find that nonetheless during his employment he received the 4% uplift in pay from January 2022 through to September 2022, where his basic pay is higher than in previous months. We've accepted Miss Newton's evidence on why this is so, in full. The claimant was paid the 4% installation accrual for July to September 2022 in his September 2022 payslip. We find that the back pay for the pay increase in 2022 was made to the claimant in his October 2022 payslip, where it says "Basic Pay, Backpay £950.56".
21. We find the claimant's allegation that he was the only person doing Installations to be incorrect as it is clear from the respondent's evidence (which we have accepted) that all drivers and drivers' mates were expected to do Installations.
22. The respondent employs staff on a range of different contracts. Some do five days a week. Some do four days a week and others work part-time. The claimant agreed this in evidence.
23. The claimant was asked to attend some training on 16th and 17th February 2022 on Installations. He was one of the first wave of employees to be invited to attend this training because he was well regarded by Mr Beckett and Mr England.
24. The claimant attended the first day of the training on Installations and did very well in his theory test. The claimant did not want to attend the second day of the training, on 18th February 2022, because he didn't think he could carry out the Installations due to his colour-blindness. The claimant's concern was he could not identify the electrical wires necessary to complete the Installations. As such, the respondent suspended the requirement to perform Installations from the claimant's role with immediate effect. The claimant also advised the

respondent that he had musculoskeletal problems but that it would not affect his ability to carry out his role.

25. We've accepted the respondent's evidence that whilst two people were required to do the delivery of goods, the Installation could be carried out by one person. Mr Beckett's evidence was clear on this point and the claimant's' was not. We've rejected the claimant submission that two people were required to carry out Installations.
26. We find that the claimant was never required to carry out Installations. The claimant agreed this in evidence.
27. There was also a proposal by the respondent that all employees working on the Argos contract carry weights of up to 150 kg. These were known as the heavies. This was due to be implemented for all staff from January 2023.
28. We find that the claimant was never required to lift weights of more than 80kg. This was confirmed in Andrew Beckett's letter to the claimant on 7 June 2022 and agreed by the claimant in evidence. The claimant's evidence was that he was always able to lift weights of up to 80 kg.

Toilet

29. To access the toilets at the Site, staff needed a pass to let them into the building. The passes were issued by a security firm. Agency staff were never issued with a pass. In December 2021, when the claimant switched from agency to employed staff, there was a problem in obtaining passes for employed staff. We've accepted Mr England's unchallenged evidence that the security firm providing the passes was switched to Mitie at this time and the printing equipment which produced the passes was not working and so many

colleagues, including the claimant, were not issued with a pass to give them access to the building at this time.

30. On 7 March 2022, Ms Cunniff sent an email on behalf of the claimant to Stephen England accusing him of breaching the Equality Act 2010 by not making reasonable adjustments to the claimant's role. In this email the claimant asked for a pass to enable him to access the building and the toilets, without having to ask someone or use a shared pass. The claimant accepted in evidence that this pass was provided shortly afterwards.

Adjustments for the claimant

31. In early March 2022, shortly after the 7 March 2022 email referred to in paragraph 30, Stephen England asked for the management of the claimant's request for adjustments to accommodate his disabilities to be passed to Andrew Beckett. We've accepted Mr England's evidence that the reason for this was he was experiencing mental health issues of his own at this time and he perceived the correspondence between him and Ms Cunniff to be detrimental to his mental health.
32. The respondent invited the claimant to a health review meeting to discuss what they could do to support the claimant in his role. This meeting took place on 17 March 2022.
33. The respondent subsequently referred the claimant for an Occupational Health assessment so that they could obtain a better understanding of the claimant's conditions and how they could support the claimant.
34. The claimant attended an appointment with an occupational health physician on 19 April 2022. The claimant informed the physician that he was colour-

blind and that he had a longstanding back problem. We find this was sent to the respondent at the very end of April 2022 after the claimant had approved it on 27th of April 2022.

35. The claimant had a medical procedure in mid-April 2022. When the claimant came back to work on 22 April 2022 the claimant was put on the split route van which only did deliveries of under 80 kg. This route avoided the claimant having to do Installations or heavy lifting. This was agreed by the claimant in evidence.
36. On 6 May 2022 the claimant was invited to attend a further health review meeting with Andrew Beckett. The meeting took place on 12 May 2022. The claimant agreed with the contents of the physician's report, advised that his musculoskeletal problems would not affect his ability to carry out his role. The claimant requested a reduction in the number of shifts that he was contracted to work and suggested that he work four twelve hour shifts per week, not including Fridays and Saturdays.
37. On 17 May 2022, the claimant lodged a grievance on the grounds that no adjustments had been implemented.
38. Andrew Beckett said he would consider the claimant's request and scheduled a further health review meeting to take place on 18 May 2022 to discuss what further adjustments could be implemented to support the claimant.
39. On 18 May 2022 the claimant met Andrew Beckett to discuss reasonable adjustments. During this meeting the claimant was offered a four day a week shift called a fixed four shift. This shift pattern was on a Saturday to Tuesday each week. The claimant would have maintained his pay if he had accepted the shift as it was a nationally agreed shift pattern with the Union designed to incentivise employees to work the less popular weekend shift. This was agreed

by the claimant in evidence. The claimant decided he didn't want to do the fixed four shift because it required weekend working each week and the claimant found it difficult to get to work on a Sunday. Separately, the claimant was also offered a four-day shift in the week. Under this shift pattern the claimant would not have maintained his pay and for this reason the claimant rejected this offer.

40. The claimant was asked to attend a training course on lifting heavies on 25th May 2022. The claimant asked Mr Beckett why he was required to attend this course on 25th of May 2022 and Mr Beckett replied that the claimant was just required to look at the process for lifting heavy goods. Mr Beckett said that the claimant was not expected to carry out heavy routes nor was he expected to deliver heavies until after 1 August 2022 at the earliest. The claimant replied to this message later that day and said that he was happy to watch the process of lifting the heavies but would attempt it further down the line. The claimant also said he appreciated knowing that he wasn't required to carry out the delivery of heavies until 1 August 2022. We have accepted the respondent's evidence that this training course was not about Installations as Mr Becket's evidence was clear on this point and the claimant's' was less clear.

41. Mr Beckett wrote to the claimant on 7 June 2022 to set out the adjustments to the claimant's role. These adjustments were:

    a. As we already mentioned, the option of doing a four-day per week shift pattern.
    b. The claimant not being required to deliver heavies, until 1 August 2022 at the earliest.
    c. The claimant being placed with a regular partner where possible to carry out deliveries.

d. A monthly review with Mr Beckett to check that the adjustments were working.

e. No requirement to do Installations.

42. It is clear to us that the respondent did carefully consider the recommendations of the occupational health report and used it as a basis to offer the claimant several reasonable adjustments. For this reason, we find the claimant's allegation that the findings from the occupational health report were *"completely ignored"* and that all reasonable adjustments were *"refused"* to be incorrect.

43. The claimant agrees that he was made a same day payment on 6th July and 12th July 2022 for £288 and £296 respectively. We have accepted Ms Newton's evidence that these same day payments were then put through payroll to allow tax and national insurance to be accounted for in July 2022 and a deduction made to the claimant's pay to ensure the claimant wasn't paid twice. Ms Newton's evidence was clear on this point and the claimant's evidence was confused.

44. On 4 July 2022 the claimant was invited to a grievance hearing. The grievance hearing took place on 12 July 2022 but was not upheld given that all reasonable adjustments had already been implemented.

45. The claimant was suspended on 18 July 2022 on full pay. The claimant did not return to work after this date and was summarily dismissed on 4 October 2022 for gross misconduct.

46. On 10 September 2022, the claimant lodged an appeal against the outcome of his grievance. The claimant was invited to attend a meeting to discuss his appeal but did not attend. The claimant's appeal was dismissed.

Knowledge of disability

47. We turn now to deal with the factual findings on when the respondent had *knowledge* of the claimant of the disabilities.
48. The respondent has accepted that the claimant was at all material times (from March to July 2022) disabled due to colour-blindness, hypospadias and joint hyper mobility syndrome.

Hypospadias

49. We turn first to determine when the respondent had knowledge of hypospadias. We found the claimant's evidence to be confused and contradictory on this point and not supported by the evidence.
50. Turning first to the documentary evidence. There is no reference to hypospadias in the probationary review document dated 1 March 2022, the claimant's letter of 7 March 2022, the questionnaire he produced on 17 March 2022 into his condition nor in the April 2022 occupational health report.
51. Turning now to the witness evidence. The claimant said in evidence that he first declared his medical conditions to Mr England on 1 March 2022. This is consistent with what he said in his grievance dated 17 May 2022. The claimant then suggested it was February 2022 when he told Stephen England, contrary to what he had previously said in evidence and supported in the grievance letter.
52. By contrast, Stephen England was consistent and clear that he had never been told by the claimant he had hypospadias.

53. We find the claimant never told the respondent about hypospadias during his employment as Mr England's evidence was clear on this point and the claimant's' was confused and contradictory.

Joint hypermobility syndrome

54. The first time it is documented to the respondent that the claimant's joint hyper mobility syndrome was a disability is in the occupational health report dated 19 April 2022. As we have found at paragraph 34, this was sent to the respondent at the very end of April 2022 after the claimant had approved it on 27th of April 2022.
55. Before that date, the claimant had referred to joint pain (on 1st and 7th of March 2022) but had made it clear that this did not impact is normal day-to-day activities. There was therefore no reason for the respondent to suspect that the claimant had a disability before the end of April 2022.
56. The claimant made it clear in an email dated 1 March 2022 that his musculoskeletal issues did not stop him carrying out the role of delivery drivers' mate that he had been doing since December 2021. We find that this role involved the claimant carrying weights of up to 80 kg when doing deliveries.

Colour blindness

57. It's been accepted by the respondent they had knowledge that the claimant was colourblind at all material times and we find the respondent knew about the claimant's disability of colour-blindness in February 2022.

Relevant Law

Burden of Proof (section 136 Equality Act 2010 ("EqA 2010"))

58. The reversal of burden of proof applies under section 136 EqA 2010 'to any proceedings relating to a contravention of this Act'.

59. The EqA 2010 provides for a shifting burden of proof. Section 136 so far as relevant provides as follows:

    (2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

60. Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the EqA 2010. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

61. If the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong* and other cases 2005 ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

62. *Efobi v Royal Mail Group Ltd 2021* ICR 1263, SC states that the issue for the tribunal, in deciding whether the burden of proof has shifted from the claimant

to the respondent is whether, after hearing the evidence from all sources at the end of the hearing, the claimant has proved facts from which, absent any adequate explanation, the tribunal can infer that a disadvantageous decision is unlawful discrimination.

Time limits in discrimination cases

63. The relevant part of section 123 EqA 2010 state:

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

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

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

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Direct discrimination (section 13 EqA 2010)

64. Under s13(1) of the EqA 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of disability than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.'

65. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] IRLR 285)

Harassment

66. Section 26 of the EQA defines harassment as follows:

"(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".

Reasonable adjustments (sections 20 and 21 EqA 2010)

67. The relevant part of sections 20 and 21 EqA 2010 state:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

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

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

68. The duty to make reasonable adjustments is unique as it requires positive action by employers to avoid substantial disadvantage caused to disabled people by aspects of the workplace. To that extent it can require an employer to treat a disabled person more favourably than others are treated.
69. Paragraph 6.28 of the equality and human rights commission code of practice on employment (2011) identifies the factors relevant to whether an adjustment is reasonable or not. These include:
    a. the extent to which it is likely to be effective;
    b. the financial and other costs of making the adjustment;
    c. the extent of any disruption caused;
    d. the extent of the employer’s financial resources and the availability of financial or other assistance, and the type and size of the employer.

Discrimination arising from disability (section 15 EqA 2010)

70. Section 15 EqA 2010 states:

15 Discrimination arising from disability

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

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

Victimisation (s.27 EqA 2010)

71. The relevant parts of section 27 EqA 2010 state:

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, ..

(2)Each of the following is a protected act—

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Unauthorised deductions from wages

72. Section 13 ERA 1996 states:

> **Right not to suffer unauthorised deductions.**
>
> **(1)An employer shall not make a deduction from wages of a worker employed by him unless—**
> **(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
> **(b)the worker has previously signified in writing his agreement or consent to the making of the deduction…**
>
> **"(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

Discussion and decision

73. We take each of the issues, set out in the appendix to this judgment, and apply the facts we have found to the law to reach our conclusions.

Direct Disability Discrimination (S.13 EQA 2010)

1. The Claimant alleges that on 18 May and 7 June 2022, Andrew Beckett refused to provide him with a 4% uplift in pay for carrying out installations, and that through such refusal, he was treated, because of his colour-blindness and joint hypermobility syndrome, less favourably than Shaun O'Connor, Paul Watson and Chris Meredith, who each received the uplift.

74. The respondent agreed that Mr Beckett initially said the claimant would not receive a 4% uplift in pay for carrying out installations.

2. Are Shaun O'Connor, Paul Watson and Chris Meredith appropriate comparators or are their circumstances different than the Claimant's?

75. No, they are not appropriate comparators. The claimant accepted Chris Meredith was an agency worker and therefore not an appropriate comparator. Shaun O'Connor and Paul Watson agreed to carry out the Installations and this is why they received a 4% uplift on pay. The claimant circumstances were different because, as we have found at paragraph 19, he did not carry out Installations.

3. Are the facts such that the Tribunal concludes that the refusal to provide him with a 4% uplift in pay for carrying out installations amounted to less favourable treatment of the Claimant because of his colour-blindness and joint hypermobility syndrome.

76. No, they are not. The claimant agreed the 4% uplift was conditional on Installations being performed. It was remuneration for this extra work and

responsibility. The reason the claimant was initially told he wouldn't receive this payment was because he wasn't doing Installations.

77. As we have found at paragraph 20, the claimant was paid the 4% uplift for carrying out Installations from January 2022 to September 2022, despite not carrying out Installations.
78. We therefore conclude that the reason the claimant was initially told wouldn't receive a 4% uplift for carrying out the Installations was because it was agreed he would do doing those Installations, not because of his colour-blindness and joint hypermobility syndrome. We also that the respondent did not refuse to pay the 4% uplift. On the contrary, the claimant was paid the 4% uplift from January to September 2022.

4. If so, was this because of the Claimant's protected characteristic?

79. No, it was not.
80. This claim therefore fails because there was no less favourable treatment and the claimant's treatment not because of his colour-blindness and joint hypermobility syndrome..

5. The Claimant alleges that on 22 and 23 April 2022, Stephen England required the Claimant to work on an install van, and that through such requirement, he was treated, because of his hypospadias, less favourably than Shaun O'Connor, Paul Watson and Chris Meredith.

81. We have found, at paragraph 34, that Stephen England required the claimant to work to on the split route van on 22nd and 23 April 2022. On the split van route he was not required to do Installations, nor was he required to lift heavies.

There was no less favourable treatment, if anything the claimant was given preferential treatment as he wasn't required to lift heavies or do installations.

82. We have also found at paragraph 53 that the respondent didn't know about the claimant's hypospadias during his employment.
83. This claim therefore fails because there has been no less favourable treatment on the grounds of the claimant's hypospadias.

6. The Claimant alleges that on 7 and 15 March and 26 April 2022, Stephen England refused to deal with the Claimant's request to be assigned to a van without the requirement to carry out installations, and that through such refusal, he was treated, because of his hypospadias, less favourably than Shaun O'Connor, Paul Watson and Chris Meredith.

84. We have already found at paragraph 31 that the reason Stephen England did not deal with the claimant's request for reasonable adjustments from March 2022 was because of his own mental health condition. Stephen England referred all queries relating to the claimant's request for reasonable adjustments to Andrew Beckett promptly in March 2022.
85. We therefore do not find that Stephen England refused to deal with the claimant's request to be assigned to a van without the requirement to carry out Installations.
86. In any case, the claimant agreed that he was never required to carry out Installations. He might have been on a van where installations done, but the claimant agreed he was never asked to do installations.

7. Are Shaun O'Connor, Paul Watson and Chris Meredith appropriate comparators or are their circumstances different than the Claimant's?

87. No, they are not appropriate comparators. The claimant accepted Chris Meredith was an agency worker and therefore not an appropriate comparator. The claimant led no evidence to suggest that Shaun O'Connor and Paul Watson were not assigned to a van without the requirement to carry out installations.

8. Are the facts such that the Tribunal concludes that the requirement for the Claimant to work on an install van and the refusal to assign him to a van without the requirement to carry out installations amounted to less favourable treatment of the Claimant because of his hypospadias.

88. No, for the reasons set out in paragraphs 84 to 86 above.

9. If so, was this because of the Claimant's protected characteristic?

89. We've found at paragraph 53 that Stephen England didn't know about the claimant hypospadias.
90. This claim therefore fails because there has been no less favourable treatment on the grounds of the claimant's hypospadias.

10. The Claimant alleges that on 7 March 2022, Stephen England refused to provide the Claimant with a pass to access the toilet facilities and that through such refusal, he was treated, because of his hypospadias, less favourably than a hypothetical comparator.

91. We were taken to no evidence from the claimant that Stephen England refused to provide him with a pass to access the toilet facilities on 7 March 2022.
92. As we have found at paragraph 30, the claimant accepted in evidence that he was provided with a pass to access the toilet facilities shortly after 7 March 2022.
93. As we have found at paragraph 29 that all new starters from January to March 2022 were not issued with a pass to access the toilet facilities because of the change in third-party security provider and the broken printer, which could not issue passes.
94. The claimant was therefore not treated any less favourably by not being provided with a pass to enter the building, than any other member of staff.

11. Are the facts such that the Tribunal concludes that the refusal to provide the Claimant with a pass to access the toilet facilities amounted to less favourable treatment of the Claimant because of his hypospadias.

95. No there are not, for the reasons set out in paragraphs 91 to 94 above.

12. If so, was this because of the Claimant's protected characteristic?

96. No, Stephen England couldn't have treated the claimant less favourably due to his hypospadias as he was not aware the claimant had a diagnosis of hypospadias at this time as we have already found at paragraph 53.

97. This claim therefore fails because there has been no less favourable treatment on the grounds of the claimant's hypospadias.

13. The Claimant alleges that on 6 May 2022, Andrew Beckett refused the Claimant's request to work four days per week and that through such refusal, he was treated, because of his joint hypermobility syndrome, less favourably than Darren Duncan, Darren Shepley, Paul Watson.

98. This claim fails because we have found at paragraph 39 that Mr Beckett offered the claimant two 4-day shifts. He didn't refuse the claimant the option of working four days.

14. Are Darren Duncan, Darren Shepley, Paul Watson appropriate comparators or are their circumstances different than the Claimant's?

15. Are the facts such that the Tribunal concludes that the refusal to allow the Claimant to work four days per week amounted to less favourable treatment of the Claimant because of his joint hypermobility syndrome.

16. If so, was this because of the Claimant's protected characteristic?

99. We do not need to answer these questions, given our findings at paragraph 98 above.

Discrimination arising from disability

17. The Claimant alleges that on 18 May and 7 June 2022, Andrew Beckett refused to provide the Claimant with a 4% uplift in pay for carrying out installations and that through such refusal, he was treated unfavourably because of something arising in consequence of his colour-blindness and joint hypermobility syndrome.

100. We have found at paragraph 20 the claimant was paid the 4% uplift for carrying out installations.

18. Did the withdrawal of the uplift amount to unfavourable treatment?

101. There was no withdrawal of the uplift and therefore no less favourable treatment. In any case, we find that a refusal to pay an individual for work they have not done, is not unfavourable treatment.

102. We therefore do not need to go on to consider issues 19, 20, 21 or 20 or 22.

23. The Claimant alleges that on 22 April 2022, Stephen England refused to allow the Claimant to carry out light duties and that through such refusal, he was treated unfavourably because of something arising in consequence of his hypospadias.

103. We have found at paragraph 34 that Stephen England gave the claimant the easier delivery-only split route van on 22 April 2022. This route avoided the claimant having to do Installations or heavies.

104. We find that this was the giving the claimant light duties. We conclude that Stephen England did not refuse to allow the claimant to carry out light duties on 22 April 2022.

24. Did the above amount to unfavourable treatment?

105. We conclude there was no less favourable treatment.

106. We therefore do not need to go on to consider issues 25, 26, 27 or 28.

29. The Claimant alleges that on 25 May 2022, Stephen England required the Claimant to attend a training course in respect of installations and that through such requirement, he was treated unfavourably because of something arising in consequence of his colour-blindness and joint hypermobility syndrome.

107. As we have found at paragraph 40, there was no training on Installations on 25th May 2022. The training course was about heavies alone. The claimant was asked by Andrew Beckett to observe the process for lifting heavy items but was not asked to take part in any heavy lifting.

108. As we have found at paragraph 40, the correspondence from the claimant at the time indicates that once he understood what the training was about and what was required of him, he was happy to attend the training.

30. Did the above amount to unfavourable treatment?

109. No it was not. The claimant was not asked to attend training on Installations. The claimant was happy to attend the training on heavies, as we have set out in paragraph 108 above.

110. We therefore do not need to go on to consider issues 31, 32, 33 and 34.

Failure to make reasonable adjustments

35. The Claimant alleges that the Respondent had a PCP of not permitting employees access to toilet facilities at the site at which the Claimant was based. He will say that the PCP applied from December 2021 to March 2022.

111. We find that the respondent did not have a practice of not permitting employees access to toilet facilities at the Site. Employees were permitted to use the toilet. This claim therefore fails for this reason and we do not need to consider issues 36, 37, 38, 39, 40 or 41.

112. If we are wrong on this point:

a. We consider issue 37. As we have found at paragraph 30, the claimant agreed that he did get issued with a pass to access the building shortly after he requested it in March 2022.

b. We consider issues 38. We have found at paragraph 53 that the respondent had no knowledge of the claimant's hypospadias during his employment.

c. We consider issues 39. We find that there was no reason the respondent ought to know about the claimant's hypospadias because he didn't tell them either via occupational health or by the various meetings with Mr Beckett to discuss reasonable adjustments, as we have set out in paragraph 53 above.

113. For these reasons, this reasonable adjustment claim fails.

42. The Claimant alleges that the Respondent had a PCP of requiring employees to carry out installations in order to qualify for the 4% uplift in pay.

114. The respondent agrees that they did require employees to carry out Installations to qualify for the 4% uplift in pay. The respondent did therefore have this practice.

43. The Claimant alleges that such PCP put him at a substantial disadvantage, in that the Claimant was unable to carry out installations and therefore was not eligible receive the 4% uplift in pay due to his colour-blindness and joint hypermobility syndrome. Was that a substantial disadvantage?

115. As we have found at paragraph 20, the claimant did receive a 4% uplift in pay from January 2022 despite him not carrying out Installations. In any case, in cannot be a substantial disadvantage to not pay the claimant for work he did not do.

116. The claimant was therefore not place at a substantial disadvantage by this practice and for this reason this claim fails.

117. We therefore do not need to consider issues 44, 45, 46, 47, 48 or 49.

50. The Claimant alleges that the Respondent had a PCP of requiring employees to carry out heavy lifting.

118. As we have found at paragraph 27 the respondent required all staff to do heavy lifting from 1 January 2023, albeit heavy goods would be incorporated into some of the respondent's delivery routes from February 2022

The Claimant alleges that such PCP put him at a substantial disadvantage, in that he was unable to carry out heavy lifting and so was unable to work due to his hypospadias. Was that a substantial disadvantage?

119. As we have found in paragraph 40, the respondent had no requirement for the claimant to do heavy lifting until 1 August 2022 at the earliest. Prior to this date the claimant was only required to lift items up to 80 kg. As we have found in paragraph 28, the claimant was always able to lift items up to 80 kg.

120. The claimant was suspended in July 2022, before there was any requirement for him to do heavy lifting and therefore the claimant never carried out heavy lifting.

121. The claimant was therefore not place at a substantial disadvantage by this practice and for this reason this claim fails.

122. We therefore do not need to consider issues 52, 53, 54, 55, 56, 57 and 58.

59. The Claimant alleges that the Respondent had a PCP of requiring employees to work five days per week.

123. As we have found at paragraph 22, there was no practice operated by the respondent that staff work five days a week. The respondent offered a range of shift patterns, including four- and five-day week patterns and part time working.

124. This claim therefore fails for this reason.

125. We do not need to consider issues 60, 61, 62, 63, 64, 65, 66 or 67.

126. If we are wrong on this point, we consider issue 60 and conclude that the claimant was not placed at a substantial disadvantage because, as we have found at paragraph 39, an adjustment was made by Mr Beckett in May 2022 to allow the claimant to work one of two four-day week shift patterns. The claimant did not accept Mr Beckett's proposal to work four days. The claimant cannot now say that the respondent failed to make an adjustment, which he himself subsequently refused.

Harassment

The Claimant alleges that the following events took place and that through each act / omission he was subjected to harassment relevant to his disability:

68.1 On 25 May 2022, Stephen England required the Claimant to attend a training course in respect of installations. The Claimant relies on his colour-blindness and joint hypermobility syndrome.

127. As we have found at paragraph 40, there was no training on Installations on 25th May 2022. The training course was about heavies alone. The claimant was asked by Andrew Beckett to observe the process for lifting heavy items but was not asked to take part in any heavy lifting.

128. We therefore find this event did not take place as alleged by the claimant and this claim fails for this reason. We do not need to consider issue 70, 71, 72 or 73.

129. If we are wrong on this point, we consider issues 70 to 72 and conclude as follows. As we have found at paragraph 40, the correspondence from the

claimant at the time indicates that once he understood what the training was about and what was required of him, he was happy to attend the training. The claimant had a friendly exchange by email with Mr Beckett regarding his attendance at the heavies training.

130. We do not find that the claimant has established Mr Beckett had the purpose of harassing him or that it had the effect of harassing him when viewed objectively. This claim therefore also fails for these reasons.

68.2 On 7 March 2022, Stephen England refused to assist the Claimant with obtaining a security pass to access the toilet facilities. The Claimant relies on his hypospadias.

131. There is no evidence Stephen England refused to assist the claimant with obtaining a security pass on 7 March 2022.

132. As we have found at paragraph 30, the claimant agreed that he did get issued with a pass to access the building shortly after he requested it in March 2022.

133. As we have said, the claimant agreed in evidence that he had been provided with a pass shortly after's request on 7 March 2022.

134. We therefore find this event did not take place as alleged by the claimant and this claim fails for this reason. We do not need to consider issue 70, 71, 72 or 73.

Victimisation

74. Did the Claimant engage in a protected act as follows:

74.1 On 7 March 2022, the Claimant sent an email to the Respondent in which he stated that he required reasonable adjustments and that the Respondent was under an obligation to provide them.

135. The respondent agrees that the 7 March 2022 email is a protected act. We conclude the claimant did engage in a protected act on 7 March 2022.

75.1 In May and June 2022, did the Respondent increase the Claimant's working hours?

136. The claimant advanced no evidence to support this allegation. The claimant agreed in evidence his hours were not increased at this time and this claim was incorrect. The evidence available to us is that the claimant's working hours were reduced during this period. This claim fails.

75.2 In May and June 2022, was the Claimant given the longest routes / delivery runs meaning he was required to work an average of 67 hours per week?

137. The claimant advanced no evidence to support this allegation. As we said, the claimant already agreed his hours were not increased at this time. The claimant was taken to evidence from the respondent he worked on average 55 hours per week not 67 as alleged. We have accepted the respondent's evidence in this regard. The claimant provided no evidence to

suggest the respondent's calculation was incorrect. The claimant also agreed that he was only given the longest routes for third of the time. This claim fails.

75.3 From 20 July 2022 until the termination of his employment, was the Claimant told that he could not "close the doors" of his van until after 6pm having commenced his shift at 6am and only then could he return to site?

138. The claimant advanced no evidence to support this allegation. This claim fails as the last time the claimant worked for the respondent was 14 July 2022. The claimant agreed that this allegation was incorrect.

75.4 In May and June 2022, was the Claimant given the heaviest routes / delivery runs meaning he was required to deliver heavy objects?

139. The claimant advanced no evidence to support this allegation. This claim fails as the claimant agreed he was never required to do anything other than the normal routes which involved lifting products up to 80 kg.

75.5 In May and June 2022 did the Respondent pair the Claimant with people who were of a significantly different height to him, despite the Claimant's request to be paired with people of a similar height?

140. The claimant advanced no evidence to support this allegation. The claimant hasn't told us about anyone he was required to work with who was a different height to him. We were told about female colleague and a non-able-bodied colleague but there was no mention of height. This claim therefore fails.

75.6 On 12 May 2022 did the Respondent refuse to carry out a risk assessment / safe system of work check?

141. We've accepted Mr Beckett's clear explanation that there was no need to carry out a risk assessment until the claimant was required to lift heavies. This requirement would not be until 1 August 2022 at the earliest. We find that Mr Beckett did not refuse to carry out a risk assessment/safe system of work on 12 May 2022. Rather, he deferred that decision until after 1 August 2022, in the event the claimant might be required to lift heavies. This claim fails.

75.7 On 4 and 6 May 2022, did Mr Beckett and Mr Hobbs tell the Claimant that he was required to take annual leave in order to attend medical appointments?

142. The claimant has not provided any evidence that Mr Beckett and Mr Hobbs told him he was required to take annual leave to attend medical appointments on 4 and 6 May 2022. This claim therefore fails.

75.8 In May and June 2022, did the Respondent allocate work on the 'specials van' to Shaun O'Connor, Mick Tarpey and Paul Watson who also attended work with injuries?

143. The claimant has led no evidence on this and in any case, allocating work to others in a particular way was not a detriment to the claimant. This claim fails.

75.9 On 25 May 2022, did the Respondent require the Claimant to attend a training course in respect of installations?

144. As we have found at paragraph 40, there was no training on Installations on 25th May 2022. The training course was about heavies alone. We conclude the respondent did not require the claimant to attend a training course in respect of Installations on 25 May 2022. This claim fails.

75.10 On 22 and 26 April 2022 did the Respondent refuse to allow the Claimant to carry out light duties following a procedure he had undergone?

145. We have found, at paragraph 35, that Stephen England required the claimant to work to on the split route van on 22nd and 23rd April 2022. On the split van route, he was not required to do Installations, nor was he required to lift heavies. There was no less favourable treatment, if anything the claimant was given preferential treatment as he wasn't required to lift heavies or do installations.

146. We find that this was the giving the claimant light duties. We conclude that Stephen England did not refuse to allow the claimant to carry out light duties on 22 April 2022. This claim fails.

75.11 On 7 March 2022 did the Respondent refuse the Claimant's request to provide him with a security pass to access the toilet facilities?

147. As we have found at paragraph 30, the claimant agreed that he did get issued with a pass to access the building shortly after he requested it in March 2022. We find that the respondent did not refuse the claimant's request to

provide him with a security pass to access the toilet facilities on 7 March 2022. This claim fails.

75.12 On 22, 23 and 26 April 2022, did the Respondent refuse the Claimant's request to be assigned to a van without the requirement to carry out installations.

148. We have already found at paragraph 31 that the reason Stephen England did not deal with the claimant's request for reasonable adjustments from March 2022 was because of his own mental health condition. Stephen England referred all queries relating to the claimant's request for reasonable adjustments to Andrew Beckett promptly in March 2022.

149. We therefore do not find that Stephen England refused to deal with the claimant's request to be assigned to a van without the requirement to carry out Installations.

150. In any case, the claimant agreed that he was never required to carry out Installations. He might have been on a van where installations done, but the claimant agreed he was never asked to do installations.

151. This claim fails

75.13 On 6 May 2022, did the Respondent refuse the Claimant's request to work four days per week?

152. No, the respondent did not refuse the claimant's request for a four-day week as we already found at paragraph 39 above.

76. If so, was this because the Claimants did a 'protected act' and / or because the Respondent believed the Claimant had done, or might do, a 'protected act' or was it for some other reason?

153. Given we have found that none of the incidents occurred as alleged by the claimant, we do not need to consider this issue. However, if we are wrong on this point find that in connection with all the victimisation claims, the claimant has failed to establish the link between the protected act and the alleged conduct.

Jurisdiction – Time Point

77. Do any of the above allegations of discrimination that occurred prior to 29 March 2022, being three months prior to the date on which the Claimants registered for Early Conciliation with ACAS, namely 28 June 2022, amount to a continuing act?

154. We haven't upheld any of the claimant's allegations of unlawful discrimination.

155. For completeness, we find that the only allegations which are out of time relates to the toilet pass allegation.

156. This is because, as we have found in paragraph 30, the claimant accepted he was provided with toilet pass shortly after seventh of March 2022 and this allegation must therefore have occurred prior to 29 March 2022. The allegation did not feature in the claimant's grievance and the first time it was referred to after 7 March 2022 by the claimant was in his ET1 and Grounds of claim

78. If not, would it be just and equitable to extend time in the circumstances?

157. We find it is not just and equitable to extend time in the circumstances. The claimant has provided no reason why we should do so. The respondent is prejudiced by dealing with this allegation, which is now over two years old and which requires the respondent's witness, Stephen England, to recall conversations on specific dates which are said to have taken place.

158. We therefore find, notwithstanding that these claims fail, we do not have jurisdiction to hear the claims identified as issues 10 (direct disability discrimination), 35 (failure to make reasonable adjustments), 68.2 (harassment), and 75.11 (victimisation) as they all relate to the issue of the alleged failure of the respondent to issue a pass to enable the claimant toilet facilities.

Unauthorised Deductions from Wages

79. Did the Respondent make the following deductions from the Claimant's pay:

79.1 From 1 July 2022 until 1 September 2022, the Respondent deducted 4% of the of the Claimant's pay amounting to £235 in total.

159. No, as we have found at paragraph 20, the claimant was paid the 4% uplift from 1 July 2022 until 1 September 2022 in his September payslip.

79.2 On 25 June 2022, £288.88 was deducted.

160. No, as we have found at paragraph 43, the claimant's July pay 2022 was adjusted to account for the same day payment he received.

79.3 On 25 July 2022, £296.32 was deducted.

161. No, as we have found at paragraph 43, the claimant's July 2022 pay was adjusted to account the same day payment he received.

Jurisdiction - Time Point

81. Do any of the above allegations of unauthorised deductions of wages that occurred prior to 29 March 2022, being three months prior to the date on which the Claimants registered for Early Conciliation with ACAS, namely 28 June 2022, amount to a series of deductions?

162. Although these claims have failed, we find they were brought in time as they occurred after 29th of March 2022.

Employment Judge Childe

20 September 2024

JUDGMENT SENT TO THE PARTIES ON

24 September 2024

FOR THE TRIBUNAL OFFICE

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