EMPLOYMENT TRIBUNALS

Claimant: Ms A Dzienisz
Respondents: (1) Phinia Delphi UK Ltd (formerly BorgWarner Ltd)
(2) The Best Connection Group Ltd

Heard at: London South (by CVP)

On: 6-9/8/2024
Before: Employment Judge Mr J S Burns
Members Dr S Chacko and Mr P Morcom

Representation
Claimant: Ms D Janusz
Respondents: (1) Ms D Gilbert (Counsel)
(2) Ms G Cullen (Counsel)

Polish/English translator Ms M Panufnik on 6-8/824 and Ms A Gleb on 9/8/24

JUDGMENT

The claims are dismissed

REASONS

Preliminary matters

1. The claims were under section 15 (discrimination arising from disability[1]) and section 20 (failure to make reasonable adjustments[2]) of The Equality Act 2010, the issues having been identified in a CMO dated 14 June 2023.

2. The documents were in a combined bundle of 421 pages. We received also an agreed chronology and cast-list.

3. The Claimant served a supplementary bundle of 41 pages on the first morning of the trial.

[1] Under section 15 the claimed "something arising" was the sickness absences and the claimed unfavourable treatment was the dismissal.

[2] Under section 20 the claimed PCPs were (i) A requirement to work with only a 30 minute and 10 minute break (ii) The requirement to work 9 hour shifts and (iii) the requirement to work in high temperatures; and the claimed RAs were (a) for additional breaks to be required (b) a reduction in shift length to 8 hours and (c) the provision of a fan.

4. The Respondents objected to the admission of these late documents. The proposed additional documents dated from as early as July 2021. The Tribunal had ordered disclosure to have been given by 2/8/23. The Claimant's explanation for not disclosing them earlier was that they were found by her/her husband on the eve of the trial on her husband's phone. General disclosure should however have been given a year ago of documents in the Claimant's possession and control. That required a reasonable search for documents to be carried out at the proper time. If the Claimant or her husband on her behalf thought that the phone could be a repository of relevant documents then they should have examined it at the proper time, and not delayed the search with the consequence of presenting the Respondents with an ambush. Many of the documents were in Polish with some translations provided by the Claimant herself and not approved by the Respondents. Ms Janusz suggested that the translations could be checked during the trial by the Tribunal translator. That would be an onerous task which the Tribunal did not think could be carried out reasonably while the translator was engaged in her already arduous task of translating the oral evidence. Nor was it the task for which she had been engaged by the Tribunal. In any event, even without the translation problem, the Respondents' witnesses and Counsel could not be expected to respond to this new contested material without a potentially substantial adjournment which itself would be unacceptable and disproportionate. The documents were of doubtful relevance in any event because they purported to show matters such private exchanges between the Claimant and her husband rather than communications between the Claimant and the Respondents. Accordingly, we disallowed the admission of the Claimant's additional bundle of 41 pages.

5. The Respondents at the outset of the trial raised a time-point in relation to the reasonable adjustments claim. This had not been pleaded in the Grounds of Resistance or identified at the Preliminary Hearing on 14/6/23 as an issue to be decided at the trial. We accepted the Respondents' submission that nevertheless we had to consider the point as it was "*a jurisdictional matter*". We gave the Claimant an opportunity in her oral evidence to comment on the point and to put forward any relevant factors which she wished us to consider in deciding it.

6. We heard evidence from the Claimant and Mr R Kreft-Fryers, former setter at R1 and then from the following Respondent witnesses: Ms D Wadhams, Site HR manager at R1; Ms F Rozvany, R2's on-site co-ordinator based at R1's premises; and Mr C Davis, senior manager at R2. We also read statements/comments said to be from Karl Packman ("KP") (the Claimant's supervisor employed by R1) and P Sturgeon Brown who did not attend as witnesses.

<u>The Claimant's English language abilities and credibility</u>

7. The Claimant used a Polish/English translator when giving her evidence but said afterwards that she had done so in case she did not understand medical and legal terms in English. She said she does understand and speak basic English. After giving her evidence she was provided with the continuing services of the translator on the agreed basis that the translator would assist if at any point during the remainder of the trial she did not understand anything. She did not appear to call upon the services of the translator at all for the rest of the trial (over a day and half of evidence and submissions) which was conducted wholly in English. We have also seen several contemporary documents in the bundle written by her in English. She also agreed that she had had to pass an English proficiency test before being accepted

for employment by the Respondents. Her GP notes show that she first registered with a UK GP in May 2015 and has consulted with that GP every year since then apart from 2019, suggesting that she has lived in the UK for much of the time between 2015 and the start of her employment with the Respondents in May 2021. We infer from this that the Claimant's understanding of English was reasonable at the material times and that to the extent that she has advanced any lack of such understanding as an explanation for various discrepancies in her evidence, this is an implausible explanation.

8. The Claimant was diagnosed with epilepsy in Poland in 2019. However, when she filled in an application form when applying for employment with the Respondents on 25/5/21, one of the parts of the form she completed specifically asked whether she suffered from epilepsy and she stated in filling out that part that she did not. (370) This was a false statement which the Claimant would have known was false at the time. She also placed a cross selecting the answer "*I am not aware that I have a health condition or disability that might impair my ability to undertake effectively the type of work offered by The Best Connection*". This conflicts with her current case that in fact her disability did negatively affect her ability to work.

9. The Claimant's accounts of her claimed epileptic attacks have been inconsistent. For example, she now accepts that she was well and did not suffer any ill-health or epileptic problems on Thursday 10/2/22. The reason for her unauthorised absence that day (which was an effective cause of her dismissal) was child-care and not epilepsy. However, when on 12/2/22 she consulted with a specialist nurse following an A&E referral she is recorded as having told the nurse "*had left sided temporary headache on Thursday before fit*". She was seen again for a clinical review by another clinician on 14/2/22 when the following is recorded as stated by the Claimant and her husband ":*She has been suffering from what has been classified so far as epileptic disorder, the last episodes happened on Thu 10/2, lasting 10 minutes…".* It is unlikely that two different professionals would independently made the same mistake. It is also unlikely that the Claimant and her husband would have made an innocent mistake about this because it was matter relating to a claimed event in their immediate past which they were seeking advice about. The most likely explanation, especially when viewed in the context of the other attempts made during the trial by the Claimant to attack the medical record where it does not accord with her narrative, is that the Claimant gave deliberately false information to the medical professionals about the state of her health on the day of the unauthorised absence which had caused her dismissal.

10. The Claimant's evidence about her epilepsy medication has been inconsistent. The GP record of what the Claimant had stated on 22/11/21 reads "*wanted to discuss diagnosis of epiilipsy (sic) when in home country many years ago , nil medication*". (283). On 12/2/2022 the Claimant is recorded as having told another health professional the following: "*Not taking anticonvulsant medication. Was prescribed Oxcarbazepine[3] in Poland but it was*

[3] a medication used in the treatment of partial seizures.

hoped she would not need to take it so has never taken this. Does not know what dosage she should have taken if needed….Says she was diagnosed with symptomatic (focal) partial epilepsy and epileptic components with complex partial seizures" (120). However, in her oral evidence to the Tribunal she stated that she had been taking the Polish prescribed medication to counter epilepsy from October 2019 to about July 2021.

11. The Claimant during her oral evidence was verbose and evasive, preferring to make long speeches rather than answering the clear questions which she was asked. This continued despite the Tribunal judge asking her on numerous occasions to answer the questions directly and concisely, which requests she ignored. As a result, the Claimant's evidence (which had been scheduled at the CMPH to be completed at the end of the first day of the trial) had to be extended and finally ended at the end of the second day.

12. The Claimant when asked awkward questions would often say she "did not know" or "did not know how to answer that" or similar.

13. The Claimant also alleged forgery of either her signature, or documents bearing her signature, and manufacturing of documentary evidence by the Respondent/s. These allegations were made as an attempt to distance herself from documents which did not fit her case, notwithstanding the fact that she had accepted in other evidence being present on the occasions when the documents were produced or used to record information. No such suggestions had been made before this by or on behalf of the Claimant during the many months which had elapsed since the disclosure of these documents in 2023. The Tribunal found that these allegations were baseless.

14. For these reasons the Tribunal finds that the Claimant is an unreliable and incredible witness and where her evidence is contradicted by the evidence of the Respondents' witnesses and or the contemporaneous documentary record, we prefer the latter.

<u>Findings of fact</u>

15. Respondent 2 is an employment business. It placed the Claimant on temporary assignment at Respondent 1, as a machine operator, from 25/05/2021.

16. The work she did was on a production-line in a factory manufacturing car parts in Gillingham. The conditions in the factory were described by the Claimant as follows: *"I worked at a station with a machine behind that washed parts – the so-called wash. Often this machine behind me was unsecured; it should have had a closed lid to prevent someone from accidentally putting their hand in, but it was usually open. The machine contained hot water and strong chemicals. If during a seizure my hand fell into this machine, I would suffer serious health consequences. The machine was also angular, and I could have seriously*

injured my head if I fell. During a seizure, when I lose consciousness, *I fall like a log. I am unable to use my hands to prevent the fall. I could easily crack my head open if I fell near my workstation".*

17. There is nothing in the UK medical notes (which start in 2015) about epilepsy until November 2021 but, if the Claimant was liable to sudden epileptic seizures when she started her employment in May 2021, then she was entirely responsible for placing herself at risk of these dangers in the first place by concealing her condition and stating that she did not have any "*health condition or disability that might impair my ability to undertake effectively the type of work offered*".

18. On 18/6/21, having secured the employment, she then approached JG, (Ms F Rozvany's predecessor - and employee of R2 who was based at R1's factory for purposes of managing and dealing with workers assigned by R2), to report that she suffered from that condition. JG made another entry on the Claimant's record (382) to note that fact; but against the box in which there is an opportunity to indicate a positive or negative answer to the suggestion *"I do have a health condition or disability that might affect my work and may required special adjustments to my work or place of work*" JG entered "*N/A"*, - which is an abbreviation for "*Not applicable*". The Claimant signed this at the time.

19. The Claimant's evidence about this conversation on 18/6/21 was as follows: "*I described the symptoms of epilepsy, and stated that there would certainly be times when I would feel weak and need more breaks, or a day off on the day of or after an attack. She agreed to this and assured me that absences related to epilepsy would not be considered for general absence. I asked her if I could get some extra breaks if I needed them. She said there was no such thing as protection for people with chronic illness and that I was not entitled to extra breaks. She also said that if I felt unwell, I should look for a setter and ask if I could leave my working station and go for a break."*

20. However, there is no contemporary document to support this account and the Claimant did not mention it in any of her several written communications with the Respondents during her employment, and in particular she did not mention it when making a detailed written complaint in October 22, (118) the subjects of which included how her absences should be treated. The claimed agreement that disability-related absences would be discounted is not recorded on the form (382). We did not receive evidence from JG who had long since left R2's employment. None of the other witnesses could give any direct evidence about this conversation. We do not accept the Claimant's account and prefer the contemporary documentary record (382) as the most reliable evidence of what occurred that day which we find was that the Claimant reported her epilepsy but did not ask for nor was she told by JG that she would be given any adjustments for her condition. The Claimant signed a form which acknowledged that such adjustments would be "not applicable".

21. The Claimant claims "*During the summer, working at BorgWarner was difficult for me because it was hot. Neither company offered any assistance in this regard. During hot periods, I brought my personal fan.*" There is no contemporary evidence that during her employment she raised with the Respondents the issue of heat or that she wanted a fan and we find that she did not. Nor did she ask for extra breaks.

22. Up to the end of August 2021 the Claimant had been working an afternoon shift of 7 and a half hours. At the end of August 2021 the Claimant moved to work a night shift of 9 hours. She accepts in her witness statement that this move was motivated by her childcare arrangements rather than by any other consideration.

23. On 27/7/21, when this move was being discussed by the Claimant and Ms Rosvany, the Claimant sent a text message which in translation reads as follows "*If you were to talk to Karl (a reference to KPMJ") about night shifts, tell him please that I can even start my shift at 8pm, but I would have to leave at 5am*…" (389) This was motivated by child-care considerations.

24. The Claimant claims that "*After moving to the night shift, I asked if they could initially shorten my working hours by an hour or rearrange them so that I could finish earlier. I discussed this with someone from BorgWarner's agency. The agency did not agree*".

25. Ms Rosvany's evidence about this was follows: "*In the claim form that I have seen there is a mention of a conversation in October about shortening hours. I think this has been mixed up with the conversation in July which is confirmed by the text message records* (a reference to 389). *I have no memory of a conversation in October about shift length*."

26. We conclude that Ms Rosvany is correct about this. Apart from the request on 27/7/21 there is no contemporary evidence that the Claimant made any further request to shorten shift length. The Claimant did not refer to any such request in her lengthy and detailed complaint on 23 October 21. (118). We find there was no request to shorten the Claimant's night shift after it had started.

27. From 10/6 to 7/10/21 the Claimant had had 6 unplanned absences on each occasion on a Thursday. The Claimant gave a number of explanations for these but the Respondents were concerned that the Claimant was regularly absent on the day of the week when she did not have consistent childcare.

28. Mr Kreft Fyers gave evidence that "*At some point in 2021, though I do not remember the exact timing, Karl Packman directly told me that Anna Dzienisz would be dismissed due to absences…"* Karl Packman who would have been a material witness and who is still

employed by the First Respondent, was not called as a witness, without adequate explanation. We accept Mr Kreft Fryer's evidence about this.

29. The Claimant complained by email on 23/10/21 (118) in which she included the following *:"During shift my work mates comes to me and keep asking how I'm feeling about agency want fire me from job. …. Somebody come exactly with my name as one person to fire from job due to absence. I don't have idea with who else those person was*…" After receiving this complaint Ms Rosvany met with the Claimant and assured her that she had not had any request from R1 to end her assignment. However, she warned the Claimant that her absence level was high, and that this was being monitored

30. Throughout her employment the Claimant had 18 days unplanned absences from work. These were for a variety of reasons including sickness clearly unrelated to epilepsy (such as flu or Covid), and childcare. In most or all cases an R2 employee (Ms Rosvany) carried out a return-to-work interview and recorded pertinent information on a form.

31. During all the occasions on which Ms Rosvany conducted these interviews with the Claimant, the latter never mentioned that epilepsy was affecting her work or that there was anything which either Respondent could do or adjust for her in relation to her epilepsy.

32. In relation to only three of these absences, namely those on 2/7/21 (89), 9/9/21 (96) and 15/12/2021 (388), is there any contemporary documentary evidence (texts from the Claimant and a RTW form) to suggest that the Claimant claimed then that the absences were disability-related, ie caused by the epilepsy. The Claimant now says there were other absences caused by epilepsy, but that she concealed that reason from the Respondents. We do not accept this evidence. If the Claimant was willing to attribute her absences to epilepsy on three occasions, we think she would have been willing to do so on any genuine occasions.

33. The Claimant's witness statement refers to her having only one seizure at work (in November 21) and one occasion when she left work early because of a seizure during her eight-and-a-half months' service.

34. The Claimant had been informed at the beginning of her employment that any unplanned absences should be reported at least one hour before the shift time started to R2 by means of a dedicated 24/7 mobile phone service (ie by calling or texting) which reporting was important not only for record and pay reasons but also so that R2 could liaise with R1 to fill the gap in the production line with another employee, so as to try to minimise interference with the R1 operation. R2 was the Claimants employer and responsible for managing any absences by workers seconded to R1. The Claimant had been given induction

documentation (406) which stated this. Another document stated that R2 should be contacted where possible but that the client (R1) could be informed where contacting R2 was impossible. The Claimant did not always follow this procedure, as she thought it was pointless.

35. She had also been told to inform the R1 first-aider if she needed to leave work early or was suffering any problems but she did not do so.

36. The Claimant was also supposed to report to R2 if she left shift early for any reason.

37. The Claimant was aware of these requirements but breached them on several occasions. She took the view that it would be sufficient if she informed a work colleague such as a setter employed by R1 with whom she shared lifts to work that she was not attending work, or if she was leaving early. This was unacceptable to both the R1 management and to R2, although there is no clear contemporary evidence that the Respondents warned the Claimant about this.

38. The Claimant's attendance record in January 22 was particularly poor. She asked for a holiday on 5/1/22 but when this was refused stayed away from work anyway. She was absent again on 6/1/22, from 19/1/22 to 25/1/22 and on 28/1/22. None of these had anything to do with epilepsy.

39. On 8/10/22 the Claimant asked for leave on 10/2/22 but this was refused on the grounds that she did not have enough accrued holiday, but she simply failed to attend work that day so she could look after her children. She did not phone in or contact R2 that day to explain her absence.

40. The Claimant claimed that she had been told by Ms Rosvany that she could so this. Ms Rosvany denied this. This alleged permission by Ms Rosvany was not mentioned in the Claimant's contemporary texts and letters of complaint which she wrote in the immediate aftermath of her dismissal. (117, 132, 127, 131, 132). The Tribunal finds that had Ms Rosvany given permission, then that would certainly have been mentioned by the Claimant in those communications.

41. On 10 or 11 February 2022 KP (the R1 supervisor) told Ms Rosvany to terminate the Claimant's assignment. There was no discussion then between them about such matters

as whether any of the Claimant's unplanned absences had been disability-related or not. As stated, KP who would have been a material witness, was not called. We are unwilling to accept the suggestion that as a consequence of prior discussions between Ms Rosvany and KP, the latter, before issuing his instruction to Ms Rosvany to dismiss, excluded from his consideration those three absences in 2021 which the Claimant had claimed were disability-related.

42. Ms Rosvany dismissed the Claimant by text message on 11/2/22 reading "*Hello I tried to call you to tell you on the phone. Unfortunately you're not required at BorgWarner anymore due to high points of absences and leaving work early while not following our procedure*…"

43. A further explanation of this dismissal was given by R2 on 14/2/22 as follows: "*Your assignment at BorgWarner was terminated due to the failure of following the absence procedure. We have recorded numerous days off sick, with some of them not reported to the appropriate person. Unreported early finish has also been documented on numerous occasions. This is especially important not only to the smooth operation of the production but also Health and Safety reasons. We have also been informed that a holiday request was denied, however an absence was recorded on that day. …"* (122)

44. Thereafter the Claimant started seeking medical advice and interventions about epilepsy, headaches and depression etc.

45. She started ACAS conciliation on 28/2/22 and received her certificate on 29/3/22 and presented her ET1 on 20/4/22.

<u>A summary of law regarding the definition of disability</u>

46. Per section 6 Equality Act 2010, a person has a disability if they have a physical or mental impairment which has a substantial (which means "more than minor or trivial" per section 212 and a limitation going beyond the normal differences which may exist between people) and long-term adverse effect on her ability to carry out normal day to day activities.

47. In assessing whether there is or would be a substantial effect, one disregards measures such as medical measures which are being used to treat it. Sch 1 para 5(1) and (2).

48. A claimant does not have to show why she has an impairment - but merely the fact that she does have one; The question is "Is there something wrong with Applicant?" The Applicant does not have to show underlying cause of impairment is physical (rather than mental);

49. Normal day to day activities are activities such as walking, driving, typing and forming social relationships.

50. The effect is long term if it has lasted or is likely to last 12 months or for the rest of the person's life (Sch 1 para 2)

51. Under Section 6(5) EA 2010 The Secretary of State has issued 2011 issued guidance on matters to be taken into account in determining questions relating to the definition of Disability 2011.

52. C5 in the guide deals with recurring or fluctuating effects as follows "*If an impairment has had a substantial adverse effect on a person's ability to carry out normal day to day activities, but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred."*

53. C7 states *"It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the long-term element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect disappear altogether*."

A summary of law regarding claims for Failure to make Reasonable Adjustments

54. Section 20 read with 21 Equality Act 2010 provide that a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments.

55. Section 20(1)(3) provides that where a provision criterion or practice (PCP) of A's puts the disabled person concerned at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is the duty of A to take such steps as it is reasonable to have to take to avoid the disadvantage.

56. Para 20(1) of Part 3 of Sch 8 provides that there is no duty to make adjustments if the employer does not know and could not reasonably be expected to know both that a disabled person has a disability and is liable to be placed at the disadvantage.

A summary of law regarding claims for Disability Related Discrimination

57. Section 15 provides that a person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

58. An employer has a defence to a claim under s. 15(2) EqA if it did not know, or could not reasonably be expected to know, that the employee had a disability.

A summary of law regarding time limits in discrimination claims

59. Section 123 of the Equality Act 2010 provides that '*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."*

60. Time starts to run against a reasonable adjustments claim when it becomes clear that the employer is not making adjustments. As to when that is, an objective test applies. A failure to make a reasonable adjustment is an omission and not a continuing act.

61. It is for the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the Claimant.

Conclusions

As to whether the Claimant was disabled.

62. The Claimant claimed that she was disabled by reason of epilepsy. The Respondents' Grounds of Resistance had not admitted that the Claimant was disabled. On 14 June 2023 the Claimant had been directed to provide an impact statement and give disclosure of medical documents and the Respondents had been directed as follows: "*The Respondents must write to the Tribunal and the Claimant by 31 July 2023 confirming whether or not it accepts that the Claimant had a disability and, if so, on what dates. If the Respondent does not accept that the Claimant had a disability on any relevant date, it must explain why*". The CMO of 14/6/23 stated in paragraph 17 "*If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules"*.

63. The Second Respondent complied with this direction by sending an email dated 28/7/23 stating that "*it did not dispute that the Claimant had a disability during her assignment at* (R1)". The First Respondent failed to comply with the direction by 31/7/23 or at all. After the cross-examination of the Claimant had started on the first day of the trial it became apparent from the questions that R1 was disputing the Claimant's disability.

64. Ms Janusz stated that she had assumed that R1 had conceded disability or at least that this was not a live issue as it had not written in to say that it was disputed and had not given any reasons. We directed the First Respondent to serve and file its proposed written reasons for disputing disability and submissions as to why it should be permitted to continue maintaining that line of defence. Those submissions were served at the end of the first day of the trial. They accepted that R1 had not complied with paragraphs 12 and 13 of the CMO and that these directions were overlooked by R1's representative. They also accepted that this was not an adequate excuse for the failure to comply.

65. In final submissions Ms Janusz submitted that had R1 made it clear at the proper time that

disability was still in dispute, and given its reasons, then the Claimant would have had an opportunity to obtain further evidence from health professionals, for example in Poland, and that allowing the First Respondent to raise this apparently dormant issue after the trial had started would be unfair. We accept that submission. We recognise that debarring a defence is a draconian sanction, and usually should be avoided, particularly if the breach can be dealt with in some lesser way which still allows a fair trial to proceed within its listing, but in the circumstances the only realistic alternative to debarring that aspect of the First Respondent's defence would have been to adjourn the (already much delayed) trial part-heard to some later date to allow the Claimant a further opportunity to obtain evidence to try to counter the reasons which the First Respondent had recently produced.

66. We are not persuaded that the Claimant was suffering substantial adverse effects caused by her epilepsy during the material time, but the definition of disability is wide enough to include conditions where the effect may cease temporarily, have ceased but be likely to recur, or fluctuate.

67. We therefore debarred the First Respondent from denying disability and proceeded on the basis that the Claimant was disabled by epilepsy at the material time.

The reasonable adjustments claim

68. It would have become apparent what the break-times were when the Claimant started employment in May 21. She told the Respondents on 18/6/21 that she had epilepsy. No change to break-times were made. Time would have started to run against any claim about failure to adjust break-times on that date and would have expired on 19/9/21. The claim was therefore 7 months late when presented on 20/4/22.

69. Time would have started to run at the beginning of September 21 against the claim that the night-shift should have been reduced from 9 to 8 hours and would have expired at the end of November 21. The claim was therefore nearly 5 months late when presented on 20/4/22.

70. The claim that a fan should have been provided would have related to the times when the Claimant was working an afternoon shift in the Summer of 2021. She moved to the night-shift at the end of August 2021. Time would have run against that claim from some date during the Summer and expired no later than the end of November 21. The claim was therefore nearly 5 months late when presented on 20/4/22.

71. The Tribunal asked the Claimant to give her reasons for her delay in presenting these claims and to tell the Tribunal about any factors which she wished us to take into account in considering extending time.

72. The Claimant stated that she had been ignorant of her rights until after she was dismissed in February 22. Ignorance can be a relevant factor as long as it is genuine and reasonable. However, in her complaint email in October 21 (118) the Claimant had asserted that " *Yes, time to time I need take day off. Only reasons why is my epilepsy and provide care for a dependant . It's my statuory (sic) right to take reasonable amount of unpaid time off work in this two cases."* This shows a degree of insight about UK legal protection of disabled persons. In any event knowledge of such protection is wide-spread and easily accessible.

73. The second reason put forward is the Claimant's epilepsy and ill-health. However, there is no evidence of the Claimant having actively sought any medical help for epilepsy during her employment, she had chosen not to take any medication for it, and she was capable of performing her work role, looking after her children and also drafting a lengthy written complaint during that period. It is only after she was dismissed that we see any real evidence in the medical record of a decline in her health, during which period however she was still well enough to contact ACAS and present her claim.

74. The Claimant has not satisfied us that during her employment she alerted the Respondents to the fact that she required the disability adjustments which she is now complaining were not provided. She is seeking an extension in order to bring a late claim which she did not raise at the material time, since when relevant witnesses such as JG have left the scene.

75. We are not satisfied that it is just and equitable to extend time for the reasonable adjustments claims which are therefore outside jurisdiction.

76. The said claims would have failed in any event, even if brought in time, because there is no evidence (apart from the Claimant's bare assertions which we are unwilling to accept on an uncorroborated basis) that (i) a requirement to work with only a 30 minute and 10 minute break (ii) the requirement to work 9 hour shifts and (iii) the requirement to work in high temperatures, even if these were PCPs, put the Claimant at a substantial disadvantage compared to someone without epilepsy. The Claimant has not produced any medical evidence or evidence from a scholarly article or similar to show this and the Claimant's conduct during employment contradicts it.

77. If we had found that the PCPs negatively impacted her as an epileptic, we would also have found that the Respondents did not know nor could they be reasonably expected to know that she was being placed at such disadvantage.

78. It is an unattractive feature of the Claimant's case that, having concealed her epilepsy in the first place and thereafter on her own evidence minimised and concealed its claimed effects on her in her subsequent dealings with the Respondents, she nevertheless seeks to criticise the Respondents for not being more pro-active in investigating, assessing and mitigating any risk she was subject to.

79. In any event, a reasonable adjustment is an adjustment which will allow an employee to overcome a disadvantage caused by the disability so that they can work safely and reasonably. If, as the Claimant claims, she was in 2021 subject to sudden epileptic seizures both at home and at work, then, even if the claimed adjustments had been provided, these would have been inadequate to protect her from the dangers of doing her allotted work on the production line in the First Respondent's factory. To avoid such dangers, she would have had to be removed to some quite different work where she could sit down away from chemicals and industrial machines. However, that was not an adjustment which she claimed either at work or in her ET claim; and, whether or not that would have been reasonable was not explored before us in the evidence.

80. A final point is that the reasonable adjustment claim against the Second Respondent would have failed in any event, because it is agreed that the Second Respondent had no real control over or responsibility for the conditions of work in the First Respondent's work place, and it had to rely on the First Respondent as an independent party to make any reasonable adjustments in this regard. The claimed adjustments would not have been adjustments which it would be reasonable to expect the Second Respondent to make in any event.

<u>The section 15 claim</u>

81. The claim is that the Claimant was dismissed for something arising from her disability, namely her "sickness absences".

82. The Claimant was dismissed for a combination of reasons, as described in the communications from the Second Respondent on 11/2/22 and 14/2/22. These included her unplanned absences, her leaving shifts early, breaches of reporting procedures and, most important of all, her unauthorised absences on 5/1/22 and 10/2/22 after she had requested and been refused holiday leave, which unplanned absences she nevertheless took so as to look after her children, and again not following the reporting procedures.

83. We have not found that KP gave any consideration to the extent to which any of the Claimant's absences had or had not been caused by epilepsy, and the written reasons for dismissal given on 11/2/22 and 14/2/22 did not distinguish between various classes of unplanned absences. We therefore find that all 18 days of unplanned absences were taken into account.

84. It seems incredible that if the Claimant was suffering from epileptic seizures in 2021, that she would choose to work and continue working in a factory production line which would be dangerous for her for the reasons mentioned by her and quoted above, and without making any requests for different or safer work.

85. We find that the Claimant did not take any medication for epilepsy during 2021 despite it having been prescribed in Poland since 2019.

86. The Claimant's witness Mr Kreft Fryers did not suggest that he had witnessed any epileptic seizure on the part of the Claimant, and on the one occasion when the Claimant says she did have such a seizure at work, he was not working on the same shift as her.

87. None of the Respondents' witnesses and in particular Ms Rosvany (who was at the factory site) were called at the time to witness or record any epileptic attack or seizures.

88. Despite being diagnosed as epileptic in Poland in 2019, and despite consulting/dealing with her UK GP regularly in the period subsequently about other matters, there is no reference in her medical record to epilepsy until a consultation on 22/11/21 when the Claimant had not gone to see her doctor about epilepsy, but rather about another unrelated matter. The epilepsy was then mentioned in passing, at which point the doctor made the following note "*wanted to discuss diagnosis of epiilipsy (sic) when in home country many years ago , nil medication , they have reports from investigations , advised to bring in for scanning/ book another appt*". Despite this, there was no attempt by the Claimant to book another appointment and there was no further mention in the medical record of epilepsy until after the Claimant was dismissed.

89. While it is clear that the Claimant did at the time attribute three absences from work to epilepsy, it is equally clear that she had childcare problems which were keeping her away from work.

90. We are unwilling to accept the Claimant's uncorroborated word about this and for the above reasons do not find it proved on a balance of probabilities that any of the 18 unplanned absences were in fact disability-related.

91. If we should have found that any of the 18 absences were caused by epilepsy, then we would have found those to be the three on 2/7/21, 9/9/21 and 15/12/2021 when the Claimant gave that reason at the time.

92. Even in that case, however, we would find that those particular absences were not a significant (or more than trivial) influence on the dismissal, such as to amount to an effective reason for or cause of it.

93. It can be seen that nearly two months expired after the last of the three said absences (on 15/12/2021) and the decision to dismiss on 11/2/22, which decision followed a particularly poor patch of unplanned absences in January 2022 which had nothing to do with epilepsy. The Claimant's custom of asking for and being refused holidays and nevertheless going absent without leave to look after her children, which she did on 5/1/22 and again on 10/2/22, were the significant and effective reasons for the dismissal.

94. Hence the Claimant has not shown a prima facie case that she was dismissed for something arising from disability. In any event we are satisfied by the Respondents' non-discriminatory explanation.

Employment Judge **J S Burns**
13th August 2024
For Secretary of the Tribunals
Date sent to parties
15th August 2024

FOR THE TRIBUNAL OFFICE