Case Number: 2501186/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondent*
Mr I Train	**AND**	**Marlow Foods Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **Middlesbrough** **On** : **6,7 and 8 March 2018**
Deliberations in chambers: 21 March 2018

Before: **Employment Judge Shepherd**
Members: **Ms Kirby**
Ms Wiles

Appearances

For the Claimant: **Mr Legard**
For the Respondent: **Mr Sutherland**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of disability discrimination is well-founded.
2. The claim of unfair dismissal is well-founded.

A further hearing to consider the remedy to be awarded is to be listed for a one day hearing and the parties should inform the Tribunal within 7 days of this judgment being sent to them as to whether the case is ready for listing or if further directions should be provided.

REASONS

1. The claimant was represented by Mr Legard and the respondent was represented by Mr Sutherland.

2. The Tribunal heard evidence from:

Darren Pettitt, Shift Manager;
Matt Young, Operations Manager;
Nick Halton, Trade Union Representative;
Ian Train, the claimant.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 165. The Tribunal considered those documents to which it was referred by the parties.

4. The issues that the Tribunal had to determine had been identified in a preliminary hearing on 30 November 2017 before Employment Judge Buchanan and were as follows:

Failure to make reasonable adjustments

4.1 It was noted and recorded that the respondent accepts that the claimant was at all material times a disabled person by reason of the impairments of cervical spondylosis and angina.

4.2 It was noted and recorded that the respondent knew the claimant was a disabled person at all material times and knew the effects of such disabilities upon the claimant.

4.3 Did the duty to consider making reasonable adjustments arise?

4.4 Did the respondent apply a provision, criterion or practice (PCP) to the claimant namely a requirement that he carry out all aspects of his role and in particular:-

(a) work across all zones;

(b) clean all machinery;

(c) carry out heavy lifting and pushing and twisting?

4.5 If so, did that PCP place the claimant at a substantial disadvantage in comparison with employees who were not disabled by making it likely for the claimant to be subject to capability proceedings and/or dismissal due to an inability to carry out all the elements of the role?

4.6 Did the respondent fail to make reasonable adjustments to the PCP and in particular did the respondent fail:-

(a) to allow the claimant to work in Zone 1 (high care zone);

(b) to adjust the claimant's role so that he did not clean machinery that required him to crawl through the machines;

(c) to amend the claimant's duties so that there was no heavy lifting/pushing/twisting?

4.7 Would those adjustments in fact have removed or overcome the substantial disadvantage and if so would they have been reasonable in all the circumstances?

Discrimination arising from disability

4.8 It was noted and recorded that the respondent accepts the claimant was a disabled person at all material times.

4.9 Was the claimant treated unfavourably by the respondent when the respondent dismissed the claimant?

4.10 If so, was the reason for the dismissal because of something arising as a consequence of the claimant's disability and in particular his inability to be able to work across all zones and/or his inability to be able to perform all aspects of his job?

4.11 In treating the claimant in that way what was the respondent seeking to achieve? Was the aim of ensuring the health and safety of all its employees including that of the claimant a legitimate aim?

4.12 If so, was the treatment of the claimant a proportionate means of achieving that legitimate aim or was there a less discriminatory way of achieving it?

General issues on disability

4.13 Have all the claims been submitted in time in accordance with section 123 of the 2010 Act?

4.14 If not, was there conduct extending over a period which is to be treated as done at the end of that period in accordance with section 123 of the 2010 Act?

4.15 If not, is it just and equitable for the Employment Tribunal to extend the period of limitation in order to allow the claims to be considered in accordance with section 123 of the 2010 Act?

Claim of ordinary unfair dismissal

4.16 Does the respondent prove the reason for dismissal namely that it was related to the capability/ill health of the claimant?

4.17 Did the dismissing officer have a genuine belief in such lack of capability/ill health?

4.18 Were there reasonable grounds for that belief?

4.19 Did the respondent follow a fair procedure in order to reach the decision to dismiss the claimant?

4.20 Did the decision to dismiss the claimant fall within the band of a reasonable response particularly bearing in mind all the circumstances and the size and administrative resources of the respondent?

4.21 If there is any procedural unfairness, has any such unfairness made any difference – the Polkey question?

Remedy

4.22 It was noted and recorded that, if successful, the claimant seeks the remedy of compensation and does not seek any order of re-employment.

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

5.1. The claimant was employed by the respondent as a Production Operator from 5 February 1996. The respondent is a manufacturer of food products under the name of Quorn.

5.2. The claimant has suffered from back pain since approximately 1996. His condition has deteriorated and in 2016 he was diagnosed with cervical spondylosis. He has also suffered with angina for 10 or 11 years. The respondent accepts that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 at all material times and that it had knowledge of the claimant's disability.

5.3. When the claimant was first diagnosed with cervical spondylosis the claimant saw his GP and was provided with a fit note dated 28 June 2016 which indicated that he may be fit to work taking into account the amended duties. It was stated "This man has neck symptoms and will require light duties until this has been resolved"

5.4. Darren Pettitt, the claimant's line manager, gave the claimant light duties in the office with him for a short period during the weekend and sought advice from the respondent's Human Resources Department.

5.5. On 14 July 2016 the claimant was provided with a temporary position as a Technical Administrator. This role was one providing cover for an employee who was on maternity leave.

5.6. The claimant was removed from the Technical Administrator role in September 2016, before the other employee returned from maternity leave. The reason for his removal from that role was with regard to the claimant's performance. The documentary evidence in respect of the claimant's removal from the role was not clear. However, the claimant agreed that he had been removed for performance issues. He said that he had not received sufficient training. He said that he had been given training by sitting next to someone who showed him how to carry out the tasks. He had asked Adrian Lee, Stokesley Day Manager, for further training, specifically, Excel training but this was not provided.

5.7. On 28 September 2016 an Occupational Health report was provided by Janet Patterson, Occupational Health Specialist. Within this report it was stated:

> "On attendance today Ian talked at length about the opportunity for less manual work facilitating better management of his symptoms. On reading the referral Ian stated he wanted to make it clear that he was not given sufficient training to do the TA role and he is unclear why this role is no longer available to him as he states given full training and time to adjust he feels he could do this role."
>
> "Ian is currently unfit for full production work tasks however he reports previously when pain permitted he managed most tasks in zone 1. He reports he has worked in zone 1 (only) for the past eight or so years due to his back. He reports the elements of cleaning the chiller provokes his spinal symptoms and is the main element he struggles with and that can exacerbate his symptoms.
>
> In my opinion based on Ian's symptoms today he is fit for restricted duties in the production role – zone 1. I have explained to Ian that restricted duties are at the employer's discretion and they are not always possible due to resource requirements. Clearly if there were not manual jobs available this would facilitate less exacerbation of symptoms however as above I have advised Ian this is dependent upon business requirements/opportunity for such role change.
>
> I have also discussed with Ian my concerns about him working 12 hour shifts – ideally 8 hour working days would be better suited to his health condition. These long hours will provoke pain and discomfort and

> although Ian has managed in the past until he has his injection he will struggle to cope with 12 hour shifts.
> Ian's spinal condition will not improve however following the injection when received may improve his level of symptom control and result in less restrictive mobility.
>
> In summary Ian is unfit for full manual production role tasks until he has had the opportunity for the cervical injection to work. It is likely that even with this injection Ian will continue to be restricted in his ability to undertake the full manual role due to bending, twisting and undertaking load activities exacerbating his condition.

5.8. On 24 October 2016 the claimant met with Adrian Lee at an absence meeting. There was some discussion with regard to the Technical Administrator role. The claimant indicated that he had asked for an Excel course and that he was disappointed with their last conversation and thought that Adrian Lee wanted to get rid of him. The claimant's witness statement provided to the Tribunal indicated that the colleague for whom was covering maternity leave had been due back in October/November 2016 and they had no further light duties for him. However, he did tell the Tribunal that he was removed from this post as a result of performance issues and that Adrian Lee told him to go home and submit sick notes.

5.9**.** The claimant was absent from work and submitted a number of statements of fitness for work from his GP which stated that he was not fit to work because of cervical spondylosis and disk degeneration.

5.10. On 8 March 2017 an Occupational Health report was provided in which it was stated:

> "Ian remains unfit for full production work tasks as he is unfit to do a full range of production manual handling tasks and the activity of cleaning belts, moving stand-alone belts and cleaning under belts. With the above considerations/reasonable adjustments (if you were able to accommodate) Ian may be fit to do 12 hour shifts.
>
> Ian's spinal condition will not improve due to the degenerative nature and it is a case of managing his symptoms and whilst keeping active is better for Ian he should avoid heavy manual work. Ian is fully aware that his restrictions may be difficult for the business to accommodate and he is willing to be considered for any other job the business can offer as alternative work."

5.11. On 30 March 2017 the claimant attended an informal absence meeting with Darren Pettitt, Shift Manager, who was accompanied by Melissa Nicholson, HR Advisor. In that meeting the claimant's condition was discussed and the current vacancies were considered. Eight roles were mentioned and the claimant said that none of these was suitable even with training.

5.12. On 31 March 2017 Melissa Nicholson wrote to the claimant inviting him to a further meeting with Darren Pettitt to discuss the claimant's continued absence and his capability for continued employment. It was also stated that they would like to discuss any amendments again and see if there was any way they could facilitate the claimant's return to work. However, if that failed, it was indicated that they may have to consider terminating his employment due to ill-health.

5.13. On 7 April 2017 the claimant attended a formal capability meeting with Darren Pettitt, the claimant was accompanied by Stephen Threadgill, Trade Union representative. In that meeting the claimant indicated that he had felt the benefit of the injection and that his condition had improved. There was discussion as to whether the claimant could try the Production Operator role with the adjustments recommended by Occupational Health. The claimant was informed that there was no role that would accommodate the claimant's restrictions. Melissa Nicholson stated that the claimant's condition was degenerative and would not improve and signing him back to work in a role for which he was not fit for not only risked the claimant's health, but also risked accelerating the degeneration and would go against the advice provided by Occupational Health.

5.14. On 11 April 2017 the claimant sent a letter appealing against the decision regarding the proposed termination of his employment. He indicated the grounds of his appeal were 30 years loyal service, excellent employment record, long-term disability. Also, that the respondent had not meaningfully looked at reasonable adjustments and had breached the Equality Act 2010. The claimant was informed that there was no right of appeal at that stage. A further meeting was arranged to "discuss any amendments and see if there was any way we can facilitate your return to work." The claimant was informed that, if all else fails, the outcome of the meeting would be to terminate his employment due to ill-health.

5.15 on 24 April 2017 the claimant attended a formal capability meeting with Darren Pettitt. The claimant was accompanied by Stephen Threadgill, Trade Union Representative, and Melissa Nicholson from HR was present. The notes of the meeting state among other things:

> "IT asked why he could not go to another zone when his current zone was in clean down as it was only the clean downs that he is unable to do. D.P. asked if IT was now saying that he was able to carry out chiller ice checks, flow freeze checks, work on the bulk copper, belt sag checks, and if he could push full buggies. IT responded that the chiller ice check was visual, D.P. asked if IT was now saying he could carry out the other tasks and IT replied no.
>
> IT asked why zone rotation was so important now. D.P. replied that it was important for job rotation and for up-skilling the shifts to cope with the demand of business growth. D.P. stated that the Production Operator role was not zone specific, Production Operators are full Production Operators across all zones and plants. D.P. asked for

> further clarification from IT that he felt it was only clean downs that he was unable to do. IT responded "you don't know if you don't try" D.P. responded to say that Occupational Health have stated that he can't if IT were to do anything beyond what he was capable due to his condition then this risked further effects on IT's health.
> …
> DP informed IT and ST that, as they would not discuss their points further we had to make a decision based on the information we had. As we are unable to find any alternative roles, and as IT is unable to carry out his role of Production Operator with a reasonable level of adjustments then, as previously discussed, IT's contract will be terminated today on the grounds of ill-health."

5.16 The claimant provided some notes he had made in respect of this meeting. However, it was unclear as to when these were made. The claimant was unable to say but he felt that it was around the time of his appeal. In these notes it is stated:

> "I wasn't given the chance to explain that the only thing I'm unable to do, due to my health condition, is push full buggies."

5.17. On 25 April 2017 Darren Pettitt wrote to the claimant confirming the decision to dismiss. In that letter it was stated:

> "As discussed with you, and taking into account the medical reports we have received, it is clear that your return to work in your current role is not imminent. We also discussed that there are no alternative duties, adjustment or support the company can undertake to facilitate your return"

5.18. The respondent treated the claimant's letter of 11 April 2017 as an appeal against his dismissal.

5.19. On 13 June 2017 the claimant attended an appeal hearing. He was accompanied by Nick Halton, Trade Union Representative. The hearing was before Matt Young, Operations Manager who was accompanied by Linda Gapper, Senior HR Business Partner. In that meeting the claimant said that he had been given an injection that had improved his condition and that his pain was manageable. Nick Halton asked what adjustments the respondent had looked at to alleviate the manual handling tasks and whether they could be overcome. Matt Young replied that they could be creating a role within a role. There was some discussion with regard to rotation.

5.20. Matt Young said that, in view of the difference the claimant was now saying, he wanted more detail on his condition and the tasks required in the role.

5.21 Julie Watson, Learning and Development Officer was asked to provide a breakdown of the tasks involved in the claimant's Production Operator role.

This was referred to as a “desk top study”. It categorised task descriptions into physical tasks, technical tasks and tasks that were both physical and technical. Matt Young then asked Geoff Walby, an experience Shift Manager, to estimate the frequency of each task and how much time was spent doing each task.

5.22. The study did not take account of the clean down. Matt Young said that this was not taken into account as the claimant said that he could not do those tasks.

5.23. Matt Young calculated, from the information in the study that 40% of the claimants working day involved physical activity.

5.24. A further Occupational Health referral was made and a report was provided from Gillian Oxley, Occupational Health Specialist Practitioner dated 11 July 2017. In that report it was stated:

> “OH Assessment and Summary
>
> As you are aware Mr Train has been absent from work since 13 September 2017 suffering from cervical spondylosis, degenerative disc problems, partial blocked arteries and limited mobility. Mr Train has been dismissed from his job and is currently going through an appeal. I understand he has a meeting with the operations manager and HR this coming Friday. Mr Train has advised Quorn that he is feeling significantly better and would like to return to work in some capacity. This will be discussed in the meeting on Friday.
>
> .
>
> OH Opinion and in respect of the questions you have asked.
>
> Prior to my meeting with Mr Train I was given an overview on the shop floor and shown the components of Mr Train’s role. In my opinion if Mr Train was to return to the shop floor then I would recommend that zone 1 would be the only suitable part of the plant for Mr Train to work in and he would be able to perform light cleaning duties only as he is not able to manage any of the manual cleaning tasks. Mr Train has an underlying condition of cervical spondylosis and degenerative disc problems which causes him to have limited mobility he also suffers from partially blocked arteries. Mr Train’s role may exacerbate his condition due to the manual handling involved in his role. He may be at risk of further injury and discomfort. He does not pose a threat of injury to others. Mr Train’s condition will not improve and he will have to live with the conditions for the rest of his life and he may never be fully fit to continue in his full-time duties. Mr Train is not fit to continue in the position he has been employed to do, however he may be fit to carry out an alternative role. Should this be available. The Equality Act 2010 will apply. It is unlikely that Mr Train will be fully fit to return to his current job. I had suggested to Mr Train that we should send off for further medical evidence from his GP but Mr Train declined. Should Mr

> Train return to work in any capacity I would recommend a phased return to work rehabilitation programme."

5.25. The appeal hearing was reconvened and took place on 14 July 2017. Claimant was, once again, accompanied by his Trade Union representative, Nick Halton. Matt Young was accompanied by Alix Cornforth, HR Business Partner. In that meeting the claimant said that he was fit for work. The injection had worked. It was agreed by the claimant that 60% of the role was technical and 40% was manual. The claimant said that he would struggle with crawling through the chillers and very manual cleaning tasks. Matt Young informed him that he had a medical professional telling him that the claimant would struggle with any manual handling or physical task and these tasks could make him worse.

5.26. The claimant was informed that his appeal was not upheld. After the decision was confirmed Nick Halton states "The role hasn't changed. And now he could do it. There is no evidence to show that he can't do the role he has done for 11 years. He would prefer help in the clean down."

5.27 On 21 July 2017 Matt Young wrote to the claimant setting out the outcome of the appeal. In that letter it was stated:

> "Following the findings of the independent study I conducted, in addition to the occupational health reports we have received, it was clear that a return to work in your current role is not imminent. It was also clear that there were no further alternative duties, adjustment or support the company can undertake to facilitate your return.
>
> It must be noted that previous reasonable adjustments have been implemented, for example the Technical Administration role you undertook until 13 September 2016. That role was a maternity cover role therefore was not a permanent option, as you are aware. Arian Lee concluded that you were not suitable for the Technical Administration role due to mistakes and errors made, and it is from there that your sickness absence began.
>
> I would like to outline all of the reasonable adjustments which we considered:
>
> - Pairing you with a full-time employee to enable you to fulfil the light duties associated with the role and leaving the manual tasks for the full-time employees to complete.
>
> - Moving you into other zones when the tasks in zone 1 were too manual but this was deemed inappropriate as the other zones are more manual than zone 1. I did not include the other zones in my independent study as it would be unfair, as you have worked on zone 1 for 11 years.

- Part-time working which was deemed unreasonable as that means the business would need to fill the role with an additional part-time employee which is unsustainable. Also, due to the nature of the role, there would be no guarantee of non-manual available tasks you would be able to carry out within the shift.

- I undertook an independent study which looked at the percentage of manual tasks associated with the production operator job. The results of this show that there is a split of 40%/60% manual and non-manual tasks which equates to 260 minutes' worth of work. I had to consider whether it was sustainable to accommodate those 260 minutes elsewhere, every day, across all of the plants.

After full consideration of the above adjustments, it was deemed that it was not reasonable or feasible to pursue any of the above.

In the meeting I highlighted the below two points to answer the questions you asked before the meeting was adjourned;

- The time the company waited for the injection to become effective was reasonable.

- The decision was made to dismiss you on grounds of capability through ill-health although a desktop exercise was not conducted before this decision. Therefore I conducted a desktop exercise myself to verify the initial decision and the outcome mirrored that of the above. It was found that alternate duties would need to be found for approximately 260 minutes per shift to enable you to fulfil a whole shift. This is unrealistic and unsustainable for the business.

I would also like to highlight that we have a duty of care towards yourself and we do not feel it would be reasonable to allow you to work on a role which could exacerbate your condition.

I regret to confirm that the decision to dismiss you for capability through ill-health stands. This confirms the position as explained to you in the letter dated 24 April 2017."

5.28. After following the ACAS early conciliation procedure, the claimant presented a claim of unfair dismissal and disability discrimination to the Employment Tribunal on 4 October 2017.

6 The law

7 Discrimination arising from Disability

Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

8 **Duty to Make Reasonable Adjustments**

Section 20 of the Equality Act 2010 states:

"(1) Where this Act imposes a duty to make reasonable adjustments of 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 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 take to avoid the disadvantage.

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

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

9 **Discrimination arising from the consequence of a disability**

Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in *Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14* at

paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see *IPC Media Ltd v Millar [2013] IRLR 707*: was it because of such a consequence?

10 The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out *in Environment Agency v Rowan [2008] ICR 218*, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

11 **Burden of Proof**

Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

12 Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* (a sex discrimination case decided under the old law but which will apply to the new Equality Act) and approved again in *Madarassy v Normura International plc [2007] EWCA 33.*

13 To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

In *Project Management Institute v Latif (2007) IRLR 579* The EAT gave guidance as to how Tribunal's should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore the burden is reversed only once potential reasonable adjustment has been identified. It not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

14 In *Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664* the EAT said that an employer's failure to make an assessment of a disabled employee is not of itself a failure to make a reasonable adjustment. This was followed by the EAT in *Scottish & Southern Energy v Mackay UKEAT LL75/06.*

15 In *Romec v Rudham (2007) All ER 206* the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In *Cumbria Probation Board v Collingwood (2008) All ER 04* the EAT stated "it is not a

requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage" the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.

In *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ* the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

In *Noor v Foreign and Commonwealth Office 2011 ICR 695* Richardson J stated "Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"

15 **Time limits**

Section 123 of the Equality Act 2010 states:

> (1) ...Proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> ...
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) a failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

16 The Court of Appeal made clear in *Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686***,** that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in

accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an "ongoing situation or continuing state of affairs" as oppose to "a succession of unconnected or isolated specific acts". It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

17 In the case of *Humphries v Chevler Packaging Ltd EAT 0224/*06 the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make reasonable adjustment. In the case of *Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170* the Court of Appeal held that where an employer was not deliberately failing to comply with the duty and the omission was due to lack of diligence or competence, or any reason other than conscious refusal, it is to be treated as having decided upon the omission when the person does an act inconsistent with doing the omitted act or when, if the employer had been acting reasonably, it would have made the adjustments. In the recently reported Court of Appeal case of Abertawe Bro Morgannwg University v Morgan [2018] WLR197 it was stated:

> "In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20 (3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to redress the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became a should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the tribunal that it should do so, and *'the exercise of discretion is the exception rather than the rule*' (*Robertson v Bexley Community Centre* [2003] EWCA Civ 576 per Auld LJ at para 25).

19 The Tribunal's discretion to extend time under the 'just and equitable' formula is similar to that given to the civil courts by section 33 of the Limitation Act 1980 for extending time in personal injury cases (*British Coal Corpn v Keeble,*

[1997] IRLR 336). Under section 33, a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. The length of and reasons for the delay;

2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time;the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant;

3. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

4. The extent to which the claimant acted promptly and reasonably once he knew of his potential cause of action. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor.

5. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

20 Time limits are short for a good purpose- to get claims before the Tribunal when the best resolution is possible. If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if it agrees with the claimant The Tribunal can make a constructive recommendation. Left unresolved, even minor omissions by employers often have devastating consequences which it is too late to remedy in that way.

21 However, for over a decade Parliament has tried various means to ensure that, before employees rush to a Tribunal, they try to resolve problems internally with the employer. That is exactly what the claimant did on his account. In Matuszowicz the Court of Appeal considered a failure to make reasonable adjustments claim where the claimant gave the employer time to remove what the claimant saw as the impediments to doing the job. The argument the claimant should have realised earlier they would not and brought the claim earlier did not find favour with Sedley LJ who said such contentions “demand a measure of poker faced insincerity which only a lawyer could understand or a casuist forgive “.

Unfair Dismissal

22 Capability is a potentially fair reason for dismissal under S.98.(2) of the Employment Rights Act 1996. It is for the employer to show the reason for dismissal and if it does show that the reason was a potentially fair reason the

tribunal will then go on to determine whether the dismissal was fair in the circumstances pursuant to S.98(4).

In cases of capability dismissals involving ill health the tribunal will consider whether the ill health relates to the employee's capability and whether it was a sufficient reason to dismiss. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in *Iceland Foods Ltd v Jones [1982] IRLR 439*. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether dismissal had been within "the band of reasonable responses" available to the employer.

In the case of *BS v Dundee City Council [2013] CSIH 91* the EAT stated that it is important for employers to consider:

(a) The nature of the illness;
(b) The likelihood of it recurring;
(c) The length of past absences and the intervening periods of attendance;
(d) What reasonable adjustments have been offered and what could be offered, such as alternative work; and
(e) The impact of the absences on the business and other employees.

23 In *Hardys & Hansons v Lax [2005] EWCA* 864 the Court of Appeal held that the range of reasonable responses test does not apply when Tribunals have to decide whether an otherwise discriminatory practice is objectively justified. The principle of proportionality required the Tribunal take account of the reasonable needs of the business. But it had to make its own judgment, upon a very detailed analysis of the working practices and business considerations involved, as to whether the proposal was reasonably necessary. The reasonableness qualification did not permit the margin of discretion or range of reasonable responses for which the respondent contended.

In O'Brien v St Catherine's Academy [2017] EWCA 145 Underhill LJ stated

> "But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee Is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard the purpose of an unfair dismissal claim and by a different standard for unfair discrimination law. Fortunately, I see no reason why that should be so."

24 With regard to compensation for unfair dismissal, one of the factors that a Tribunal has to consider is whether, there was a likelihood that a dismissal would still have occurred if the dismissal had been fair pursuant to *Polkey v. AE Dayton Services Limited [1988] ICR 142.* Also, there may be consideration of reduction of compensation for loss of earnings in a successful discrimination claim to reflect the chance that the employee would have been dismissed lawfully in any event pursuant to *Abbey National v Chagger [2010] ICR 397.*

25 The Tribunal had the benefit of oral submissions provided by the representatives. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

26 **Conclusion**

The Tribunal has given careful consideration to the evidence and the submissions in respect of the issues identified at the earlier preliminary hearing, and, agreed at the commencement of the substantive hearing, as those that the Tribunal should determine, and its conclusions are as follows:

Failure to make reasonable adjustments

1 It was noted and recorded that the respondent accepts that the claimant was at all material times a disabled person by reason of the impairments of cervical spondylosis and angina.

2 It was noted and recorded that the respondent knew the claimant was a disabled person at all material times and knew the effects of such disabilities upon the claimant.

3 Did the duty to consider making reasonable adjustments arise?

4 Did the respondent apply a provision, criterion or practice (PCP) to the claimant namely a requirement that he carry out all aspects of his role and in particular:-

(a) work across all zones;

(b) clean all machinery;

(c) carry out heavy lifting and pushing and twisting?

27 The Tribunal has considered the applicable PCP. This was a requirement that the claimant carry out all aspects of his role in the zone 1. He was not required to work across all zones. The wish for operatives to work across all zones was aspirational and the respondent did not actually require the claimant to work across all zones. It was mentioned on a number of occasions but it was not a requirement. The job title did not specify that the claimant was a Production Operative in zone 1, however, he had worked in that zone for a substantial number of years. The claimant had worked for the respondent for in excess of 20 years and, on an agency basis for around 10 years before that. The claimant had been carrying out his role in zone 1 for around 11 years.

5 If so, did that PCP place the claimant at a substantial disadvantage in comparison with employees who were not disabled by making it likely for the claimant to be subject to capability proceedings and/or dismissal due to an inability to carry out all the elements of the role?

28 The requirement to carry out all aspects of his role in zone 1 did involve heavy manual work and the Tribunal is satisfied that this placed the claimant at a substantial disadvantage when compared with non-disabled employees. The claimant had a long-standing history of cervical spondylosis and lumbar disc degeneration. He also suffered from angina although that did not arise as a relevant consideration in the case. The Occupational Health report and, the claimant's evidence, were relatively consistent in that the claimant was not able to do heavy manual work. The claimant said that he was unable to carry out the tasks of crawling under the chiller belt to clean it and pushing or pulling the large wheelie bins full of waste.

The Tribunal is satisfied that the duty to make reasonable adjustments was engaged.

6 Did the respondent fail to make reasonable adjustments to the PCP and in particular did the respondent fail:-

(a) to allow the claimant to work in Zone 1 (high care zone);

(b) to adjust the claimant's role so that he did not clean machinery that required him to crawl through the machines;

(c) to amend the claimant's duties so that there was no heavy lifting/pushing/twisting?

29 The respondent did allow the claimant to work in zone 1. That had been his job for around 11 years. There was no adjustment to the effect that the claimant was not to clean machinery that required him to crawl through the machines. Also, there was no adjustment to the claimant's duties so that there was no heavy lifting/pushing/twisting. The respondent was of the view that the claimant could not carry out the duties of the Production Operator in zone 1. The Occupational Health report of 28 September 2016 indicated that the claimant was unfit for full production work tasks but that he was fit for restricted duties in the production role in zone 1. It was indicated that, ideally, an eight-hour working day is more suitable than 12 hour shifts. The claimant underwent a nerve root injection to help with his symptoms on 26 February 2017. The Occupational Health report on 8 March 2017 indicated that he was significantly better but unfit to do a full range of production manual handling tasks and cleaning.

30 The respondent determined that there were no alternative duties, adjustments or support the respondent could put in place and the claimant was dismissed. At the appeal stage the "desktop report" was commissioned. However, this split the tasks into physical, technical and a mixture of physical and technical tasks. There was no determination of what tasks claimant could do and no

consideration of what tasks were heavy manual tasks or light manual. It was determined that the claimant's role involved 60% technical tasks and 40% manual tasks. The claimant said that he could carry out the majority of the tasks. The injection had worked. His evidence as to what he could actually do in the role was not entirely clear. During the Tribunal hearing he estimated that he could do 98% of the work. Many of the cleaning tasks were said to be automated and the tasks required of the claimant involved checking these. The Occupational Health report carried out between the two appeal meetings, on 11 July 2017, indicated that it was recommended that zone 1 would be the only suitable part of the plant for the claimant and he would be able to perform light cleaning duties only.

31 The evidence of Matt Young was, in part, confusing with regard to how the tasks in the 'desktop report' had been assessed and who had been involved. He was faced with a situation where the claimant had been indicating that he could carry out most of the work, and an Occupational Health report which indicated that the claimant's role may exacerbate this condition due to the manual handling involved.

32 The evidence with regard to the clean down was not clear. The report indicated that the claimant was assisted by two or three other workers when the full clean down was carried out. The claimant indicated that one of these other workers would usually carry out the cleaning of the chiller belt which required the crawling and he would often get assistance with pushing or pulling the wheelie bins full of waste. There were other tasks he struggled with such as lifting heavy trays and bags full of waste.

33 The claimant had undergone a nerve root injection on 26 February 2017. This would take some time to take effect. In the second appeal meeting on 14 July 2017 the claimant said that the injection had worked and he was he was fit for work. The Occupational Health report of 11 July 2017 indicated that claimant had said that he was significantly better and zone 1 would be the suitable part of the plant for him to work in and he would be able to perform light cleaning duties only. It had been suggested by the Occupational Health practitioner that they should send for further medical evidence from the claimant's GP. The claimant had declined. He said this was because he was angry that the matter been dragging on. It would have been appropriate for the respondent to obtain further medical evidence from the claimant's treating specialist or, at least, his GP, in the circumstances before ending a very long-standing employee's employment.

34 The Tribunal accepts that the respondent was in a difficult position. However, the claimant was indicating that he was fit to return and that the only parts of his role that he struggled with were crawling through the chillers and heavy manual cleaning tasks

.

> *7 Would those adjustments in fact have removed or overcome the substantial disadvantage and if so would they have been reasonable in all the circumstances?*

35 The Tribunal has given very careful consideration to this issue and is satisfied, on the balance of probabilities, that there were reasonable adjustments that could be made which had a good prospect of ameliorating the substantial disadvantage suffered by the claimant. The reasonable adjustments being removing the requirement for the claimant to carry out the cleaning of the chiller belt which required crawling, and pushing or pulling the heavy wheelie bins. The Tribunal is satisfied that these adjustments were reasonable. On the clean down, the Tribunal is satisfied that there were other employees who could clean the chiller belt and the claimant could be provided with assistance when he needed to move the heavy wheelie bins. The Tribunal understands that the respondent was concerned that the claimant's condition could be exacerbated by carrying out his role. However, the claimant said that he was fit to carry out his role following the nerve root injection. The respondent was properly concerned about the claimant's health and safety. However, the Tribunal has to consider balancing such risks against the requirement to make reasonable adjustments. In the absence of a clear analysis of the manual tasks and proper consideration of how help could be provided, the evidence from the respondent was not sufficient to demonstrate that the substantial disadvantage would not be alleviated by applying the reasonable adjustments set out.

Discrimination arising from disability

8 It was noted and recorded that the respondent accepts the claimant was a disabled person at all material times.

9 Was the claimant treated unfavourably by the respondent when the respondent dismissed the claimant?

10 If so, was the reason for the dismissal because of something arising as a consequence of the claimant's disability and in particular his inability to be able to work across all zones and/or his inability to be able to perform all aspects of his job?

36 The dismissal of the claimant was unfavourable treatment. The reason for the dismissal was that of the claimant's inability to perform all aspects of his job. It was not the result of his inability to be able to work across all zones. The ability to work in other zones was mentioned on a number of occasions in meetings prior to claimant's dismissal. However, the Tribunal is satisfied that was not the reason for the dismissal. The dismissal was because of something arising as a consequence of the claimant's disability.

11 In treating the claimant in that way what was the respondent seeking to achieve? Was the aim of ensuring the health and safety of all its employees including that of the claimant a legitimate aim?

The aim of the respondent was to fulfil its production requirements and ensure the health and safety of all employees including that of the claimant. The Tribunal is satisfied that this was a legitimate aim.

12 If so, was the treatment of the claimant a proportionate means of achieving that legitimate aim or was there a less discriminatory way of achieving it?

37 The Tribunal is satisfied that there was a less discriminatory way of achieving this aim. There was concern for the claimant and the exacerbation of his condition. However, the claimant said that he was fit to carry out the role and the Occupational Health report said that he was fit to carry out some light work. Balancing the claimant's need to continue in employment and his indication that he was fit, the Tribunal finds that it would have been less discriminatory for the respondent to allow the claimant to return to work having removed the requirement to carry out the heavy tasks of crawling under the chiller and moving the heavy wheelie bins, by ensuring that he could obtain assistance in respect of these tasks as he had done so in the past.

<u>General issues on disability</u>

13 Have all the claims been submitted in time in accordance with section 123 of the 2010 Act?

14 If not, was there conduct extending over a period which is to be treated as done at the end of that period in accordance with section 123 of the 2010 Act?

38 The failure to make a reasonable adjustment was an omission which continued over a number of years. The position continued to change and there were various recommendations from the Occupational Health reports. Both the claimant and the respondent were hoping to resolve the situation. The claimant was awaiting the effects of the nerve root injection and the Tribunal considers this to be conduct extending over a period which is treated as done at the time of the claimant's dismissal. The circumstances were changing, there were various medical reports and the respondent was still considering adjustments, even after dismissal.

15 If not, is it just and equitable for the Employment Tribunal to extend the period of limitation in order to allow the claims to be considered in accordance with section 123 of the 2010 Act?

39 If it had been found that the claim was submitted out of time, the Tribunal would consider it just and equitable to extend time. The length of, and reasons for, the delay were because claimant was doing what he could to preserve his employment and to seek agreement for his return until his dismissal and at the time of his appeal. The respondent continued to obtain further evidence by way of the desk top study and Occupational Health evidence. There was no

prejudice to the respondent as the situation was clear throughout and they were still giving consideration to adjustments.

Claim of ordinary unfair dismissal

> *16 Does the respondent prove the reason for dismissal namely that it was related to the capability/ill health of the claimant?*
>
> *17 Did the dismissing officer have a genuine belief in such lack of capability/ill health?*
>
> *18 Were there reasonable grounds for that belief?*
>
> *19 Did the respondent follow a fair procedure in order to reach the decision to dismiss the claimant?*
>
> *20 Did the decision to dismiss the claimant fall within the band of a reasonable responses particularly bearing in mind all the circumstances and the size and administrative resources of the respondent?*

40 There was no dispute that the reason for dismissal was the capability/ill health of the claimant. The Tribunal accepts the reason for the claimant's dismissal was his capability and that there was a genuine belief that he was incapable of carrying out his full role.

41 With regard to the grounds for that belief, the claimant said he was fit and that the injection had worked. The Occupational Health report recommended further medical evidence be obtained. The claimant did not cooperate. He said that this was because he was angry and fed up. He had already been dismissed and the final Occupational Health report was obtained for the purposes of the appeal. The respondent was concerned about the claimant's health and exacerbation of his symptoms. The Occupational Health report was short and suggested that they should send off for further medical evidence. Even though the claimant declined the suggestion, the Tribunal is satisfied that the respondent could have required the claimant to provide further medical evidence or, indeed, instructed a specialist to provide further medical evidence in the circumstances.

43 The Tribunal has been careful not to substitute its views for those of the respondent. The claimant had a long-standing and serious medical condition and had been off work for a considerable amount of time. The Tribunal has given careful consideration to whether a reasonable employer acting reasonably could have dismissed the claimant in the circumstances.

42 The Tribunal has considered the procedural and substantive position throughout the whole process including the dismissal and the appeal during which further investigations were carried out. The claimant was a long-standing employee and the Tribunal is satisfied that, before ending such a long-standing employee's employment, a reasonable employer in the respondent's circumstances should reasonably have obtained further medical

evidence and, in the circumstances, dismissal was outside the band of reasonable responses. The respondent is a moderately large employer employing approximately 750 people nationally and 433 at the place where claimant worked. The respondent had substantial human resources facilities. At the very least the respondent should have obtained further medical evidence. Having considered the position in view of all the evidence, the Tribunal is satisfied, on the balance of probabilities, and applying an objective test, that the dismissal of the claimant, in the circumstances, was outside the band of reasonable responses.

> *21 If there is any procedural unfairness, has any such unfairness made any difference – the Polkey question?*

43 The Tribunal did not hear evidence or submissions in respect of remedy. The Polkey question is a matter for remedy and may be significant in respect of unfair dismissal compensation, as will Abbey National v Chagger [2009] EWCA Civ 1202 in respect of compensation for discrimination. It will be necessary for a further remedy hearing and the Tribunal will expect to hear submissions and consider evidence in this regard.

44 Also, with regard to pension loss, there were no details available at the liability hearing. It is noted that a retirement age of 62 is provided within the details of employment provided in the offer letter dated 22 January 1996 although it is appreciated that was over 20 years ago.

45 A further hearing is required in order to consider the question of remedy. It is proposed to list this for a one-day hearing and the parties' representatives should indicate to the Tribunal within 7 days of the sending of this judgment and remedies whether the case can now be listed for remedy hearing or whether it will be necessary for further directions to be provided.

Employment Judge Shepherd
16 April 2018