Case Number: 3312954/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Szymczak	**v**	Wincanton Group Limited

Heard at: Cambridge ET in person **On:** 7-9 July 2025

Before: Employment Judge R Wood; Mrs L Davies; Mr A Hayes

Appearances
For the Claimant: In Person
For the Respondent: Miss Brown (Counsel)

JUDGMENT

1. The Respondent discriminated against the Claimant on the grounds of something arising out of a disability pursuant to section 15 of the Equality Act 2010.

2. The Respondent failed to make reasonable adjustments in respect of the Claimant pursuant to section 20/21 of the Equality Act 2010.

3. The Respondent did not directly discriminate against the Claimant on the grounds of disability.

STATEMENT OF REASONS

Claims and Issues

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.

2. This is a claim which involves allegations of direct disability discrimination, discrimination arising out of disability, and a failure to makes reasonable adjustments. The claimant had commenced work for the Respondent on 7 August 2023 as a warehouse operative. His employment was terminated with effect from 15 September 2023, the respondent having found that he had failed to satisfy the conditions of his probationary period. During his

employment with the respondent, the claimant had a disability namely anxiety, depression and suicidal ideation. The claimant says that he was dismissed as an act of direct discrimination. In addition, he alleges that he was dismissed because of his absence due to ill health, which it is accepted was caused by his disability. In addition, the claimant asserts that the respondent failed to make reasonable adjustments in respect of his disability, and in particular that it failed to offer him alternative duties.

3. For its part, the respondent denies discrimination. In particular it submits that with regards to discrimination arising out of disability, dismissal of the claimant was a proportionate means of achieving a legitimate aim, namely to manage authorised employee absence such as sickness leave, to meet the needs of customers, and to maintain the respondent's reputation. In relation to the alleged failure to make reasonable adjustments, the respondent argues that it was not aware of any substantial disadvantage arising out the PCP which required employees to have a certain amount of attendance at work in order to pass a probationary period until 15 September 2023 i.e. the date of his dismissal. The respondent also alleges that the proposed adjustments had no prospect of alleviating the disadvantage alleged.

Procedure, Documents and Evidence Heard

4. The Hearing took place on 7-9 June 2025. The claim was heard in person at the Cambridge Employment Tribunal. We heard testimony from the claimant, who adopted his witness statement and confirmed that the contents were true. The respondent did not call any witnesses to give oral testimony. We were provided with two witness statements from a Mr A Croce (Warehouse team leader and the claimant's line manager) and Mrs S Paterson (now Ms Cave)(People Manager). We also had an agreed bundle of documents which comprises 341 pages, as well as separate copies of the respondent's terms and conditions of employment; the Diversity, Inclusion and Belonging ("Diversity") Policy; and emails between Mrs Paterson and the respondent's solicitors dealing with the reasons for her non-attendance as a witness. We also heard helpful submissions from Miss Brown and the claimant. Miss Brown also provided a written opening note. Both the claimant and Miss Brown provided written closing submissions.

5. In coming to our decision, the panel had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself. The Tribunal allowed the claim in relation to section 15 and section 20/21 of the Equality Act 2010 ("EA 2010"). It dismissed the claim ion respect of direct disability discrimination. The Tribunal gave reasons for its decision at the conclusion of the hearing. The claimant made a request for a written reasons, which he hoped might assist in seeking legal representation for the remainder of the claim. This document is a response to that request. We hope it assists.

Legal Framework

6. The relevant legislation in respect of the allegations of direct discrimination is contained in the Equality Act 2010 ("the Act").

7. Disability is a protected characteristics as defined by section 4 of the Act. Sections 39 and 40 prohibit unlawful discrimination against employees in the field of work. Section 39(2) provides that:

> "*An employer (A) must not discriminate against an employee of A's (B) -*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B; or (d) by subjecting B to any other detriment.*"

8. Section 136 of the Act provides that:

> "*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".*

This provision reverses the burden of proof if there is a prima facie case of direct discrimination.

9. In summary, the Act provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

10. Direct discrimination is defined in section 13(1) of the Act as "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

    (a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

    (b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main

reason. It is sufficient that it is significant in the sense of being more than trivial.

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

(d) The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.

(f) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as she was. However, as the EAT noted (in *Ladele*) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some

> instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

11. Under section 15 of the EA 2010 a person (A) discriminates against a disabled person (B) 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. Section 15(2) goes on to state that the section 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'.

12. As to proportionality, the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective. A Tribunal hearing a section 15 claim will be expected to undertake a critical evaluation on the question of objective justification, weighing the needs of the employer against the discriminatory impact on the employee. The Tribunal must carry out its own assessment on this matter, as opposed to simply asking whether the employer acted reasonably.

13. The law in relation to a failure to make reasonable adjustments is found at sections 20 and 21 of the EA 2010. The duty to make adjustments under section 20 comprises three discrete requirements, any one of which will trigger an obligation on the employer (or other person subject to the duty) to make any adjustment that would be reasonable. In so far as it relates to this case, the requirement applies where a provision, criterion or practice (PCP) has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. A failure to comply with any of the requirements in section 20 amounts to a failure to comply with the duty to make reasonable adjustments, and an employer will have discriminated against a disabled person if it fails to comply with the duty in relation to that person.

Findings

14. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

15. The claimant was a warehouse operative at the Kettering Glendon Road site of the respondent company. The respondent provided warehousing services for Sainsbury's PLC at the site. The claimant always worked the 6am to 2pm shift. The role potentially included several different duties including 'hand balling' containers, picking, loading and manual handling

equipment work (this included working on FLT for which the claimant was qualified). In relation to the picking work, the claimant was provided with instructions by a device which was connected to a headset. Picking was the only work which required use of the device and headset.

16. The claimant started with the respondent on a probationary period which was to last for a minimum of 13 weeks, with scope for extending the probationary period if required. He had a start date of 7 August 2023. It was a condition of his probation that the claimant prove his suitability for the job by demonstrating that his performance, attendance, time keeping, attitude, and behaviour, all reached the standards required by the respondent. If the standards were not met then it was a term of his contract that disciplinary action could be taken in accordance with the disciplinary procedure [61].

17. Pursuant to page 53 of the separate terms and conditions document, employees on a probationary period fell outside the respondent's 'Absence Monitoring Procedure'.

18. As stated, the respondent had a Diversity Policy. It applied to all those who were either taking part in recruitment, or employed by the respondent. This included those subject to a probationary period. The duty to make reasonable adjustments for those with disabilities is described as a "key additional protection" (page 10 of the policy). It is stated that the prime responsibility for arranging appropriate adjustments lay with the line manager/people manager. In this case, that would have been either Mr Croce and/or Mrs Paterson. The policy goes on to state that on starting work, the employee's line manager/a people manager will be responsible, in consultation with the disabled colleague, for ensuring such reasonable adjustments are made. Where those individuals do not have relevant experience, then an outside specialist will be considered. After 4 weeks of absence, the policy indicates that the respondent may request a medical, vocational or functional assessment of the employee. Following such an assessment, a phased return to work will be arranged where possible (page 11 of the policy). The policy also talks about retention of staff, and of the need to ensure that all reasonable measures are taken to retain disabled colleagues. It states that this might include, but are not limited to, provision of specialist equipment and training, alterations to role, retraining, flexible hours, remote working and/or redeployment to a suitable alternative vacancy.

19. In terms of the medical evidence in this case, the Tribunal makes the following findings. The claimant had a disability at the relevant times i.e. whilst employed by the respondent. This was not in issue. The claimant had anxiety, depression and suicidal ideation which, when taken together, were properly defined as a disability under the EA 2010.

20. The claimant suffered with his mental health conditions throughout 2021, 2022 and up to August 2023. The main trigger for his symptoms was the situation with his previous employer. We know a limited amount about this situation. Miss Brown has been pragmatic in not asking questions about this

aspect of the case. It is clearly an upsetting episode in the claimant's life and we agree that it would have been inappropriate and unnecessary to delve into the detail of these matters. For the purposes of this liability decision, it suffices that we find find that he had been employed as a warehouse operative and as an IT Technician. The claimant felt he experienced bullying and this led to a deterioration in his mental health, which resulted in him taking about a month off work in June/July 2023. During this period, the claimant returned to Poland, his country of origin. That employment ended in the middle of July 2023 when he was dismissed. There was a break of a few weeks between this employment ending, and his employment with the respondent commencing.

21. During this period, the claimant visited his GP on a number of occasions. On 26 July 2023, his GP recommended that he attend his local A & E department with a view to speaking to the mental health team [120]. He was prescribed promethazine, which amongst other purposes, is used as a sedative. On 2 August 2023, the claimant attended his GP complaining of ongoing mental health issues, low mood, lack of sleep, and lack of motivation, which was largely attributed to being dismissed from work. He was attempting to contact his psychologist in Poland at the time.

22. We find that the claimant had significant pre-existing mental health conditions when he started working for the respondent. There was likely to have been some abatement of his symptoms as a result of his previous employment ending. We accept the claimant's evidence to this extent. However, it is difficult to assess the extent of such an abatement save to say that it was probably limited given the short time frame between the termination of his previous employment and starting with the respondent i.e. a period of about three weeks.

23. Returning to the narrative, the claimant underwent induction and training with the respondent. It seems that no problems arose during this period albeit that we find that the claimant had notified the respondent that he had a disability as part of the applications process [118]. No concerns about the claimant's mental health were raised by either party. We note the provisions of the respondent's standard terms and conditions regarding probationary periods that it was at least sometimes a condition that a satisfactory Occupational Health Report was obtained on an employee. This did not happen here. The claimant confirmed he had not seen OH during his time with the respondent.

24. The claimant's attendance at work for the respondent is set out in a document at [78]. This is a document created by the claimant. There does not appear to have been a similar document created by the respondent. We accept the content of the record at [78]. It is largely uncontentious. In short, the claimant attended 12 out of 30 shifts with the respondent. He attended his schedule shifts until 15 August when he left work due to illness.

25. There is disagreement as to what happened on this occasion. The respondent alleges that the claimant went home and did not notify

management before doing so. As stated, the respondent alleges that this happened on 15 August 2023. This date appears in the statements of both Mrs Paterson and Mr Croce. The claimant disagrees. He says he left work on 15 August but did tell Mr Croce that he was leaving. The claimant says he failed to notify management of his departure on either 9, 10 or 11 September. He is not sure when save that he was adamant that it had occurred after he had been with the respondent for about a month. He further asserted that this was the result of frustration concerning lack of support for his mental health issues.

26. The Tribunal was not particularly impressed by either parties evidence on this point. However, on balance, and not without some hesitation, we preferred the claimant's evidence. Neither Mrs Paterson or Mr Croce had attended to give evidence and be challenged in cross-examination. Whilst we drew no inferences from their failure to attend, we tended to place only limited weight on their statements. On this point, we also find that the documents are not consistent with the respondent's timeline. There is no contemporaneous record of alleged misconduct on 15 August. The claimant was not spoken to about it by management until 15 September 2023. If, as has been suggested by the respondent, this was a serious misconduct issue, then we find this more consistent with it having taken place in early September rather than the middle of August. We also note that the document at [80] which is a record of a return to work meeting on 21 August 2023, indicates that the correct absence reporting procedure had been followed by the claimant on that occasion i.e 15 August. The document is silent about any disciplinary matter. Accordingly, we find that the failure to notify management upon leaving his shift was in early September and not on 15 August.

27. This document at [80] is important for other reasons. It demonstrates that the claimant was, from a very early stage in his employment with the respondent, making complaint about his working conditions. We find that from only a few days into his tenure with the respondent the claimant was having problems with the voice pack, i.e. the device and headset used for picking work. There appeared to be an issue with it understanding his voice/accent which resulted in his performance being adversely affected. He explained that this triggered his anxiety issues because at least to some extent, it was a mirror of the situation at his previous employer where he had performance related issues which had led to what he perceived to be bullying by management. On 21 August 2023, this issue is clearly reported to the respondent. Mr Wright of the respondent noted at [81] that there was a need to consider adjustments or arrange a welfare meeting and that this was to be arranged. There is no indication in the evidence that this was ever done.

28. At [84], the claimant was again interviewed about the medications he was taking for his mental health issues. This took place on 23 August. There is mention that the headset had been 're-profiled' but that this had not helped the claimant much. It is clear that the claimant was already having significant

concerns about his working conditions and how they were impacting his disability.

29. The Tribunal finds that the claimant's mental health condition was exacerbated by the working environment at the respondent. We accept the claimant's testimony on this point. He returned to his GP on 30 August 2023 [126] reporting that he was getting stressed at his current workplace, and makes particular reference to the machine he takes orders from (which we find it is a reference to the headset). He stated that had left work an hour into his shift, that he did not want to work there and was looking for another job.

30. On 30 August, the claimant submitted a fit note for 7 days which referred to 'stress at work, mental heath, and anxiety' [89]. There was a further return to work meeting on 8 September 2023 [91] and then on 11 September 2023 [93]. On the latter occasion, it was again noted that the voice picking system was not working well and that this was a cause of stress and anxiety for the claimant. Mr Croce noted on this occasion that he was looking at whether the company needed to consider any adjustments or arrange a welfare meeting [94]. Again, nothing seems to have been done.

31. The claimant was seen at his surgery again on 12 September 2023 [126]. He was complaining of symptoms of depression, having nightmares, poor appetite and poor concentration. He was seen again on 20 September reporting having been dismissed, and detailing similar symptoms.

32. The next thing to happen was a probation review meeting. This was at the one month stage. The probationary period was set at 13 weeks by the term of and conditions of employment. We are not clear why there was a review at this early stage, or whether this was unusual. In any event, the meeting took place on 15 September 2023 [96]. Again, problems with the picking system are noted and that these were, in terms, exacerbating his pre-existing mental health issues. This had had the effect of reducing his attendance to a 'poor' rating. In terms of the overall review, he had scored 59, when a pass rate was 90. It was also noted that there had been "instances" (in the plural) of leaving the site UA (misconduct)". We find that this observation was incorrect, even on the respondent's case. There had only been one occasion when the claimant had left without authorisation, as stated above. It is noted that he had worked 12 out of 30 shifts. There are boxes on the form headed "how can performance be improved" and "what further training is required. These boxes are either empty or indicated as not applicable [97].

33. There is a note of a discussion at this meeting at [100]. It is the first time that leaving without authorisation is mentioned. Further, Mr Croce stated that "I understand situation but I don't believe this is right environment and will terminate your probation now due to absence". The claimant asked whether his request to change his working hours to part time had been received. Mr Croce confirmed that he has passed it to HR. There is no other mention of this in the papers.

34. The claimant was dismissed on the same day by letter at [102]. It refers to attendance, performance and a case of misconduct i.e leaving shift without permission.

35. The claimant submitted what was treated as a letter of appeal on 25 September 2023 [106]. An appeal hearing was set for 4 October 2023. However, the claimant decided not to attend. He lodged his claim with the Employment Tribunal on 3 November 2023.

Reasons and Decision

36. We have applied the law as helpfully summarised in Miss Brown's written submissions. Those submission have not been challenged, and in our view properly reflect the salient law in this claim.

37. We began our considerations by looking at the allegation of direct disability discrimination.

38. We applied the guidance set out in the case of *Ladele*. In our judgment the claimant has failed to establish a prima facie case of direct discrimination. It was our view that the reason for the claimant's dismissal was his poor attendance record with the respondent, albeit caused by his disability. We appreciate that the differences of focus between claims brought under sections 13, 15 and 20/21 of the EA 2010 are not always apparent to the claimant trying to represent himself. We can also understand why, as a belt and braces exercise, that a litigant might argue these sections in the alternative. However, it was illuminating to see how difficult it was for the claimant to explain why it was that he thought Mr Croce had dismissed him simply because he was disabled, as opposed to it being a reaction to his extensive sickness absences.

39. It was our impression from the documents in the bundle that the relevant team leaders who had dealt with the claimant had shown some interest in his problems. This is not a case where the claimant was ignored when he complained of issues, or when he was off sick. There were regular discussions and meetings about these matters. We find that at the time, there was a degree of empathy shown towards the claimant on occasions. Of course, this did not turn into tangible action, but that is a separate matter to which we will return below. In short, we are perfectly satisfied that this is not a case of direct discrimination.

40. We turn then to the allegation of discrimination arising from disability i.e. from the claimant's sickness absences. There is no dispute that the claimant had a disability; that the respondent was aware of the disability; that dismissal constituted unfavourable treatment; and that dismissal arose because of the ill health absences.

41. What remains for us to decide is whether dismissal was a proportionate means of achieving a legitimate aim. We find that the respondent's aims in

this case were legitimate, namely the efficient running of the business and/or meeting the expectations of their client. Part of this is the management of staff attendance, and of ill health absence.

42. What we must decide is whether dismissal in this case was an appropriate and reasonably necessary means of achieving those aims. We must ask ourselves whether there was an obviously less discriminatory means of achieving the aims. In this case, it is submitted by the claimant that the respondent could have amended either his hours or his role, which would have been obviously less discriminatory, and would have achieved the aim of significantly improving his attendance so that he could have passed his probationary period.

43. The Tribunal must engage in a balancing exercise between the discriminatory effect of dismissal in this case, and the legitimate business aims being pursued by the respondent. In other words was there something short of dismissal which may have improved his attendance sufficiently. We reminded ourselves that this is an objective test. It is irrelevant whether or not the respondent thought at the time what it did was justified, or whether it considered the issue at all. It is for the Tribunal to make an assessment on the evidence before it. The burden is on the respondent to establish that less favourable treatment is justified.

44. In our view, the respondent failed to do so. In so finding, we have been guided by the respondent's own policy in term of disabled employees. The policy clearly required an exploration of the claimant's impairment, and of the possibility of making adjustments to accommodate his disability. The policy makes reference to this being done by reference to a medical, vocational or functional assessment of the employee. We understand this to include referral to OH and/or for a risk assessment, amongst other possibilities. The policy makes specific reference to induction and retention of staff. Indeed, there is repeated reference in the papers to the management hinting that this type of exercise was appropriate. One such example is at [80] on 21 August 2023. There are several other examples.

45. There is however little if any explanation from the respondent as to why these potential alternatives to missal were not explored, or if they were explored, then why were not pursued. The respondent's witness statements are strangely silent as to the policy, and its application, in this case. Indeed, we only had access to the written policy on day two of the hearing when we requested it ourselves. It may well be that Mr Croce lacked the necessary training and/or experience to have realised that the policy was pertinent. His witness statement is silent as to any diversity training he may have received (para 6). However, one might have expected Mrs Paterson, from HR, to have identified the issue and to have brought it to Mr Croce's attention. This appears not to have happened.

46. Of course, the procedural integrity of what the respondent did is not relevant to the question of objective justification. However, there is a vacuum of evidence so far as the respondent's case is concerned. Having not itself

obviously engaged in the exercise of examining the altenrartvies to dismissal, the respondent has deprived the Tribunal of the sort of evidence which might have assisted it in assessing whether dismissal was proportionate.

47. We accept that it was highly unlikely that reducing the claimant's hours would have made made any discernible difference to the situation. The problem was quite narrow and well defined in that the claimant continued to have problems with the picking voice pack which cause him anxiety. The relevant adjustment had to involve reducing or removing the need to use the voice pack, which meant less picking and/or allowing the claimant to pick without the voice pack. Save for 're-profiling' his voice pack, there is little evidence that other adjustments were seriously considered, let alone acted upon.

48. At paragraph 35 of Mr Croce's witness statement, he suggested that the site was mainly a pick warehouse and that therefore there was no alternative role that the claimant could have moved to instead of a warehouse operative. This evidence could not be challenged by the claimant in cross-examination. We also note that is little, if any, record of Mr Croce having examined the possibility of alternative roles for the claimant at the time. Further, it is not consistent with the document at [73] which suggests that the role of warehouse operative was more multi-faceted. We find that it is likely that there were other tasks that the claimant could be have done which did not include voice picking. The claimant was a highly experienced warehouse operative who had FLT qualifications. In our judgment, there were obvious and available options to dismissal which remained unexplored.

49. We would add that we were not impressed by evidence in Mrs Paterson's witness statement to the effect that warehouse operatives always start their employment in the pick department and when they pass their probation they have the opportunity to be trained for another department if roles become available. The first thing to say about this evidence is that it is inconsistent with the suggestion of Mr Croce that here were no other roles other than picking. The second is that this may be a sound enough general rule, but it is our view that it hampers the application of the diversity policy in a case where an employee in their probationary period is disabled. In essentially creates barriers to the possibility of making adjustments. It says that you cannot have any adjustments to your role until you pass probation. This is unfortunate if your disability, as in this case, is preventing you from satisfying the requirements of probation.

50. The other vacuum of evidence is the effect that the claimant's absences had on the respondent's business. In our view, this is not the sort of case where the impact of absences can be assumed. The claimant was, at the time, on probation. He had been there for a very short time. He had a very junior role in the business. The resources of the respondent are clearly significant. There would have been considerable scope to find others to take his place, even at short notice. In any event, having to find replacements for absences

is not unusual for such an organisation. The evidence given by Mr Croce on this point is very general in its terms, even to the extent we are prepared to rely upon it. There is little, if any, evidence as to the actual effect that these absences had on the respondent at the time. We find that it was minimal, especially when looked at in terms of the proportionality exercise required here, with a discriminatory dismissal on the other side of the scales.

51. Miss Brown submitted that the claimant had been there for little time, during which his attendance had been very poor. As a result, the respondent was entitled to come to the view that there was no prospect of the situation improving, or of him satisfying the requirements of his probation. We disagree looking at the situation objectively. There were adjustments with at least some prospect of success, which had not been explored or tried. Justification is not made out in this case.

52. This then bring us to the question of a failure to make reasonable adjustments. Again, Miss Brown has been able to narrow the issues. We agree with her that the only viable PCP is the amended version at para.3.2.1. We dismiss the other PCP's for the reasons set out in Miss Brown's submissions.

53. We find that there was a substantial disadvantage arising out of the minimum attendance requirement for those on probation and that the claimant was aware of this on 15 September 2023 at the very latest. Indeed, it was why the respondent had called the one month review i.e. because the claimant's attendance was so poor. The primary question for us here is whether, at the point of knowledge, there were adjustments which could have been taken that might have alleviated the disadvantage, and which were reasonable in the circumstances.

54. In our view, there were. In coming to this conclusion, we rely upon the findings and conclusions we have already set out above. We find that it was reasonable for the respondent to have changed the claimant's role to one which was less stressful namely either cleaning, or moving goods, instead of operating the headset. As stated, we take the view that these adjustments were obvious and unexplored because the respondent had failed to apply its own policy. We strongly suspect that had the respondent engaged OH, and/or carried out a risk assessment, that such options would have been investigated and implemented. It is our judgment that there was still much to be gained from exploring these options for at least a few months, after which a review may have been appropriate. As it was, the dismissal was in our view, at the very least premature.

55. In summary, the claim of discrimination arising out of disability, and failure to make reasonable adjustments, are allowed.

Approved by:
Employment Judge R Wood

Date: 20 August 2025…….

Sent to the parties on: 22 August 2025

.....
For the Tribunal Office