EMPLOYMENT TRIBUNALS

Claimant: Miss Jevgenija Mironova

Respondent: BFS Group Limited

HELD AT: Leeds Employment Tribunal **ON:** 26, 27, 28, 29 and 30 January 2026

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: In person

Respondent: Mr McNerney (counsel)

Interpreter: Ms Munton

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

WRITTEN REASONS

Claims and Issues

1. The list of claims is as set out in the case summary attached to the order of Judge Elliot sent to the parties on 17 July 2025:

    a. Automatic unfair dismissal under section 103A of the Employment Rights Act 1996 (for making a protected disclosure)
    b. Wrongful dismissal for notice pay
    c. Direct disability discrimination

d. Failure to make reasonable adjustments
e. Direct race discrimination

2. The list of issues is also as set out in the order of Judge Elliot, save that it includes, in error, the issues that arise in an ordinary unfair dismissal claim which are not in issue in this case. There is no ordinary unfair dismissal claim because the claimant does not have two years' service. Accordingly, issues 2.2.2 and 2.3 do not need to be determined.

3. The issues set out in the order of Judge Elliot are:

1. Time limits

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

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

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

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

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

1.1.4.1 Why were the complaints not made to the Tribunal in time? 1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the claimant dismissed? – The parties agree the claimant was dismissed with immediate effect on 31 October 2023.

2.2 What was the reason or principal reason for dismissal?

2.2.1 The claimant says the reason was that she made a protected disclosure. If this was the reason or principal reason, the claimant will be regarded as unfairly dismissed.

2.2.2 [removed].

2.3 [removed]

3. Remedy for unfair dismissal

3.1 Reinstatement/reengagement: - The claimant is currently interested in this.

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

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

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

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

3.1.5 What should the terms of the re-engagement order be? 3.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.2.1 What financial losses has the dismissal caused the claimant?

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

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

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

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

3.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it?

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

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

3.2.9 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.2.10 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

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

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

4. Protected disclosure

4.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

4.1.1 What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

4.1.1.1 On 22 and 23 March 2023 verbally to her training instructor Sean Greenwood;

4.1.1.2 In April 2023 verbally to Scott Leigh and Modestas Rakauskas;

4.1.1.3 In May 2023 verbally to Scott Leigh;

4.1.1.4 On 18 June 2023, in an email to Scott Leigh;

4.1.1.5 On 7 September 2023, verbally to Grzegorz Tomczak.

4.1.2 Did they disclose information? 4.1.2.1 4.1.1.1 – The claimant says she asked the instructor why were the edges of the steps not marked to go Packhouse through the Locker room, why people, did not park MHE in any particular place, why not walkways marked.

4.1.2.2 4.1.1.3 – The claimant says she raised concerns about proper equipment and manual handling concerns;

4.1.2.3 4.1.1.2 and 4.1.1.4 – The claimant says she raised concerns about blocked access to the locations with pallets and bins;

4.1.2.4 4.1.1.5 – The claimant says she raised concerns about Simona Butaciviete speaking in Lithuanian rather than English, meaning her health and safety instructions could not be understood by non-Lithuanian speakers.

4.1.3 Did they believe the disclosure of information was made in the public interest?

4.1.4 Was that belief reasonable?

4.1.5 Did they believe it tended to show that:

4.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

4.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered.

4.1.6 Was that belief reasonable?

4.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. Wrongful dismissal / Notice pay

5.1 What was the claimant's notice period? – The parties agree the notice period was four weeks.

5.2 Was the claimant paid for that notice period? – The parties agree no notice was paid.

5.3 If not, was the claimant guilty of gross misconduct? – The respondent's case is that she was.

6. Disability

6.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide: 6.1.1 Did they have a physical or mental impairment: Musculoskeletal condition?

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

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

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

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

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

6.1.5.2 if not, were they likely to recur?

7. Direct disability discrimination (Equality Act 2010 section 13)

7.1 Did the respondent do the following things:

7.1.1 In April 2023, Modestas Rakauskas refuse to let the claimant train on the "loading" activity;

7.1.2 In April 2023, Modestas Rakauskas refuse to let the claimant do the "loading" activity.

7.2 Was that less favourable treatment?

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

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

The claimant has not named anyone in particular who they say was treated better than they were.

7.3 If so, was it because of disability?

7.4 Did the respondent's treatment amount to a detriment?

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

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? 8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.2.1 employees in the role of "picker" ("Warehouse Operative") do not receive training on the PPT (power pallet truck);

8.2.2 employees in the role of "picker" are not allowed to use the PPT.

8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it affects her back condition to lift things with the manual pallet lifter?

8.4 Alternatively, did the lack of an auxiliary aid, namely the PPT, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it affects her back condition to lift things with the manual pallet lifter?

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

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

8.6.1 Providing her with training to use the PPT;

8.6.2 Allowing her to use the PPT.

8.7 Was it reasonable for the respondent to have to take those steps and when? – The claimant says from 25 March 2023 or soon after.

8.8 Did the respondent fail to take those steps?

9. Direct race discrimination (Equality Act 2010 section 13)

9.1 The claimant is a Latvian citizen who speaks Russian.

9.2 Did the respondent do the following things:

9.2.1 On or around 31 August 2023 Simona Butaciviete make an allegation that the claimant was using her mobile phone and talking during work;

9.2.2 On 31 August 2023 Scott Leigh speak with the claimant about an allegation that she was using her mobile phone and talking during work.

9.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant compares herself with colleagues who speak Lithuanian and/or colleagues who are related to those colleagues.

9.4 If so, was it because of race?

9.5 Did the respondent's treatment amount to a detriment?

10. Remedy for discrimination

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

10.2 What financial losses has the discrimination caused the claimant?

10.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

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

10.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that? – This is not currently alleged

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

10.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

10.8 Should interest be awarded? How much?

Application to make referrals

4. Before the hearing the tribunal received a written request from the claimant to make various referrals to various agencies. Other than the power to send the copy of a claim form to a body, which is not what has been requested, it is not within the tribunal's jurisdiction to make those referrals therefore I refused the application in the hearing on that basis.

Summary of reasons for my decision

Unfair dismissal

5. In relation to the claim for automatic unfair dismissal, I find that the reason for dismissal was the claimant's conduct on 8 September 2023 when she used a power pallet truck, referred to as PPT, and not because she had made a protected disclosure. In summary I reached this conclusion because:
   a. There is no dispute that the claimant drove PPT, and I accept the respondent's evidence that they only allow employees to drive PPT once they have passed the company training.
   b. That is the sort of conduct that would be expected to lead to disciplinary proceedings and, potentially, dismissal given the potentially serious consequences for health and safety.
   c. The disciplinary proceedings were commenced just after that incident took place.
   d. Mr Leigh and Mr Craddock gave detailed and convincing reasons for why they considered that the conduct justified dismissal both in their outcome letters and in oral evidence.
   e. Both came across as honest witnesses.
   f. I believed Mr Leigh and Mr Craddock when they said that was the reason for dismissal.

Wrongful Dismissal

6. Having taken into account the claimant's explanation for her conduct, I am satisfied having regard to potentially serious consequences of an accident while she was driving the PPT, that it was gross misconduct to drive a PPT when she was aware that she had not having undergone the required workplace specific training.

Direct race discrimination

7. I am satisfied that the claimant was spoken to by Simona Butaciviete and Mr Leigh about talking on her phone. I do not accept that the reason his happened was because of the claimant's nationality. I find that the reason she was spoken to was because she had been seen using her phone, which the claimant accepts, albeit that she says it was for work purposes.

Disability

8. I have found that the claimant satisfied the definition of disability because of the ordinary things she cannot do, such as lifting things over a certain weight, hoovering and bending over the bath to wash her dog.

Direct disability discrimination

9. I am satisfied that the reason why Mr Tomjac refused to train the claimant on loading was because the respondent did not need any more loaders, and that the decision was not in any way influenced by the claimant's disability.

Failure to make reasonable adjustments

10. This claim fails because it is not part of a pickers' role to move pallets. A picker does not therefore need to use the hand pallet truck to perform their normal duties. The occasional use of the hand pallet truck could be avoided altogether by, for example, splitting a load. In any event, it would be impractical and unsafe for pickers to use PPT as part of their normal duties.

Evidence

11. The claimant gave evidence in support of her claim. Subject to my comments below, overall, the claimant's oral evidence was consistent with the evidence in her witness statement and the version of events set out in the claim form. Overall, although I have found that the claimant was wrong in her assumptions about the reason for her treatment, I found her to be an honest witness.

12. However, there were occasions where I reached the conclusion that the claimant overstated the evidence in a way that supported her case.

13. For example, when Mr McNerney put to her that she had not been taking any prescription medication for her back, she said that it was not possible for her to visit the GP, because she was working long shifts and that they were away every holiday. On further questioning it emerged that she started work at 2.30pm. She still maintained that it was not possible to visit the GP because it would mean that she did not get enough sleep. it is clearly not the case that it was impossible for the claimant to visit her GP: if she was in sufficient pain that she needed prescription medication, she could have got out of bed a few hours early on one occasion.

14. Secondly, the claimant's evidence was inconsistent in relation to whether or not she accepted that she needed authorisation from the respondent to drive a PPT, i.e. whether on the night in question she was doing something that she thought she was allowed to do. Her assertion that she had repeatedly asked for and been denied refresher training was inconsistent with her assertion that she did not need any further training from the respondent to be allowed to operate the PPT. It is inconsistent with her assertion that the respondent had a PCP that pickers were not trained in using PPT and that pickers were not allowed to use PPT. In evidence she at first suggested that she did not accept that she needed the respondent's training to be allowed to use PPT but later agreed that she knew that she needed refresher training before being allowed to drive the PPT.

15. For those reasons I did not accept all the evidence given by the claimant, in particular I did not accept her assertion that she thought that she was allowed to use the PPT on the night in question.

16. The respondent's witnesses' evidence was consistent with the witness statements. The events in question were over two years ago, and some nearly three years ago. The witnesses stated candidly on a number of occasions that they were having difficulty recalling what conversations were had, even though it would have assisted their case if they had a clear recollection. I found that they were doing their best to assist the tribunal with their honest recollection rather than trying to give the 'best' evidence to support their case. Due to these

undoubted difficulties in recollection, I did sometimes prefer the claimant's evidence of what had happened in specific conversations, but where it came to questions of why things were done, I accepted the respondent's witnesses were giving an honest explanation of their reasons for acting as they did.

Documentary evidence

17. I had in front of me a main bundle, two bundles of additional documents provided by the claimant (a bundle with 232 pages and a bundle with 49 pages). I also had before me the following additional documents which were produced by the parties during the hearing:
    a. A small bundle of loose papers including the claimant's handwritten (not agreed) transcripts of various recordings she had made of conversations.
    b. Various documents emailed to the tribunal during the course of the hearing.

18. The parties took a sensible approach and did not object to the submission of these documents at a late stage.

Relevant Law

Unfair dismissal

19. Under section 103A of the Employment Rights Act 1996, a dismissal is automatically unfair if the principal reason for the dismissal was that the claimant made a protected disclosure.

20. Because of my findings on the reason for dismissal, it is not necessary to set out the law on what amounts to a protected disclosure.

Wrongful dismissal

21. In a claim for wrongful dismissal, the question for the tribunal is whether the claimant had committed an act of gross misconduct, i.e. whether the claimant acted in such a way that the employee's behaviour constitutes a repudiatory breach so that the employer was entitled to dismiss the employee without notice.

Disability

22. Section 6 of the EA 2010 provides:

> **6 Disability**
> (1) A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
> (2) A reference to a disabled person is a reference to a person who has a disability.
> (3) In relation to the protected characteristic of disability—

> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
> (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
> (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
> (6) Schedule 1 (disability: supplementary provision) has effect.

23. Section 212(1) of the EA 2010 defines "substantial" as "more than minor or trivial".

24. By paragraph 2(1) of Schedule 1, the effect of an impairment is long-term if: (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

25. In **Goodwin v Patent Office** [1999] ICR 302, the Employment Appeal Tribunal (Morison J presiding) analysed the predecessor provision to section 6 of the EA 2010 into four components,

> "3. Section 1(1) [of the Disability Discrimination Act 1995] defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions.
> **(1) The impairment condition**
> Does the applicant have an impairment which is either mental or physical?
> **(2) The adverse effect condition**
> Does the impairment affect the applicant's ability to carry out normal day-to-day activities …, and does it have an adverse effect?
> **(3) The substantial condition**
> Is the adverse effect (upon the applicant's ability) substantial?
> **(4) The long-term condition**
> Is the adverse effect (upon the applicant's ability) long-term?"

Direct discrimination

26. Direct discrimination and harassment are defined by the EQA as follows:

> **13 Direct discrimination**
>
> (1) 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.
> …

27. In addition, s23 of the EQA states in relation to comparators for direct discrimination cases that:

> **23 Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

28. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:
    a. was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances
    b. if so, was such less favourable treatment because of the claimant's protected characteristic?

29. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

30. Section 136 of the Equality Act 2010 provides for a shifting burden of proof where the Claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. Once that *prima facie* case has been established the second stage requires a Respondent to prove that he did not commit or is not to be treated as having committed the unlawful act.

31. Where the Tribunal is able to make clear findings as to the reason for the treatment the burden of proof provisions do not take the matter much further. In **Hewage v Grampian Health Board** [2012] IRLR 870, it was stated:

> "32. … as Underhill J pointed out in **Martin v Devonshires Solicitors** [2011] ICR 352, paragraph 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance."

Failure to make reasonable adjustments

32. Sections 20 and 21 EA 2010 provide:

> **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.
…

33. The tribunal has to carry out an objective assessment to consider whether any proposed adjustment would avoid the 'substantial disadvantage' to the employee caused by the PCP (Royal Bank of Scotland v Ashton [2011] ICR 632).

Did the claimant have a disability?

34. I deal first with the issue of disability as a preliminary issue

Findings of fact on disability

35. The claimant suffered a back injury while working for a previous employer on 5 November 2019. She saw a physiotherapist in March 2020 who said that she had an injury to her spine with a pinched nerve cord, two slightly moved discs, and tension/stiffness of muscles. Between November 2019 and May 2020, the claimant was significantly affected by this injury and was unable to work. She was dismissed by her previous employer on grounds of capability on 1 May 2023.

36. The claimant's symptoms improved to the extent that she felt able to apply, successfully, for a job at Bradford College in August 2021, where she combined work and studies from about August 2021. She still suffered from some pain during this period when sitting down at work and did walking exercises to improve her pain.

37. She felt sufficiently improved to apply for another warehouse position with the respondent and was appointed in March 2023. That is when the relevant period begins for these purposes. Near to the beginning of her period of employment the claimant filled in a medical questionnaire with Medigold.

38. In the 'general' section of the Medigold questionnaire the claimant answered 'no' to the following questions:

Do you suffer from any medical condition, that you feel you would need support with in order to carry out functions which are essential to your proposed employment?

Do you require any adjustments to be made to your work or work environment due to a medical condition?

Are you taking any medication?

39. The claimant answered yes to the following question:

Are there any factors that you feel would impact on your ability to undertake your potential role?
Yes.
Health and safety at work require improvements such as picking due to paperwork, blockage of locations by bind and inaction of management.

40. Under the heading 'Musculoskeletal' the claimant answered the following questions:

Within the last 5 years have you suffered from any medical conditions that affect your muscles, ligaments or joints that may impact on your ability to undertake any aspect of your potential role?

Yes, Injury of the back spine, nerve cord, disk, and muscles.

Do you feel that you require any adjustments in relation to a musculoskeletal concern to allow you to undertake your potential role? No

From your knowledge of the job that you will potentially be doing, is there anything that you feel may impact on your medical condition?

Yes, See the above question: Are there any factors that you feel would impact your ability to undertake your potential role? *[that is a reference back to the claimant's concerns above about general health and safety improvements]*

41. The Medigold report sent to the respondent on 13 April 2023 stated as follows:

> We can confirm that the employee is fit, however they have identified a health concern and would benefit from the following:
>
> • Conditions
>
> Musculo Skeletal and Connective Tissue Outcome Notes: This candidate has declared treatment for a musculo-skeletal back injury in 2019. This is generally well controlled although she reports intermittent lower back aches when lifting over 10kg. She is fit to undertake the proposed role but if there are any concerns or changes in health status in the future, we would recommend a management referral is submitted
>
> Adjustments & Comments
> Manual Handling Training is recommended
> A workplace risk assessment is recommended

> Outcome Notes: A workplace risk assessment is recommended to identify with the employee what if any workplace risks may need to be controlled e.g. manual handling heavy loads over 10kg. Management is advised to discuss this further with the employee and document any mutual concerns and supportive measures or adjustments agreed.

42. No workplace risk assessment was carried out.

43. The claimant says that during the relevant period she avoided anything that could have an impact on her back. If she had to pick a box of potatoes weighing 15kg or a bag of onions weighing 20kg she asked a colleague to help. She avoided bending and staying in a bent position for a long time so for example did not wash the dog in the bath. She did not vacuum the stairs at home and could not sit for a long time in one position. She could not drive for more than two hours at a time and did not lift a shopping bag of more than 10kg. From time to time, she used Voltarol gel or paracetamol or had a hot bath. She also used heat pads and wore a belt to support her back at work.

44. She did not visit her GP in the relevant period and managed to work as a picker full time with no need for time off. I accept that the claimant is a stoical person, but it is clear that she would have taken time off work if she needed to as she did when she had her back injury at her previous employer.

Discussion and conclusions on the issue of disability.

45. Applying the definition I am satisfied that he claimant had an impairment and I am satisfied that the effects of avoiding lifting more than a 10kg shopping bag, avoiding lifting 15 or 20kg loads at work, avoiding hoovering at home, not driving for more than two hours and avoiding leaning over the bath to wash the dog amount to a substantial, in the sense of more than minor or trivial, adverse effect on her ability to carry out day to day activities which lasted more than 12 months.

46. She was therefore a disabled person for the purposes of the Act.

The substantive claims

47. As there is no ordinary unfair dismissal claim it has not been necessary to separate out the factual findings in relation to wrongful dismissal and unfair dismissal.

48. I have only made the findings of fact that are necessary for me to resolve the claims. It was not necessary for me to make findings on whether or not the claimant's complaints amounted to protected disclosures because I concluded that those complaints had no impact on the decision to dismiss. I have therefore not needed to make findings of fact on the complaints.

Findings of fact

49. The respondent is a large wholesale food distribution business that has distribution hubs and regional depots throughout the United Kingdom. Products are picked and packed in warehouses, loaded on to commercial vehicles and

transported to customers and unloaded by drivers. Oliver Kay is the name of the division within which the respondent supplies fresh produce and chilled ingredients.

50. The claimant's line manager, according to her contract of employment, was Grzegorz Tomczak, although Modestas Rakauskas was also a line manager in the warehouse at the relevant time and in practice shared responsibility for line managing the claimant.

51. The claimant was employed by the respondents from 22 March 2023. Her formal job title, as recorded in the contract of employment, was 'warehouse operative'. However, that covers a number of different roles in the warehouse and the role that she was appointed to and trained for was that of a 'picker'. She was trained at her induction in using hand pallet truck, but not trained by the respondent in using the power pallet truck, referred to as PPT.

52. The respondent has specific training for using PPT. This involves between 1 and 3 days of training, depending on the individual's experience and aptitude, and involved a pass/fail test. Once trained by the respondent on using PPT an employee is allowed or authorised to use PPT in the respondent's workplace. Employees have to undertake a refresher after a specified number of years.

53. It was the practice of the respondent that pickers were not trained by respondent or authorised by respondent to use PPT because pickers did not need to use PPT – it was not their responsibility to move pallets and therefore they did not need to use PPT. This is dealt with in more detail below. If an employee is not trained by the respondent in PPT and has not passed the test at the end of the training, they are not authorised to use PPT by respondent and they cannot use PPT in respondent's workplace.

54. This requirement applied to anyone, including employees who had experience elsewhere in driving PPTs. The claimant referred on a number of occasions to the HSE approved code of practice. The guidance that accompanies that code of practice says:

> "Operators with some experience of lift trucks or relevant experience of similar vehicles may need less extensive training than those with no experience, however, **do not overestimate the value of such experience**. An operator with basic training on one type of lift truck or handling attachment cannot safely operate others, on which they have not been trained, without additional conversion training"

55. Further although the Code of Practice itself only requires 'basic training' (on the relevant type of lift truck) the guidance that accompanies the training says that operator training should always include three stages.

> Basic training: the basic skills and knowledge required to operate a lift truck safely and efficiently.

> Specific job training: knowledge and understanding of the operating principles and controls of the lift truck to be used and how it will be used in their workplace.
> Familiarisation training: applying what has been learnt, under normal working conditions, on the job.

56. The respondent only authorised employees to use PPT once they had been trained by this employer. That is in accordance with the guidance which says that specific job training should always be provided.

57. Therefore although the claimant had been trained in using PPT by a previous employer, had a nationally recognised AIT issued certification and had undertaken refresher training in PPT in 2018 – 4-5 years before the incident in question – she was not permitted to use PPT in the respondent's workplace, because she had not been trained or authorised by the respondent to use PPT.

58. Although the claimant's evidence was a little inconsistent on this, and she made a number of points about the clarity of the written material provided by the respondent, I find that the claimant knew that she was not allowed to use PPT for the following reasons:

    a. Up until the incident on 8 September 2023, she had never used PPT.
    b. She asked on a number of occasions to be given refresher training so that she could use PPT. If she did not need that training to use PPT, she would not have requested it.
    c. That was what she said during the disciplinary process on a number of occasions.

59. The claimant, as a picker, generally worked on what was known as the split area, but occasionally worked in the bulk area.

60. Her job in split involved picking a list of items of stock off the racking and placing those items in a trolley. PPTs are powered pallet trucks. They are not used during picking. They are used to move the pallets, once full, to another area. Not only was it not necessary to use a PPT while picking, but it would also not have been safe for pickers to be using a PPT while carrying out their normal picking duties.

61. In bulk, slightly heavier items were involved. Generally, even in bulk those items would be placed in a trolley. Occasionally, if heavier items were being picked in bulk, a picker might choose to pick the items and put them on to a pallet, rather than a trolley, and the pallet could then be moved with a hand pallet truck.

62. Although hand pallet trucks were available, and the claimant had been trained in them, there was no requirement for a picker to use a hand pallet truck. There was no need for the pickers to move pallets. Occasionally, when the claimant was asked to work on bulk, she chose to use a hand pallet truck. The claimant used a hand pallet truck approximately three times throughout her entire employment with the respondent. Although the hand pallet trucks were available, if pickers wanted to use them, the claimant and other pickers could avoid using a hand pallet truck altogether in the bulk area by splitting down the load into a smaller size, or they could ask to be given a lighter load to pick.

63. In relation to the use of a hand pallet truck, the claimant was trained not to attempt to move loads that she could not manage, and the employer's Safe System of Work document on use of hand pallet trucks states: "If a load is too heavy to move seek assistance from authorised MHE users or split the load down to a more manageable size."

64. Early in her employment the claimant asked Mr Rakauskas if she could be trained on PPTs. He refused because he said that they prioritise loaders and bulk pickers and FLT drivers and they do not have people picking in splits using PPT.

65. The claimant also asked Mr Rakauskas in April 2023 if she could have training in 'loading'. Mr Rakauskas refused, because the respondent did not need more people in loading at that time. I do not accept that Mr Rakauskas said that he had received a letter saying that the claimant could not do it because of her back, or that he said that she could not do loading because of her back.

66. The claimant has raised a number of health and safety concerns during her employment, including the following:

    a. In April 2023 the claimant raised health and safety concerns with Mr Greenwood, who had carried out her training. She asked him why the edges of the depot were not marked, why people did not park MHE in particular places and why walkways were not marked.
    b. In April 2023 the claimant verbally raised concerns with Mr Leigh about the positioning of bins and pallets which she said were causing an obstruction.
    c. In May 2023 the claimant raised concerns with Mr Leigh about proper equipment (damaged trolleys) and manual handling concerns, i.e. that picking should be done with two hands not one.
    d. On 18 June 2023 the claimant raised concerns again about bins causing an obstruction in an email to Mr Leigh.
    e. On 7 September 2023 verbally to Mr Tomczak, she raised concerns about Simona Butaciviete speaking in Lithuanian rather than English at work meaning that health and safety instructions could not be understood by non-Lithuanian speakers. Mr Tomczak spoke to Simona Butaciviete about the complaint.

67. In August 2023 the claimant was spoken to about using her mobile phone at work by Simona Butaciviete. Simona Butaciviete reported this to Mr Leigh, and although he did not recall this happening, I accept that he spoke to the claimant informally about this. No formal action was taken. The claimant accepts that she used her mobile phone but says that she was talking about work matters. She said in evidence that she thought that Simona Butaciviete had made the complaint in revenge for the claimant making complaints about her. She also said that Simona Butaciviete had done so because the claimant was not part of her family. Nothing that the claimant said in evidence supported a finding that Simona Butaciviete did this because of her race, or because the claimant was a Latvian who speaks Russian. Much more likely was that it was because she saw the claimant using her phone and assumed, perhaps wrongly, that it was for non-work-related purposes. That is the reason on the balance of probabilities.

68. On 8 September 2023, Simona Butaciviete was not at work. She was the coordinator who would ordinarily have been working in the split area, although there were other coordinators in the warehouse, including 'Kamil', who was working in the bulk area, and 'Kully' who was in loading. At the end of the briefing, the claimant was told by Kamil, the other coordinator, that Simona Butaciviete was going to be late for work. The claimant said that she would prepare everything for the split area, and Kamil agreed.

69. The claimant prepared everything for the split area by asking some 'guys' to move the empty boxes and lids and to bring pallets to the split area. Then the pickers started to pick.

70. The claimant then went to see Mr Rakauskas to ask if Ms Butaciviete was coming into work, and he said that she was not. The claimant said something along the lines of 'Who is going to be the split coordinator today?' but Mr Rakauskas did not respond.

71. Later in the shift, after pallets had been filled, they needed to be moved from the split area. The claimant asked Tauseek, a reach driver, to move the pallets but he said he was too busy. The claimant moved two pallets herself using the hand pallet truck. The claimant and the other pickers then filled up three more pallets which needed to be moved. The claimant did not want to use the hand pallet truck to move the three pallets because she was worrying about hurting her back. She decided that she would move the three pallets using the PPT.

72. The engine of the PPT was on already. She checked the forks, wheels, and hydraulics before she started to drive. She checked the warehouse and made sure that nobody was in the warehouse, and everyone was on their break. Then she used the PPT to take each of the three pallets individually along the aisle and then parked the PPT.

73. A few days later, the claimant told Mr Greenwood that she had used the PPT while on shift, and he reported this. Mr Rakauskas was informed on or around 10 September 2023.

74. The claimant was suspended with full pay by Mr Rakauskas on 12 September 2023 for using a power pallet truck without training or a company licence on 8 September 2023. She was informed in writing that she would receive an invitation letter for 'investigations'.

75. A letter confirming the suspension was sent to the claimant on 18 September 2023. The letter said that the claimant was suspended on full pay pending an investigation into allegations of alleged Gross Misconduct namely that she had used MHE without a company provided license or training.

76. That letter was accompanied by an invite to an investigatory meeting with Mr Rakauskas on 21 September 2023.

77. An investigatory meeting took place on 22 September 2023 with the claimant and Mr Rakauskas. In that meeting that claimant accepted that she had driven an

MHE and had not been trained by the respondent. She said that she did not know that training was needed to drive an MHE.

78. A further investigation meeting was scheduled for 27 September 2023. The claimant complained about Mr Rakauskas dealing with the investigation because his sister-in-law was Simona Butaciviete. The case was allocated to Matthew Harris, warehouse manager. The claimant was informed of this change by email dated 27 September 2023 and the investigation meeting was rescheduled for 28 September 2023 and rearranged for 2 October 2023.

79. At the meeting on 2 October 2023, the claimant was accompanied by a colleague, Sukhwinder Bains. In that meeting the claimant said that she decided to lead the area because Simona was not in work. She said that when she was picking there was a full pallet that needed to be moved, that she had asked Tauseek to move the pallet, but he was too busy. She said that she thought if she moved the pallet manually, she would injure her back, because she had injured her back in the past. She said they had then filled another three pallets and needed to get some more space, so she asked the people in splits to move the pallets, and no-one replied.

80. She said that she had requested PPT training, but it had not been done but she knew the risks. She decided to use the PPT. She said that no-one was around, everyone was on a break, the mover was switched on, and the key was in the ignition. She checked over the PPT wheels/forks etc. she presumed that the pre-ops had been done. She used the PPT to move the pallets to the end of the aisle to make space while everyone was on a break. She said that she did not have a choice. She said that the coordinator did not have a PPT licence and she would use the pallet truck if she had been there. She accepted that she had no training at this company or a licence at this company but said that she had an outside licence that had not expired. She said that the SSoW was not clear who cannot use PPT.

81. After taking some advice from HR, Mr Harris decided not to interview Tauseek, because he accepted that the claimant had asked him for help, but he was too busy.

82. An investigatory meeting took place on 19 October 2023 with Mr Harris and Mr Rakauskas. In that meeting Mr Rakauskas said Simona's attendance on 8 September 2023 had been optional because it was an overtime shift. He said that there were normally four coordinators on shift and that the claimant had not been asked to supervise the coordinator duties on 8 September 2023. He said that she had asked him if she could be trained on PPTs. He refused because he said that they prioritise loaders and bulk pickers and FLT drivers and they do not have people picking in splits using PPT.

83. Mr Harris produced an investigatory report in which he recommended that a disciplinary case be progressed.

84. Scott Leigh was the disciplinary officer. The claimant was invited to a disciplinary hearing on 30 October 2023 by letter dated 26 October 2023. P 220 The letter said that the allegation was gross misconduct namely using MHE without

company provided training and license. The letter said that these were extremely serious allegations which, if proven, could result in disciplinary sanctions up to and including summary dismissal. The claimant was sent a copy of the disciplinary standard and asked if she would be bringing a witness. The letter said that the witness had to be a fellow employee or a recognised trade union representative and that they could confer with the claimant and address the meeting but would not be able to answer questions on behalf of the claimant.

85. The disciplinary meeting took place on 30 October 2023. It was chaired by Scott Leigh. Matthew Harris presented the findings of the investigation. Michelle Cleghorn was the notetaker. The claimant was accompanied by a colleague, Phil Steer.

86. The claimant accepted that it was not acceptable to use the PPT but said that she did not want to risk making her back injury worse or risk other's health and safety. She said that she was confident to use a PPT, as she has previous experience and has experience as a health and safety representative and has done lots of training.

87. During the adjournment Mr Leigh checked the recommendations from Medigold and noted that there was no mention about the need to use equipment and said that she was fit for work.

88. After an adjournment Mr Leigh informed the claimant that she was dismissed without notice for gross misconduct and she was informed of her right to appeal within 5 days. This was confirmed in a letter dated 7 November 2023 which was sent to the claimant by email dated 9 November 2023. That letter is 2.5 pages long and sets out in detail the reasons why Mr Leigh decided that the claimant was guilty of gross misconduct. It considers the circumstances cited by the claimant and her argument about mitigation. Mr Leigh in evidence also explained why he had decided to dismiss for the incident on 8 September 2023.

89. It is not in dispute that the claimant did drive PPT on 8 September. It is not in dispute that she did so without having been trained by the respondents. Mr Leigh and the other witness expressed clearly in evidence the risks there were entailed in an employee driving PPTs without having undergone the respondent's training. That is underscored by the HSE guidance.

90. Taking account of those factors, Mr Leigh's oral evidence and the detail provided in that letter, I accept that the reason for dismissal was the claimant's conduct on 8 September. I do not accept that any of the complaints of health and safety or complaints about the actions of Simona Butaciviete above played any part in Mr Leigh's decision to dismiss.

91. It is entirely normal for dismissal to take effect before appeal. It is not evidence of predetermination.

92. The claimant appealed by email dated 31 October 2023. Her grounds of appeal are set out in that email and in a further email on 10 November 2023. The email on 31 October read:

"• I disagree with the way disciplinary action was taken. The complaints have not been reviewed regarding "As far as I understand The Equality Act 2010 is a Law about removing consistency and anti-discrimination at the workplace.

All employers have a legal responsibility under legislation such as the Health and Safety at Work Act (HSWA) 1974 and the Management of Health and Safety at Work Regulations 1999 to ensure the health, safety, and welfare at work of their employees".

• The risk assessment has not been done for me. Before I was recruited, I honestly replied on the Medical Form and informed the managers that I had had a serious injury with my back in the past, which took me more than six months to recover.

• I have asked for training PPT in the company even though I have a PPT Licence. I know the Legal Requirements for forklift truck Operator refresher training, but I refused by my management.

• I feel the outcome was too harsh. Could give a second chance as has been provided to the manager who was unloading the truck without the company's PPT training. He even has not been suspended from work for a certain time like me.

• I have new evidence that I feel should be considered which has not been included in the investigation. Please have a look at the attached file as a link.

• I think it is unjustly Victimisation to me. I was driving PPT because Simona (Warehouse Coordinator) did not come to work as she should have been present by the rota. Nobody was leading Split Area. The manager, Modestas (Warehouse Operation Manager), who was in his duties on Friday 8 September 2023 ignored my question regarding who will cover the Warehouse Coordinator at the split area."

93. The claimant' further email sent on 10 November 2023 read as follows:

"31.10. 2023 I had a final disciplinary hearing regarding driving PPT without the company's license in an incident on 8 September 2023 which I did for the productivity of work in the unauthorized absence of Simona, warehouse coordinator, and I mitigated all risks in operation equipment, surroundings, and concern about my health. As an outcome, I was dismissed by Scott Leigh.

replied I disagreed with Scott Leigh's decision and did write an appeal on 31.10.2023 to Nick Craddock. I didn't get any responses yet.

> From my first days, I requested for a refresher course for PPT training regarding my medical conditions which I filled up and sent to HR, but it has been refused by management.
>
> Additionally, I wrote the first complaint regarding Health and Safety issues at the workplace a month ago before an incident occurred, but it was not solved
>
> On Thursday, 7 September 2023, a day before an incident, I complained regarding the Health and Safety, Equality Act 2010, and I was ignored again. It was not solved either.
>
> Are ignorance and gross misconduct ways to solve issues? I do not think so. Does management have the right to ignore Health and Safety Laws and good practice at work? Does management have the right to cover relatives? Does that mean no one cares about the business, health, and safety at the workplace, and the well-being of employees?
>
> Could you clarify how Simona became a witness, please?"

94. The claimant was invited to an appeal hearing which took place on 22 November 2023. The appeal was conducted by Nicholas Craddock, head of operations (Bradford and Wolverhampton). The claimant was accompanied by a colleague, Phil Steer. Laura Fletcher, Assistant People Partner, took notes. A detailed discussions took place at the hearing.

95. Following the appeal hearing, Mr Craddock upheld the decision to dismiss and informed the claimant by a detailed letter dated 12 December 2023 of three A4 pages, in which Mr Craddock dealt with the relevant issues raised by the claimant in detail. Taking account of the matters I relied on earlier in relation to Mr Leigh's decision, bearing in mind Mr Craddock's oral evidence, and in light of the content of that letter, I find that the reason for dismissal was the claimant's conduct on 8 September 2023 and that her earlier complaints about health and safety and in relation to Simona Butaciviete played no part in the decision to uphold the dismissal.

96. On 5 May 2022 the depot had received a shipping container from China which had taken some time to arrive. It was loaded with onions so there was a pressing need to unload it. Some of the load had moved in transit and when it was put in the loading bay someone raised the fact that some pallets may cause a problem.

97. Mr Craddock, Scott Leigh and the QHSE Manager were present to assess whether we could unload the onions safely. They made a decision that they would unload the two pallets nearest the rear of the container to assess the situation better. Mr Leigh had been trained on the relevant equipment by the respondent and was confident he could unload the items without the rest of the load falling, which he did.

98. It came to the respondent's attention after the event that Mr Leigh had not yet completed his refresher MHE course, which is usually done every 2 years. On that basis Mr Craddock provided informal counselling which was recorded and

instructed him to undertake his refresher training, which he did the next day with the depot trainer.

Discussion and conclusions

Wrongful dismissal

99. The claimant had not been asked to perform a coordinator's role on 8 September. She was a picker, not a coordinator. At best, another coordinator had agreed that she could get things ready to start the day: she did that and it did not require the claimant to use PPT. In any event, a coordinator's role does not require the use of PPT. The coordinator who was absent, Ms Butaciviete, was not authorised to use PPT. The claimant had not been told to use PPT, she had not asked if she could use PPT. She was not asked to perform a role that necessitated using PPT.

100. Further the claimant had not received the respondent's workplace-specific training in using PPT. She knew that she needed additional training to be permitted to operate PPT in the respondent's workplace, as shown by repeated requests for refresher training. I accept that a pallet needed moving. I accept that she had difficulty in getting someone else to move the pallet. I accept that the claimant did not want to move the pallets with the hand pallet truck because she was worried about her back.

101. However, her decision to use PPT to move the pallet was a very serious error of judgment. It was not the only option. It was not her responsibility or her role to move the pallets. Presumably, if she was in the same circumstances but had had no previous training or experience in using PPT she would not have attempted to use it. She could simply have waited until someone was available to move it or gone to see a manager to explain the problem. That was an option available to her.

102. Although the claimant had received training in PPT with another employer, and refresher training in 2018, that was over 4 years prior to this event and in a different workplace. The HSE approved code of practice stresses the importance of workplace-specific training. That is what the respondent does: nobody is allowed to drive PPT unless they have had training by the respondent. It would have been worse if the claimant had driven PPT having had no training – in that sense it mitigates the seriousness of the incident to some extent, however I am satisfied that the conduct was still so serious that it amounted to gross misconduct.

103. In reaching that conclusion I take account of the following:

    a. There would be very serious consequences, both for the respondent and for other individuals, if the claimant, driving a PPT that she had not received the respondent's training on, had had an accident. There is risk of serious injury and loss of life. The Code of Practice stresses those risks and the importance of a proper system of training, including workplace-appropriate training.
    b. It is important that the respondent treats breaches of health and safety systems seriously in order to keep those systems robust.

c. The fact that Mr Leigh received a lesser outcome, when he drove a PPT on instructions by a more senior manager, before he had received refresher training, in the different circumstances outlined above, does not make me view the claimant's actions any less seriously.

104. In my view taking account of all the surrounding circumstances, the claimant's conduct amounted to gross misconduct.

Automatically unfair dismissal

105. I have found as a fact that the reason for dismissal was the claimant's conduct on 8 September 2023. It was nothing to do with her complaints. The dismissal is therefore not automatically unfair and this claim is dismissed.

Failure to make reasonable adjustments

106. I accept that the respondent had a practice that employees in the role of picker do not receive training on the PPT, and that there is a practice that pickers are not allowed to use the PPT.

107. I do not accept that this put the claimant at a substantial disadvantage. Even if lifting heavy things manually might affect the claimant's back, that does not mean that she was placed at a substantial disadvantage by not being trained on using PPT. That is because she does not need to use the PPT in her role as picker to avoid lifting heavy items as set out in my findings of fact above.

108. Further, I find that it would not in any event have been a reasonable adjustment to allow her to use PPT when picking – it was simply not safe to use the PPT for picking. The PPT was used to move the pallets away and bring to the picking area. It was not safe for pickers to be using PPT as part of their normal picking role. It would therefore not have been a reasonable adjustment to provide the claimant with training to use the PPT or allow her to use the PPT.

109. This claim is dismissed.

The claims for direct discrimination and the burden of proof.

110. It is not necessary for me to consider the shifting burden of proof, because I have been able to make positive findings on the evidence as to the reason why the claimant was treated as she was.

Direct race discrimination

111. I have found as a fact that the reason for that treatment was not the claimant's race. The claimant's race had no influence on reason why the claimant was treated in that way. Having determined the 'reason why' question, I conclude that the claimant was not treated less favourably than others would have been treated in not materially different circumstances. This claim fails.

Direct disability discrimination

112. Although this claim was brought out of time, I have considered it on its merits and I have found that reason for the treatment was because there was no need for additional loaders, not because of claimant's disability. Having determined the 'reason why' question, I conclude that the claimant was not treated less favourably than others would have been treated in not materially different circumstances. This claim fails.

113. That claim is dismissed.

Approved by Employment Judge Buckley

Date 26 February 2026

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