EMPLOYMENT TRIBUNALS

Claimant: Mr I Stanley

Respondent: The Village Bakery (Wrexham) Limited

Heard at: Mold **On:** 7 May 2024, 8 May 2024 and 9 May 2024

Before: Employment Judge R Brace
NLM: Mr A Fryer and Mr S Moules

Appearances
For the Claimant: Ms M McLaren (the Claimant's wife)
For the Respondent: Mr D Jones (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal as follows:

1. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    a. Giving the Claimant a longer period of probation to adjust to a new unfamiliar role and work location to reach the same standard required of other employees on probation;

    b. Providing the Claimant with a support worker;

    c. Telling the Claimant's colleagues of the Claimant's sight impairment so that they would be aware of his difficulties; and

    d. Providing the Claimant with a High-Viz jacket/clothing.

2. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.
3. The complaint of unfavourable treatment of being dismissed because of something arising in consequence of disability is well-founded and succeeds.

Written Reasons

1. This has been an in person hearing heard over 3 days at Mold Justice Centre.

2. The Claimant is a disabled person, being severely sight impaired. He has been registered blind since 2010. He has been assisted and represented throughout this hearing by his wife. The adjustments discussed at the preliminary hearings, were adopted and in place for the hearing. This included ensuring that the Claimant had read out to him whilst giving evidence, relevant passages in the documents and / or witness statements, before the Respondent's representative asked cross-examination questions.

Early conciliation, Complaints and Issues

3. On 28 September 2023, the Claimant contacted ACAS on 28 September 2023 and on 13 October 2023, an Early Conciliation Certificate (R249001/23/67) was issued [1].

4. On 26 October 2023, the Claimant's claim was accepted by the Tribunal [2]. In the ET1, the Claimant complained of not passing his probation as no reasonable adjustments had been made for him and that his 3 month probation had ended after 6 weeks.

5. By the ET3 and Grounds of Resistance filed [21][30], the Respondent did not admit that the Claimant was disabled or that he had been subjected to any discriminatory treatment, indicating that the Respondent was unaware of the extent of the condition that the Claimant asserted he was suffering from. They sought further particulars of the claims of failure to make a reasonable adjustment.

6. At case management preliminary hearing on 19 January 2024 [40], claims of failure to comply with the duty to make reasonable adjustments were clarified and the Respondent were permitted to file an amended ET3. Within that Amended Grounds of Resistance [55], the Respondent conceded that the Claimant was deemed disabled, having received evidence provided by the Claimant's ophthalmologist certifying that the Claimant was severely sight impaired. The Respondent continued to dispute discrimination, denying that the PCPs, physical features and/or lack of auxiliary aid put the Claimant at the alleged disadvantages (set out in §2.3, §2.4 and §2.5 of the list of issues). Further, the Respondent asserted that the Claimant had not requested the adjustments now relied on.

7. At a further case management preliminary hearing on 24 April 2024, the list of issues was amended to reflect a further reasonable adjustment, of being given a 'buddy', that had not been discussed at the previous case management but one which the Claimant had been raising in correspondence to the Tribunal since the end of February 2024. The list of issues was also amended to reflect the Claimant's claim in respect of the termination of his probationary period, a claim that had been omitted from the original list of issues, but was in the original ET1.

8. The amended issues, as discussed at the case management preliminary hearing on 24 April 2024, are listed in the Appendix to these written reasons.

9. A Second Amended Grounds of Resistance, in response to the claims now clarified in the amended list of issues, was included in the Bundle [286]. Knowledge of disability was now also conceded, although the Respondent's counsel confirmed the Respondent denies that it knew or ought reasonably to have known of substantial disadvantage (§2 Second Amended Grounds of Resistance [286]).

10. Further, the Respondent denied that the PCPs, physical features and lack of auxiliary aid put the Claimant at a substantial disadvantage compared to those not suffering the Claimant's disability. In addition, or in the alternative, the Respondent asserts that the Claimant did not request the reasonable adjustments or that they would have removed any substantial disadvantage.

11. At the outset of the hearing, Counsel for the Respondent suggested that the PCP was incorrectly stated, that the PCP was in fact the ending of the probationary period and further suggested that time could be given to the Claimant to get legal advice. After discussing whether the Claimant wished to get that further legal advice, and the Claimant confirming that he did not, the hearing commenced with the evidence of the Claimant.

Bundle

12. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle"). References to the hearing Bundle (pages 1-287) appear in square brackets [ ] below.

13. At the outset of the hearing, Counsel for the Respondent was asked to obtain copies of the Equal Opportunities Policy and a copy of the Performance and Development Review Policy and these were added to the Bundle on the second day of the hearing with the consent of the Claimant, together with photographs the Respondent had taken of the Coedpoeth Bakery, the location of the Claimant's workplace.

Schedule of Loss

14. Two schedules of loss were included in the Bundle [58][253]. In the latter the Claimant claimed £112,107.77 including

    a) £33,404 for past and future financial losses;
    b) £35,000 for injury to feelings;
    c) 25% uplift for failure to follow the ACAS Code of Practice on Discipline and Grievance; and
    d) An amount for aggravated damages in relation to the manner in which the Respondent has conducted the litigation and for forging his signature of the probation review form.

15. The hearing was split such that the Tribunal considered liability only, indicating that we would deal with remedy subsequently if the Claimant was successful on all or any of his claims.

The Evidence

16. All witnesses who attended to give live evidence relied upon witness statements, which were taken as read. Save for Ms McLaren, all were subject to cross-examination, the Tribunal's questions and re-examination. The Tribunal heard evidence from the Claimant. The Claimant's wife, Ms Mhairi McLaren who, after being sworn in, was not questioned in relation to liability.

17. For the Respondent, the Tribunal heard evidence from:

    a. Kevin Jones, Night Shift Manager at the Coedpoeth Bakery; and
    b. Mr Tom Breeze, Manager of Coedpoeth Bakery.

Assessment of the evidence

18. In this case, there is little dispute on the facts of the case and whilst, both Mr Stanley and Mr Breeze were at times confused in their answers, correcting their responses on reflection, we considered this was down to the stress of giving evidence and did not consider that either were unreliable or not telling the truth.

19. Findings are made on the basis of balance of probabilities and it is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:

    a) whether the evidence is probable,
    b) whether it is corroborated by other evidence from witnesses or contemporaneous records of documents,
    c) how reliable is witness' recall; and
    d) motive.

Facts

Employment History

20. The Respondent is a family bakery business based in North Wales and employs around 950 employees across 4 sites in North Wales producing a range of baked goods for the retail market. There were around 170 employees based at the Coedpoeth Bakery.

21. The Claimant is registered blind, having being diagnosed with Bardet Biedl Syndrome in 2010. Whilst the Claimant does have some vision, his sight is severely impaired with his vision being 6/60, which the Tribunal was told means that he can see at 6 metres what someone with standard vision could see from

60 metres away. He suffered initially a gradual deterioration in his sight and his brain has adapted peripheral vision to enable him to move around independently.

22. Prior to the commencement of his employment at the Respondent the Claimant had for around 18 years, from 2005 to 2023, been engaged as an agency worker as a waste-co-ordinator/packer at another foods manufacturer. His responsibilities included packing cereal boxes into larger boxes for distribution and moving large bags a short distance. He did have to read paperwork as part of that role, which was enlarged to assist him, and he used an adapted computer. He rarely needed support in that role as he was familiar with the job. He decided to look for new employment in the June of 2023, as a result of the lack of shifts there.

23. The Claimant applied for a role as a night shift production operative at the Respondent and, following a telephone interview, was invited in for a 4 hour assessment session for the Claimant to experience the workplace and the type of work he would be doing. It was also an opportunity for the management team to see if they thought he would be the 'right fit' for the bakery [65].

24. This assessment took place on 10 July 2023 and was undertaken by another night shift operative when the Claimant was talked through some of the processes in place and helped to complete tasks of separating bread, collecting bread and placing it in trays. In live evidence, the Claimant indicated that he had spent around 2 hours on the 'hands-on' assessment whereby he undertook certain tasks, after some induction and observation.

25. The Claimant passed that assessment and was offered employment upon him satisfying the Respondent's medical assessment that he was fit to undertake the duties associated with the role, satisfactory references and completion of company documentation required [67][69].

26. There is a dispute as to the dates of employment with the Claimant asserting that he was employed from 19 July 2023 to 1 September 2023 and the Respondent asserting that his employment commenced on 17 July 2023 and ended on 30 August 2023. We found that the Claimant's employment commenced on Monday 17 July 2023 and he was based at Coedpoeth bakery working a 4 on 4 off shift pattern from 17.45-06.00 hours [73].

27. Clause 16 of the written terms and conditions, signed by the Claimant but undated, provided that the employment was subject to a three month probationary period during which the notice period was one week. The Respondent reserved the right to extend the probationary period and the right not to apply its Disciplinary Procedure during such time.

28. The Claimant's employment was subject to workplace policies contained in a Staff Handbook although these appear to contain nothing of particular relevance at least none that we have been taken to [84].

29. On his first day of employment, an employee of the Respondent, Nia Hamilton, assisted the Claimant in the completion of the forms in which the Claimant disclosed on:

    a) the Employee Details form that he had a '*central vision problem'* [64];
    b) the Employment Health Screening Questionnaire that he was suffering from a medical condition for which he received treatment or had regular specialist follow up relating to his '*eyes'* [111]; and on
    c) the Equal opportunities Monitoring Form that he was '*visual impaired'* [117].

Claimant's Duties

30. The new premises were relatively similar to the size of the Claimant's workplace in terms of the exact locality of the Claimant's duties. The new role was however more labour intensive than that held at the Claimant's previous workplace. The method and style of the work was different to what he had been used to. The facility was a busy one, with lots of people working at pace alongside machinery and constant movement of both equipment and staff, although the Tribunal did find that there was some consistency in terms of where equipment and staff would be each shift.

31. The Claimant reported to Kevin Jones, the Night Shift Manager, who is also disabled by reason of a physical disability. Whilst this was not an issue in the case, we were reminded of this as part of the Respondent's submissions and in that regard, considered it appropriate to refer to that within the body of these written reasons.

32. For the first three weeks of his employment, from 19 July – 6 August 2023, around 10 shifts, the Claimant worked alongside a colleague, known as Terri, whom the Respondent referred to as a 'buddy', in the area known as 'Dowson Dispatch'. The Claimant's role involved:

    a) taking hot bread from the oven area into dispatch to cool,
    b) splitting some bread to assist with the cooling of the bread, testing the temperature of the bread to ensure it was cool enough to slice.
    c) rotating the bread in the cooling area, where the bread had been stacked on trolleys or racks, moving the trolleys/racks away from the left-side towards the right-side of the area, and rotating the coolest.

33. During this period the buddy probed the bread to check if it had cooled enough for slicing. As an experienced production operative, she was able to generally gauge the temperature of the bread through experience built up working at the bakery. However, the temperature was tested of a loaf or two on at every trolley, generally in the middle, using a thermometer to ensure that it was at or below the temperature required for slicing.

34. The Claimant believed that he was doing well and was able to keep up with production. No one spoke to his during this time regarding his speed of work or expressed concern to him that he was making mistakes, whether incorrectly

loading bread onto the racks or the incorrect volume. No one told him of any concerns held regarding his general performance.

35. Whilst Kevin Jones gave evidence that the night shift supervisor informed him that he had seen the Claimant crashing racks of bread into machinery and had been close to hitting staff with the racks or trolleys, or 'near misses', he did not speak to the Claimant that this was an issue or had been noticed.

36. No one spoke to the Claimant regarding what difficulties he might be facing as result of his vision impairment.

37. The Claimant's 'buddy' was then on annual leave from 11-14 August 2023, when the Claimant was left for periods of time on his own. It took him longer to complete most tasks during this week, in particular

    a) The Claimant had difficulty in seeing the gauge on the thermometer when testing the temperature of the bread. It would take him around a minute to focus on and read the bread temperature on each occasion; and
    b) He found it difficult moving the racks of bread around the factory, pulling them backwards and not being able to see the end of the trolley.

38. He was struggling to keep up with production. Bread was accumulating in the Dowson Dispatch area. The Claimant stopped rotating the bread hoping he would have time to sort out later but the bread was not cooling enough quickly enough and a 'jam' in the production arose. A shift supervisor came to assist the Claimant to clear the backlog on the production, helping the Claimant to organise the bread, utilising the coolest space in the cooling area, rotating the bread.

39. Once the backlog was cleared, racks of proving dough were taken to the proving room where the Claimant had to write down the time the bread entered the room. As the Claimant could not see the clock on the wall, the supervisor suggested that the Claimant used his own phone. Beyond this, again at no point did anyone speak to the Claimant regarding his disability or what difficulties he may be having with his eyesight. Again, at no point did anyone raise with the Claimant that there were any issues regarding the speed or quality of the Claimant's work.

40. Whilst Kevin Jones gave evidence in his written statement that around the end of July, he started moving the Claimant into various other roles in production, in live evidence this date shifted to the later week commencing 3 August 2023. The Claimant gave clear evidence that this took place on 13 August 2023. We preferred the clear evidence of date to be that given by the Claimant, particularly when aligned with the evidence from Kevin Breeze that he spoke to Kevin Jones about the Claimant's performance on 14 August being the end of that 11-14 August 2023 shift week.

41. On 13 August 2023, the Claimant was moved to the slicing department where he spent 20 minutes placing bread on a conveyor belt[1]. We heard evidence that this was not one of the skilled roles, but this was a new area that the Claimant had not worked in before. He was shown only once how to undertake the role and couldn't see how his colleagues were doing the job in order to copy their behaviour. He was not supervised and no support was given. Again, the Claimant was not asked about his disability.

42. Kevin Jones slowed down production to assist the Claimant. The Claimant wasn't able to keep up with production, placing the bread onto a conveyor belt which needed to be done quickly, was difficult for him.

43. Whilst Kevin Jones had given evidence that the Claimant was provided with a 'buddy', we accepted the Claimant's evidence that he was not informed of this and was not aware of such a person, who was simply working alongside him in any event. No one assisted or supported the Claimant in the sense that they pointed out his errors and supported him to familiarise himself with the process – it appears that this 'buddy' simply worked alongside the Claimant.

44. That same day, Kevin Jones moved the Claimant to yet another area, the end of line where the bread came off production in a bag ready for sale. The Claimant was tasked with checking if the seal at the top of the bag was there and correctly closed and that there were no rips in the bag. This was a different task again and took the Claimant longer to undertake as he had to refocus his vision every time he moved a bag. The Claimant was shown what to do once and then left on his own. He was not asked about his disability or asked if he needed assistance to undertake this role as a result of his disability. Again, irrespective of whether someone else was also working on the line, the Claimant was not aware of this.

45. It was during this period that the Claimant was informed that he would be told about any issues arising during his probationary period and given time to make improvements.

46. The Claimant was then off for four days work until 19 August 2023 on annual leave. On his return to work he started a new block of four shifts when he was again working in Dowson Dispatch.

47. No issues were brought to his attention save for a manager informing the Claimant that bread was falling off the end of his trolley, an issue which the Claimant had not been aware of. The way that the Claimant had been pulling the trolley was not the easiest or most efficient way of manoeuvring the trolleys. The Claimant had not been able to see how others were moving them and he had not been able to learn from watching their method of operation. The manager explained to the Claimant that rather than push the trolleys, he could pull them towards him, making sure that the loads at the back were in the correct position before loading the rest. Once that had been explained to the Claimant he was able to complete the task without the bread falling off.

[1] CWS25

48. He was also asked to clean the baking trays. After this task, he was told he had left debris on the tray. On the second occasion he took longer to ensure that the trays were clean. No one informed the Claimant that he was taking too long to complete this task.

49. The Claimant accepted that as the Respondent's environment was fast-flowing, it would not have been apparent during the trial period as part of the recruitment that he would have had any difficulty with the processes.

50. The evidence from Kevin Jones was that it was apparent to him shortly after the Claimant commenced employment that the Claimant's sight impairment was, as he put it, severe and he was getting reports that the Claimant was making lots of mistakes and taking a long time to undertake the tasks. He also gave evidence that the Claimant had been seen crashing racks of bread into machinery, at times that he had dropped trays of bread, had loaded the incorrect volume of bread and had damaged bread; that he had also not cleaned trays properly on more than one occasion. He also gave evidence that it was 'patently obvious' to work colleagues who were reporting issues almost immediately from the Claimant starting employment.

51. The Respondent was also aware of the Claimant's difficulty in clocking in, using a small keypad and fingerprint system when sometimes the Claimant would miss the numbers and then run out of time for inputting his thumbprint.

52. We found that knowing that the Claimant was disabled by a severe sight impairment, it was self-evident that the Claimant would not be able to see the layout of the factory or the produce that he was handling, in the way that a non-disabled employee would. Further, the Respondent knew that the Claimant having difficulties in navigating racks or trolleys around the factory and knew, or ought to have known, that the Claimant's vision made it difficult for him to see the thermometer to read the temperature of the bread.

53. In turn, we concluded that the Respondent knew or, at least ought to have known that
    a) it took or would take the Claimant longer than them to achieve the same standards in terms of efficiency, speed and accuracy; and in tun
    b) that the Claimant's inability to reach the required standards within the timeframe required by the Respondent would increase the risk of his employment being terminated during the probationary period.

54. We therefore found that the Claimant was placed at a substantial disadvantage and even though the Claimant did not expressly tell them of his difficulties, they were on notice; they ought to have known such that the Respondent had the requisite knowledge not just of disability but of substantial disadvantage in respect of all the PCPs relied on, the layout of the factory and failure to provide an auxiliary aid.

55. This knowledge was likely to have arisen within a week or so of the Claimant's employment of the factory when it gradually became clear to Mr Jones the level of the Claimant's impairment.

Probationary Review

56. On 21 August 2023, the Claimant was informed by Kevin Jones, Shift Manager, that he would be having a probationary review at the start of his next shift the following day. The Tribunal found that at that point the Respondent had determined to terminate the Claimant's probationary period and employment. Despite being informed that he would receive paperwork in relation to this meeting, none was sent to him.

57. The Claimant started his shift as normal on 22 August 2023 and around 45 minutes after the start was called into the office for a review conducted by Tom Breeze who was accompanied by Kevin Jones. The Claimant was provided with no paperwork or certainly no documentation that was in an accessible format for the Claimant in advance of that meeting.

58. At that meeting, the Claimant was informed that whilst he had scored 'fair' in attitude and commitment, cleaning tasks had been unsatisfactory. He was informed that he had been trialled in different areas of the factory and hadn't reached the required standard and that there had been 'near misses' and the Claimant had bumped into machinery. The Claimant was informed that it wasn't safe for the Claimant to be working in the Respondent's environment and that he was to collect his belongings.

59. Mr Stanley gave evidence that at no time during the meeting had the Respondent discussed with the Claimant his sight impairment or the difficulties had had experienced in working at the Respondent. The Claimant did not tell them that he needed longer or more time to familiarise. He did not raise what adjustments he might need. We found that it was more likely than not that at that meeting, the Claimant did not challenge any of the concerns or issues raised about his performance.

60. Whilst Kevin Jones had given evidence that safety, in addition to standards and efficiency, was in his mind, we did not accept this evidence. He had allowed the Claimant to work for 6 weeks without any form of health and safety risk assessment and had permitted the Claimant to continue working without addressing with him such safety concerns. Further, he had given evidence that he had permitted the Claimant to work for further shifts after 14 August 2023 when Tom Breeze had agreed that this could not go on[2] and had placed him on different and new elements of production in the run up to the probationary meeting on 22 August 2023. This was not a reasonable step to have taken, as has been suggested by the Respondent's counsel. Rather, putting the Claimant on a considerable variety of new tasks in one day would have and did exacerbate the difficulties that the Claimant was facing trying to adapt to a new workplace and did not demonstrate that safety was of a concern.

61. The Claimant was dismissed at the end of that meeting. This was confirmed in writing by way of letter dated 25 August 2023, further confirming that the

[2] KJWS para13

Claimant's employment would end on one week's notice on 30 August 2023. He was not required to work his notice. The Claimant's employment therefore ended on 30 August 2023 [150].

62. The Claimant was informed of his right of appeal within the same letter. He did not appeal. The Claimant did not read the letter for some time and his distress and upset at that time meant that he had become unable to deal with an appeal.

63. To complete our findings, Tom Breeze was asked in live evidence about the costs of wastage at the factory and the 'spoil target'. He confirmed that that this was 2% of the production run of between 12,000-20,000 loaves. By our calculation, the Tribunal found that the spoil target was between 240-400 loaves per production. Tom Breeze was unable to confirm how many loaves the Claimant had caused to be wasted in production as a result of his errors and we did not find that the Claimant's errors had impacted significantly to that wastage cost.

64. He also gave evidence that the salary of a production operative would be in the region of £28,000 and that it was not cost effective to employ two production operatives to undertake one job, which would be required to employ a 'buddy' for the Claimant. He was unable to give any evidence as to the profits of the bakery as a whole or profit margins and we were unable to find that the Respondent would have been unable to accommodate increased salary costs.

Respondent's Submissions

65. In terms of the reasonable adjustments claim, Respondent's Counsel relied on **Rentokil Initial limited v Miller** 2024 EAT 37 as a helpful summary of the overview of the law on the burden of proof, that the burden is on the Claimant to show that the PCP was applied, the substantial disadvantage, and in broad terms the adjustments.

66. It was submitted that the PCPs largely reflected the entirety of the Claimant's role demonstrating the scale and level of difficulty the Claimant was going to face, conceding that if the PCP was the application of the probationary review it would be obvious that this would place the Claimant at the substantial disadvantage. However, as the case was not placed that way, the Respondent remained of the position that knowledge of substantial disadvantage was not conceded as:

    a) The Claimant had conceded that reading a temperature would take him a minute to do so – that this was not substantial
    b) That as there were no actual accidents, disadvantage was not 'abundantly clear' and the Claimant had not accepted that there had been 'near misses'.

67. In terms of the adjustments, he submitted that the factory was constantly changing in a fast paced environment and an extended period of training would not have assisted; that telling staff of the Claimant's disability or the Claimant wearing a High Viz jacket would not have assisted as it was patently obvious to others what Claimant's disability was and/or would not have alleviated the

disadvantage. In terms of clear pathways and priority, it was argued that this was either not possible as driven by production or in place in any event. It was conceded that the provision of a temperature guage would have alleviated the disadvantage.

68. In relation to the 'buddy' it was submitted that this would cost £28,000 and would involve employing two people to do the job of one and on any objective analysis was a significant cost. The Tribunal was invited to find that the Claimant was tried in different roles and production speeds reduced to accommodate the Claimant. We were also invited to find that Kevin Jones had given the Claimant more time to familiarise himself and that he had a buddy for at least 5/6 weeks. In relation to the termination, it was conceded that termination was unfavourable treatment and invited us to find that there were legitimate aims and that dismissal was proportionate.

69. The Claimant reminded us that he had worked in a factory environment with minimal adjustments for many years. In terms of a buddy, he considered that having someone to support him, give him specific direction and for the Claimant to be able to ask for assistance was what was required, so that he could work on strategies to familiarise himself with the layout and production process. In terms of the disclosure to staff and high viz clothing, it was suggested that this would act as a reminded that there was a person with a disability and overtime may not be needed, but in a new environment it could assist the Claimant. The Tribunal was reminded that a longer period of time for adjustment would have assisted and that the Claimant had not even been provided with a 3 month probation period

Legal Principles

S.20/21 EqA 2010 - Duty to make reasonable adjustments

70. Section 20 EqA 2010 states that:
(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.*

71. Section 21 EqA 2010 states that*:*
(1) A failure to comply with the first … 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.

72. In **Environment Agency** v **Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:

a) the provision, criterion or practice applied by or on behalf of an employer or the physical feature of premises occupied by the employer;

b) the identity of non-disabled comparators (where appropriate); and

c) the nature and extent of the substantial disadvantage suffered by the claimant.

73. S.212 (1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (EHRC CoP, 6.15). It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non-disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage (**Newcastle Upon Tyne Hospitals NHS Trust** v **Bagley** (2012) UKEAT/0417/11/RN, para 72).

74. In relation to knowledge of disadvantage, the correct questions are, in relation to the relevant time:

a) Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?

b) Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

75. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

76. In relation to the reasonableness of a proposed adjustment, this is a fact-sensitive question. It is an objective test: **Smith v Churchill Stairlifts plc** [2006] ICR 542. Whether a particular step would be effective in avoiding the substantial disadvantage is relevant to the question whether it would be reasonable to have to take it. If its effectiveness is uncertain, that is one of the factors to be weighed in assessing reasonableness. **Lancaster v TBWA Manchester** UKEAT 0460/10 reminds us that the focus was on the practical result and it was submitted that even if the duty was triggered, there was not a chance that they would have worked in any event prior to that date.

77. Sections 136(2) and (3) provide for a shifting burden of proof:

'(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) This does not apply if A shows that A did not contravene the provision.'

78. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

79. In a complaint of failure to make reasonable adjustments, for the burden to shift, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could be reasonably inferred, absent an explanation, that the duty has been breached. The claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made, identifying in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage. (**Project Management Institute v Latif** 2007 IRLR 579, EAT).

80. which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

81. The burden then shifts to the employer to provide an "adequate" explanation, to show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or the adjustment was not a reasonable one to make.

S.15 EqA 2010 - Discrimination arising from disability

82. Discrimination arising from disability is defined in s15 EA 2010:

> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

83. Section 15(2) applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).

84. As for the correct approach when determining section 15 claims we refer to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31. The relevant steps to follow are summarised as follows:

a) the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

b) the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

c) motive is irrelevant when considering the reason for treatment;

d) the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

e) the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

f) this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

g) knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

85. It does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.

86. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent. Under s15 EA 2010 it is the treatment which must be justified, rather than any policy which might lie behind the treatment. The test is reasonable necessity and the Tribunal must make its own objective assessment, weighing the real needs of the undertaking against the discriminatory effect of the unfavourable treatment.

87. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified (EHRC Code, para 5.21).

Conclusions

88. The Respondent conceded that the Claimant was disabled as he is registered blind and that the Respondent had knowledge of that disability at all times.

<u>S.20/21 EqA 2010 - Duty to make reasonable adjustments</u>

89. In terms of the PCPs relied on, we found that the Respondent did require production operatives to undertake production to a required efficiency in terms of speed and accuracy and that this included duties of checking the temperature of bread and manoeuvring trolleys of cooled bread around the factory.

90. Whilst the Claimant did on one occasion work in the packing area, we did not find that the Claimant was required to slice bread on a production line and that this was not a PCP applied to the Claimant but that he had been required to pack sliced bread ready for distribution.

91. Overall, we also concluded that the Respondent had a PCP of imposing probationary periods on new employees and that if employees did not reach the

required standards of efficiency in terms of speed and/or accuracy, their employment would be terminated, which is the alternative PCP suggested by the Respondent.

92. We further concluded that these PCPs placed the Claimant at a disadvantage compared to a non-disabled comparator probationary employee who had the benefit of full sight in that:

    a) the Claimant needed more time to learn the layout of the factory – that as this wasn't something he could see in the same way as others, he was unable to see what work his colleagues were doing to jog his memory and copy, so would need repetition to learn. As a result he took longer to learn by gaining familiarity through experience and touch

    b) This in turn resulted in the Claimant having to process more information than those with sight, leading to the Claimant forgetting things such as remembering which side of the cooling racks the hotter bread should be place. He had to work harder to compensate for his vision and learning new things takes him longer. He needed more time to overcome such mistakes and familiarise himself with the role.

    c) He was more apt to bump into machinery when manoeuvring the trolleys as he was unfamiliar with the layout of the factory, again something the Claimant needed to familiarise himself with

    d) He was unable to see small print such as the temperature on the thermometer gauge without concentrating his vision such that it would take him not just a few seconds to read the temperature of the bread but that it would take him up to a minute

93. In the alternative, we considered that the layout of the factory, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant couldn't see the layout and that it took him longer to familiarise himself with new surroundings and in turn took longer to undertake tasks and was unable to see staff and temporary obstacles which increased the risk of him bumping into staff/obstacles. However, this was pleaded in the alternative and did add to the existing claim.

94. We concluded that whilst the Claimant did not tell the Respondent that his disability disadvantaged him substantially, the employer knew, or at the very least ought to have known that the disability was liable to disadvantage him.

95. The Respondent had knowledge that the Claimant had the sight impairment, that he was making lots of mistakes, including dropping trays of bread, struggling to load trays of bread onto racks and loading incorrect volumes of bread onto racks and damaging bread, that he was crashing racks of bread into machinery, had been close to hitting staff with racks on occasions and had been seen walking into doors and walls. The Respondent also gave evidence that he was poor at cleaning and was slow. The Respondent knew that the Claimant had difficulty clocking in.

96. In those circumstances, we concluded that the Respondent knew or ought to have known that the Claimant's disability was liable to disadvantage him substantially in respect of all the PCPs, in terms of

a) Undertaking production to a required efficiency in terms of speed and accuracy;

b) His ability to operate the trolleys;

c) Reading and in turn use of a thermometer; and

d) Packing bread.

97. We concluded that such disadvantages were 'substantial' in that they were more than minor or trivial. We did not consider that a non-disabled person, with no vision impairment, would be affected by the PCPs in the same way as the Claimant and that there was a comparative substantial disadvantage.

98. Whilst we concluded that the Claimant would also have been disadvantaged in being able to operate the slicing of bread he was not required to undertake this role and was therefore not liable to be disadvantaged.

99. We also conclude that the Respondent ought to have known that the Claimant's disability was liable to disadvantage him substantially in respect of the probationary period.

100. Whilst we found that the Claimant did not raise the need for adjustments, we recognise that there is no onus on the Claimant to do so and this did not impact our findings on knowledge of substantial disadvantage.

101. We were therefore satisfied that the duty to make reasonable adjustments had been triggered as the Claimant had discharged the burden of establishing a prima facie case that the duty to make reasonable adjustments had arisen and that there are facts from which it could be reasonably inferred, absent an explanation, that the duty has been breached.

102. We then our mind to what adjustments could and should have been made. The Claimant has identified in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage. The burden shifts to the Respondent to show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or the adjustment was not a reasonable one to make

103. In relation to the adjustments, we reminded ourselves of HHJ McMullen in **Cumbria Probation Board v Collingwood** [2008] All ER (D) 04 (Sep), EAT, where he said that *"it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage*" and the EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work.

104. We took into account the nature of the activities, that this was a busy bakery with moving machinery and staff. We also took into account that the organisation has four sites with over 1900 staff. Whilst it is a family business, it is not a small undertaking and whilst Mr Breeze gave brief evidence regarding the cost of employing a buddy as being prohibitive, we remind ourselves that cost alone would not prevent the adjustment being a reasonable one.

105. We focussed on the effectiveness of the steps in question.

106. We concluded that giving the Claimant more time to familiarise himself with the processes, the people and the factory environment would have been a practicable step that would have been effective. We were not persuaded by the Respondent that disadvantage would not have been eliminated or reduced by the proposed adjustment and/or the adjustment was not a reasonable one to make.

107. The Claimant had worked for over 18 years in a factory environment living and managing his sight impairment within a factory setting for most if not all of that time. Whilst we acknowledged that this was a different working environment, we did not consider it unreasonable, particularly taking into account the standard probation period was 3 months, to have given the Claimant at least that time if not longer to adjust to the unfamiliar role, work and environment to reach the same standard required of other employees on probation.

108. This would have provided the Claimant with the chance to improve once he had become more familiar with the process and environment.

109. In term of manoeuvring machinery, further time to enable the Claimant to recognise and familiarise himself with the lay out of the bakery would have enabled him to get 'tactile-used' to the weight of the trolley and the layout of the factory. Whilst the Claimant accepted in cross-examination that training would not have assisted, this does not mean to say that the Claimant accepted that additional time with support would not have assisted. As he put it, in a fast paced environment, increased practice of any duty such as manoeuvring the trolleys would have increased the chance of him operating in the role despite the environmental changes in the factory.

110. The Claimant had been consistent in his responses that given time he believed that he could have come to a point when he could operate on his own and that with discussion he believed that there could be a resolution as to what safety measures needed to be taken; and that with increased practice on any duty, despite the environment changing, that additional time and extra practice would have given him the opportunity to familiarise himself and adapt to the workplace.

111. As the Claimant had put it in evidence, with additional time for familiarisation and training, he could have come to the point where he felt he could operate on his own and with practice would have risen to a level acceptable to the Respondents. We agree. We consider that there was a chance that such an adjustment would have either alleviated the disadvantage or ameliorated it.

112. In conjunction with this, a further reasonable adjustment would have been to given the Claimant proper support in learning the new role, giving him a designated support worker who could have assisted the Claimant. Whilst we accepted that the Claimant had worked alongside someone, this was not a 'buddy' in the sense that the Claimant suggests of a support worker. Rather this was someone who worked alongside the Claimant and who, we found did not correct the Claimant or support him in such a way.

113. We were not persuaded by the evidence of Mr Breeze that it would be cost prohibitive to employ someone in this role either on or a short term basis. Even if this adjustment had a significant cost associated with it, which we were not persuaded that it would, it may still be cost-effective in overall terms – for

example, compared with the costs of slowing down the production and paying someone to take on half of the Claimant's workload, which the Respondent appears to have been undertaking, and/or recruiting and training a new member of staff still be a reasonable adjustment to have to make.

114. Further, if enquiries were made of Access to Work or RNIB, there may be funding for such a post and make it reasonable for an employer to take certain steps which would otherwise be unreasonably expensive.

115. We were also not persuaded that giving the Claimant more time would have increased the risk to health and safety of the Claimant or indeed any other member of staff working at the bakery. Suitable and sufficient risk assessments should have been used to help determine whether such risk is likely to arise and we had found that there had been none. We concluded that if there had been such concerns, steps would have been taken to address any safety risk whilst the Claimant had been working with them. They were not.

116. The Tribunal also noted the EHRC Code of Practice recognising that it is accepted that in some cases, a reasonable adjustment will not succeed without the cooperation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens.

117. Whilst we had found that the Claimant's colleagues would have known that the Claimant was sight impaired, we further concluded that this is not the same as taking steps to ensure that colleagues as well as managers, were aware of the Claimant's needs.

118. We further concluded that asking the Claimant if he wished to disclose his disability and difficulties to other staff, to assess whether he wished his colleagues to knew about his difficulties and then in turn telling his colleagues of his disability and difficulties might have had a chance of assisting the Claimant further. In the same vein, whilst we accept that giving the Claimant a High Viz jacket would not have alleviated the disadvantage to the Claimant of himself perhaps misjudging distance, it would have increased awareness of the Claimant's location in a busy environment and. Coupled with dissemination to them of the Claimant's disability and difficulties, this too had a chance of assisting the Claimant.

119. The remaining claims of failure to comply with the duty to make a reasonable adjustment were not well-founded and were dismissed.

    a) We did not consider that ensuring bread trays were not placed in pathways was a reasonable step to take in the context of a busy bakery. We accepted that this would have caused inefficiency and it was not reasonable to make such an adjustment.

    b) Likewise we accepted that priority was given to moving trolleys operated by the Claimant and was already in place and no adjustment was therefore required in that regard.

    c) As we did not find that the Claimant was required to slice bread and was not required to pack bread, that this was just a temporary role to assess if the

Claimant could undertake that role, these were not PCPs that were applied to the Claimant and therefore the duty to make reasonable adjustments to those processes was not triggered.

S.15 EqA 2010 - Discrimination arising from disability

120. The Claimant was subjected to unfavourable treatment by the Respondent, and in particular, Tom Breeze, when he determined to terminate the Claimant's employment 6 weeks into his probationary period

121. We further concluded that the effective reason for the termination of the Claimant's employment after 6 weeks of probationary was because the Claimant was not working to the required standard.

122. We readily determined that the "something arising in consequence of disability" was the Claimant's inability at week 6 to reach the required standard for reasons already articulated in relation to the reasonable adjustments claim.

123. When considering justification, the Respondent had relied on the following as its legitimate aims:

a) Efficient production to meet customer demand;

b) Saving costs (waste and/or damage to machinery/equipment); and /or

c) Health and safety and wellbeing of the Claimant and all other staff.

124. We accept that in principle the aims relied on were capable of being legitimate aims, we were only persuaded that the first, that of efficient production was in the Respondent's mind when dismissing the Claimant.

125. Mr Breeze was unable to indicate how much waste and cost had been caused by the Claimant and in terms of 2% wastage there was no evidence that the Claimant's impact on the level of spoiled goods was any greater than any other probationary contract holder. We were not persuaded that the Respondent had demonstrated that this was its legitimate aim.

126. Whilst Kevin Jones had given evidence that safety, in addition to standards and efficiency was in his mind, we struggled with this concept as he had allowed the Claimant to work for 6 weeks without a health and safety assessment. He had permitted the Claimant to continue working without addressing with him such safety concerns, including further shifts after 14 August 2023.

127. We were not persuaded that safety and wellbeing of the Claimant and staff was an aim of the employer when dismissing the Claimant.

128. We then turned to whether dismissal was a proportionate means. We take into account the EHRC Code para 5.21, that if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

129. In this case, we concluded that the Respondent had dismissed the Claimant, a disabled employee, without making a reasonable adjustment of giving the Claimant more time in conjunction with a support buddy and raising employee awareness of the Claimant's disability and needs. These adjustments would

have in our view enabled the Claimant to remain in employment and therefore the dismissal was not justified.

130. We did not consider that dismissal was proportionate and therefore the claim that the dismissal was discriminatory arising from disability is also well founded and succeeds.

131. A hearing of one day will be listed by video (CVP) to determine remedy.

Employment Judge R Brace
Dated: **28 May 2024**

JUDGMENT SENT TO THE PARTIES ON 30 May 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

Appendix
List of Issues

The issues the Tribunal will decide are set out below.

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

    1.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

    1.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

        1.2.1 Requiring production operatives to:

            1.2.1.1 undertake production to a required efficiency, in terms of speed and accuracy;

            1.2.1.2 operate trolleys in around the entrance from the factory production to the warehouse/dispatch;

            1.2.1.3 Check the temperature of baked bread with a thermometer;

            1.2.1.4 Slice/pack bread on a production line.

    1.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

        1.3.1 The Claimant was unable to meet the efficiency/speed/took longer to undertake, or was unable to meet the accuracy required in the role due to unfamiliarity with surroundings and took longer to undertake tasks and was not consistent?

        1.3.2 The Claimant was unable to see staff and temporary obstacles in the entrance from the factory production to the warehouse/dispatch and would bump into staff/obstacles;

        1.3.3 The Claimant took longer to read the temperature gauge on thermometer used to check temperature of bread and was unable to read the temperature in the required time/timely manner;

        1.3.4 The Claimant had difficulty/failed to identify correctly the type of bread, required for the required slicing and packaging.

    1.4 In the alternative to the PCP relied on, did a physical feature, namely the width and layout of the area between the entrance from the factory production to the warehouse/dispatch, put the Claimant at a substantial

disadvantage compared to someone without the Claimant's disability, in that:

1.4.1 The Claimant was unable to meet the required efficiency/speed/took longer to undertake, or was unable to meet the consistency required in the role due to unfamiliarity with surroundings and took longer to undertake tasks and was not consistent?

1.4.2 The Claimant was unable to see staff and temporary obstacles in the entrance from the factory production to the warehouse/dispatch and would bump into staff/obstacles;

1.4.3 The Claimant took longer to read the temperature gauge on thermometer used to check temperature of bread and was unable to read the temperature in the required time;

1.5 In the alternative to the PCP relied on, did the lack of an auxiliary aid, namely a thermometer with an audio temperature gauge, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant took longer to read the temperature gauge on thermometer used to check temperature of bread and was unable to read the temperature in the required time/timely manner?

1.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

1.7 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

1.7.1 Giving him a longer period of probation to adjust to a new, unfamiliar role/physical work location to reach the same standard required of other employees on probation;

1.7.2 Telling the Claimant's colleagues of the Claimant's sight impairment/blindness so that they would be aware of his difficulties in seeing obstacles/staff;

1.7.3 Ensure temporary obstruction/obstacles, e.g. bread trays, were not placed in the area and/or pathways in the area were clear of such obstruction/obstacles;

1.7.4 Ensure priority was given to moving trolleys operated by the Claimant;

1.7.5 Providing the Claimant with a Hi-Viz jacket to ensure he could be seen by colleagues;

1.7.6 Providing the Claimant with a thermometer gauge, with inbuild audio temperature read-out;

1.7.7 Putting in place a set system of production on slicing/packaging lines to ensure that breads weren't mixed/were segregated by type on slicing/packaging.

1.7.8 Providing the Claimant with a person to support him short term whilst learning new role.

1.8 Was it reasonable for the Respondent to have to take those steps and when?

1.9 Did the Respondent fail to take those steps?

2. **Discrimination arising from disability (Equality Act 2010 section 15)**

2.1 Did the Respondent treat the Claimant unfavourably by:

2.1.1 Terminating the Claimant's employment?

2.2 Did the following things arise in consequence of the Claimant's disability:

2.2.1 The Claimant bumped into objects; and
2.2.2 The Claimant was unable/took longer than others on probation, to reach the standard required in an unfamiliar role/physical work environment, as he could not see how colleagues were operating?

2.3 Was the unfavourable treatment because of any of those things? Did the Respondent dismiss the Claimant because he bumped into objects and/or was unable/took longer than others on probation, to reach the standard required in an unfamiliar role/physical work environment?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.4.1 Efficient production to meet customer demand;
2.4.2 Saving costs (waste and/or damage to machinery/equipment); and /or
2.4.3 Health and safety and wellbeing of the Claimant and all other staff.

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the Claimant and the Respondent be balanced?

2.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3. **Remedy for discrimination or victimisation**

3.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

3.2 What financial losses has the discrimination caused the Claimant?

3.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

3.4 If not, for what period of loss should the Claimant be compensated?

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

3.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

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

3.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

3.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

3.11 By what proportion, up to 25%?

3.12 Should interest be awarded? How much?