EMPLOYMENT TRIBUNALS

Claimant: Miss J Jasinska

Respondent: Bravo FB Limited (trading as Fox's Biscuits)

Heard at: Manchester **On:** 6-10 November 2023

Before: Employment Judge Phil Allen
Ms A A Roscoe
Ms J Whistler

REPRESENTATION:

Claimant: Mr P Dytkowski (a lay representative)
Respondent: Mr A Ryan (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant did not have two years continuous employment with the respondent as at the effective date of termination and therefore she could not claim unfair dismissal. The complaint of unfair dismissal is therefore dismissed as the Tribunal does not have jurisdiction to determine it.

2. The complaints of harassment related to disability are not well-founded and are dismissed.

3. The complaints of direct disability discrimination are not well-founded and are dismissed.

4. The complaint of breach of the duty to make reasonable adjustments was not well-founded and is dismissed.

REASONS

Introduction

1. The claimant worked for the respondent from either 27 July or 12 November 2018. She worked as a production operative on the biscuit production lines. The

respondent conceded that she had two disabilities at the relevant time: plantar fasciitis; and depression. The claimant was dismissed on 19 August 2020. The claimant alleged that she was unfairly dismissed, and she also brought claims for disability discrimination (harassment, direct discrimination, and breach of the duty to make reasonable adjustments). The respondent denied that the claimant had two years' continuous service as an employee, as is required to bring a claim for unfair dismissal. It contended that the dismissal was fair by reason of capability. It denied discrimination.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 22 September 2021. Following that hearing a case management order was issued with a list of issues attached to it (80.12). At the start of this hearing, it was confirmed with the parties that those issues remained the ones which needed to be determined. In this Judgment the Tribunal has determined the liability issues only as it was confirmed at the start of the hearing that the liability issues would be determined first (including issue 2.5(b)). The remedy issues were left to be determined later, only if the claimant succeeded in her claim.

3. The issues identified are appended to this Judgment.

Procedure

4. The claimant was represented at the hearing by her partner, Mr Dytkowski. Mr Ryan, counsel, represented the respondent.

5. The hearing was conducted in-person with both parties and all witnesses in attendance at Manchester Employment Tribunal. A Polish language interpreter attended the hearing.

6. An agreed bundle of documents was prepared in advance of the hearing. The bundle initially ran to 394 pages. At the start of the second day of hearing the respondent produced some additional documents which had been identified and which were relevant to the issues to be determined. The claimant's representative did not object to those pages being read by the Tribunal and added to the bundle. Those pages were added as pages 395-410. Where a number is referred to in brackets in this Judgment it is a reference to the number of the page in the bundle. On the first morning of the hearing, we read the pages in the bundle which the claimant's representative asked us to read and the pages referred to in the respondent's witnesses' witness statements.

7. We were provided with four witness statements: two from the claimant (including the claimant's own); and two from the respondent. The respondent's representatives had added paragraph numbers to the claimant's witness statements and at the start of the hearing the claimant's representative confirmed that he was happy for the versions of the statements which included paragraph numbers to be used. On the first morning, we read the four witness statements.

8. We heard evidence from the claimant, who was cross-examined by the respondent's representative, before we asked her questions, and she was re-examined. She gave evidence from lunch time on the first day until the end of the

second day. Initially the cross-examination of the claimant was fully translated, but after a short period the claimant reverted to answering the questions asked in English for the majority of the time, but used the services of the interpreter when required both to translate what had been asked and, where required, to translate the answer given. It was emphasised to the claimant how important it was that she ensured she understood the question being asked and, if in doubt, she should use the assistance of the interpreter provided.

9. Mr Dytkowski also gave evidence for the claimant. He gave evidence on the morning of the third day of hearing and was briefly cross-examined.

10. Mr Nicholas Bourne, Production Manager, and Mr Lee McLeod, Manufacturing Manager, gave evidence for the respondent. Mr Bourne's evidence was heard throughout the third day of hearing, following Mr Dytkowski's evidence. Mr Lee's evidence was heard on the fourth day. Each of the respondent's witnesses was cross examined by the claimant's representative, we asked questions, and they were re-examined.

11. The Tribunal did not hear any evidence from Mr Abid Hussain, Mr Lukman Patel, or Ms Rachael Bourne. No evidence was heard about their non-attendance nor was any explanation provided for their non-attendance in submissions. Mr Bourne confirmed in evidence that Mr Hussain was still employed by the respondent.

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. A submission document was submitted by the respondent's counsel. On the fifth day of the hearing, the respondent's representative made oral submissions (in addition to the document provided) and the claimant's representative made oral submissions.

13. Judgment was reserved and accordingly we provide the Judgment and reasons outlined below.

Facts

14. The claimant had previously been employed at the Kirkham site of Fox's Biscuits. She left the previous period of employment voluntarily. During the period relevant to this claim, the claimant first worked at the Kirkham site from 27 July 2018. That engagement was initially through an agency (Staffline).

15. The Tribunal was shown an email from Staffline Recruitment Ltd to the claimant sent on 22 July 2018 which invited the claimant to an interview because she had applied on-line to work at Fox's Biscuits (147). She was sent an email about her induction by Staffline on 26 July 2018 (149) and started working on 27 July 2018. She was sent a further email from Staffline about her contractor number and job number on 29 July 2018 with an attached job brief which set out the details of her new assignment. That document was on Staffline Group plc headed paper, described the customer name as Northern Foods PLC (Fox's bisc) and detailed the assignment. A further email of the same date with an attached job brief was also provided (155) which included the same information together with the rate of pay and the applicable hours.

16. During this initial period, the claimant was paid by Staffline. The Tribunal was provided with one payslip from the period which had been emailed to the claimant by Staffline (160) and which recorded the employer as Staffline 2Sisters N1 and was on Staffline paper. In her evidence, the claimant emphasised the name used on the payslip.

17. Throughout the initial period, the claimant worked full time at the Fox's Biscuit factory. There was no dispute that from 12 November 2018 the claimant was engaged by the company who at the time operated the factory, Northern Foods PLC, permanently. From that date, the claimant was paid by that company. It was the claimant's evidence that what she did and where she worked did not change when she became a permanent employee.

18. At the start of the second day of the hearing, the respondent produced some additional documents which recorded what had occurred at the change of engagement and shortly afterwards. The claimant had completed a vacancy application form on 26 September 2018, when she applied for the permanent role at Fox's Biscuits (395). In it she stated that she was a packing operative for Staffline. A statement of employment particulars was provided (397) dated 12 November 2018 (signed by the claimant on the same date) which recorded the claimant's employment with Northern Food Grocery Group trading as Fox's Biscuits with a start date of 12 November 2018 and which recorded the same date as the start of the claimant's continuous employment. Three probationary review records were also provided for the claimant dated 20 December 2018, 14 January 2019 and 13 March 2019.

19. In her evidence, the claimant referred to Staffline 2Sisters Recruitment Agency as being part of the 2 Sisters Company which was the owner of the Fox's Biscuits brand. She said that they specifically worked to hire people only for the one workplace and they had their own office in the Fox's Biscuits' Kirkham site. No other evidence was provided of any relationship between Staffline (or any Staffline entity) and Northern Foods PLC (or any similar entity). It was the evidence of both the claimant and Mr Dytkowski that Fox's Biscuits had used the agency for all new staff to engage them for a probationary period before deciding whether to offer a permanent engagement. Mr Dytkowski had gone through the same process when he had been recruited at the factory, but his initial engagement had been with a different agency.

20. It was Mr McLeod's evidence, that the claimant did not become an employee of Fox's until 12 November 2018. His evidence was that between July and early November 2018 the claimant was engaged by a recruitment agency called Staffline Group PLC. It was his evidence, that Staffline was not part of the Fox's group of companies, and he said it is/was a completely unrelated company. In his verbal evidence he also explained that: agency workers have to sign in at security whereas employees do not; agency workers where a different colour hat; and agency workers arrange their holidays and notify their sickness directly to Staffline.

21. A commercial agreement was also provided which set out the terms upon which Staffline provided temporary workers (127) and which, it was Mr McLeod's evidence, applied to Fox's. That included the terms which would be expected to be found in an agreement where a company provided agency workers to a client.

Importantly, Staffline were responsible for paying the Agency Worker and making the requisite deductions. The agreement recorded that the Client paid Charges to Staffline, and the way that the Charges were calculated was set out in the agreement (which included, as part of the calculation, the Agency Worker's hourly rate of pay and other employment costs, with the addition of a fee).

22. In her claim form, the claimant recorded that the date when her employment started was 12 November 2018 (5) and that same date was stated as the date when the claimant started to work for Fox's Biscuits in the statement which was attached (13).

23. The response form recorded that Northern Foods Grocery Group Limited had sold Bravo FB Limited to the Ferrero Group in October 2020. It had been agreed by the parties (prior to this hearing) that the respondent to this claim was the correct name for the respondent for the purposes of these proceedings.

24. The claimant was employed as a production operative. She worked on the lines operated at the factory. It was not in dispute that each employee was allocated to a specific line but would on occasion work on another line (such as when their line was not operating). The claimant had also moved between lines. The claimant had worked on K6 (as was confirmed by the probation reviews). She had also worked on K1 and K3.

25. The Tribunal heard a considerable amount of evidence about the lines operated by the respondent and the different arrangements for work on each line. The Tribunal also heard evidence about the locations on each line where employees could sit down and where they could not. It is not necessary to reproduce the detailed evidence heard in this Judgment. In summary, employees could sit when undertaking inspection roles, but not in most other roles on the lines. Within each line employees were rotated around locations, usually each thirty minutes. The rotation was a health and safety practice which ensured that employees did not remain only doing one action, or using one part of their body, throughout the shift. K1 was the fastest line and had more positions where employees could sit than other lines. On the other lines, there were limited positions where an employee could sit.

26. Some chairs were available in the factory for locations where workers could sit and undertake their tasks. The claimant's evidence was that, for her and her shift, chairs were frequently unavailable. The claimant's evidence was that people on the line also sat on packing stools/stands when they were available. It was the evidence of both Mr Bourne and Mr McLeod, that employees should not have been sat on packing stools/stands at all, as that equipment was provided for other reasons. Their evidence was that there were chairs available for the locations where they could be used, but the chairs did move around and sometimes were not where they should have been (for example, if a line was not being used, the chairs might be moved by employees to where they were working on other lines).

27. There was no dispute that an accident had occurred at the respondent's site involving a forklift truck in or around October 2019 with a box falling, involving injury to another employee. The respondent identified that when employees were sat on a particular location on one of the lines, there was a health and safety risk arising from trucks moving near to them and visibility. As a result, and as a health and safety

measure, the decision was taken to stop employees in that location from sitting on one side of the line, as they had done previously. The respondent's case was that this decision explained at least one of the incidents when the claimant was told not to sit down in a location where she had previously done so.

28. It was Mr Bourne's evidence, that he would have expected anyone in a management role who had seen someone sitting in a location where they should not have been sat, to have raised it with the employee (irrespective of whether or not they were at the time responsible for that line).

29. It was the claimant's evidence, that when her health condition significantly worsened around June or July 2019, she requested a chair to help her work where it was possible to sit down on the K3 line. She said that she made the request to Mr Lukman Patel, who she said was the K3 line manager. She also said that the whole of the K3 line repeated the request for chairs. It was her evidence that Mr Patel said there was not approval for more funds for chairs. We did not hear evidence from Mr Patel. In her witness statement, the claimant said that she made dozens of requests for a chair and then she requested an appointment with occupational health, but the request was ignored.

30. On 12 November 2019 the claimant visited the occupational health advisor on site, Ms Duggan. It was the respondent's case that employees were able to visit the occupational health advisor if they wished to (without prior permission/agreement). In her answers to cross-examination, the claimant emphasised the practical difficulty of doing so in the time available for a brew (without leaving the line short). There was no dispute that the first occasion when the claimant visited occupational health was on that date.

31. The Tribunal was provided with an occupational health report prepared by Ms Duggan (the respondent's occupational health advisor) and sent to Ms Burns (the HR advisor) on 13 November 2019 (217). That report said that the claimant was unable to stand for longer than an hour at a time. It recommended regular changes between sitting and standing during the claimant's shift. It also recommended referral to a physiotherapist. It was Mr Bourne's evidence, that HR would speak to the managers to action such a report, but he personally was not involved in doing so for the claimant at that time.

32. It was the claimant's evidence, that on 14 November 2019 (being the day after she had visited the occupational health advisor) she was working on the K5 line and was sat on a chair or a stool, undertaking work where she was able to sit down to undertake it. Mr Abid Hussain, a Technical Operator who had been responsible for another line but not the K5 line which she was on, came to her and took away the chair or stool. She allowed him to take the chair or stool. Her witness statement said that he said that the chair belonged to him. The claimant informed him that she needed a chair because it was a reasonable adjustment made by the occupational health advisor to help with her plantar fasciitis. Mr Hussain ignored the information and took the chair away and said it was not his problem.

33. The Tribunal did not hear evidence from Mr Hussain or anyone else present when the event the claimant described on 14 November occurred. There was no evidence which contradicted the claimant's account.

34. It was the claimant's evidence that she approached the K3 line manager, Mr Patel, explained the situation, her plantar fasciitis related problems, and why she needed a chair. She said he was with another manager, Ms Egle Vaisytute, at the time. The claimant said she reminded them about her reasonable adjustments. In her witness statement, the claimant said that they answered her "*maybe should you go off sick if you are unable to do your job*". When asked in cross-examination, the claimant was unable to recall exactly what had been said in the conversation prior to this response having been given, but she was very sure that the response had been given as she alleged. The Tribunal did not hear evidence from Mr Patel or Ms Vaisytute. There was no evidence which contradicted the claimant's account.

35. It was not entirely clear when the conversation with Mr Patel had occurred. In her statement the claimant said that it was in the week between 14 November and 20 November 2019. From the account in the claim form and from the timeline in the notes of 5 December 2019 meeting, it appeared that it had taken place earlier. The claimant said that she was sure it had occurred after she had visited occupational health. The Tribunal accepted her evidence about when the conversation occurred.

36. A timeline document from a later meeting on 5 December 2019 (224) recorded that there had been a meeting with the claimant on Friday 15 November 2019. The meeting was also attended by Ms Egle Vaisytute, Mr Patel, and Ms Burns (the HR Advisor). The note recorded "*sat down with* [the claimant] *and agreed K1 is the line to accommodate sitting/standing*".

37. The claimant also gave evidence about a further incident which occurred with Mr Hussain on 20 November 2019 when she was working on the K3 line, when he started to take pictures of her when she was sitting on a stool and started yelling at her. The claimant was upset about this and, in particular, the fact that photographs were being taken of her without her consent. It was the claimant's evidence in her witness statement, that this caused her mental breakdown and anxiety, as well as a panic attack, and she said she started to cry on the line. She also said in her evidence that this situation broke her completely and she went off sick on the following day. As with the previous allegation regarding Mr Hussain, the Tribunal did not hear evidence from Mr Hussain or anyone else present when the event the claimant described on 20 November occurred. There was no evidence which contradicted the claimant's account, save for the file note and meeting referred to below. It was the claimant's evidence that she was sat on the stool, which would appear to be the stool which Mr Bourne and Mr McLeod were clear should not have been used as a seat. It also did not appear to be in dispute that when this occurred, the claimant was sat in the location where there had previously been the accident and where the respondent had decided that the operator should not be seated due to health and safety reasons.

38. It was the claimant's evidence, that she attended the HR office and raised a complaint about Mr Hussain. She was reassured that there would be an investigation. She was never subsequently informed about any investigation or outcome.

39. A note of a meeting was provided from 20 November 2019, attended by the claimant, Ms Ryden-Croasdale, and Ms Duggan (218). The claimant recounted that Mr Hussain had asked her to get off <u>his</u> chair, she needed to sit down, and he said it

was his chair. In that meeting, Ms Duggan stated that the claimant was suffering on the line and was in pain. The claimant said she could not work on K1 because it was very fast (her inability to work on K1 related to the claimant's other health conditions and not her plantar fasciitis). She referred to her feet hurting when she had to stand up all day. Ms Duggan emphasised that her report recommended the claimant having regular seating breaks, which she thought was why the managers had put the claimant on K1 as it offered time to sit down (however Ms Duggan had not specified a particular line). The claimant was told that Ms Duggan would support her in her decision about whether she returned to the line or went home. The claimant chose to return to the line, as she did not want to let the team down (but felt very anxious though).

40. A file note was provided dated 22 November 2019 (220) which recorded that Mr Hussain had been spoken to and denied taking a photo as alleged, but it was said he understood why the claimant had got upset and he would not repeat the incident. In his evidence, Mr Bourne confirmed that he had made the file note and he confirmed what was recorded in the note. Mr Bourne said he had accepted Mr Hussain's statement that he had not taken a photo, but the note reflected that the incident should not be repeated.

41. The evidence was far from clear about where the claimant had worked during the period from her first visit to occupational health on 12 November 2019 and the end of her shift on 20 November 2019. The notes suggest that there had (at least) been some suggestion that she worked on K1 where there were more seating positions, and the employees could sit down for more time. The claimant's own evidence was not clear about exactly where she worked on which day. There was also no specific evidence about how long the claimant had been able to sit down on each line upon which she worked on each of the days. Save for the specific events described, there was also no evidence about specific occasions when a chair had not been available in places where the claimant would have been able to sit down (had a chair been available).

42. The claimant commenced ill health absence on 21 November 2019. She did not return to work. A meeting was held with her on 5 December 2019 (224) and a letter sent following the meeting on 6 December (225). In that letter Ms Burns said:

> *"The purpose of the meeting was to discuss how we can support you in absence and your role when you return. We commenced by discussing the report from the OH Adviser from 13.11.19, this recommended that you be placed on a line which allows sitting and standing, hourly if applicable. After discussion at the time K1 was deemed to be the only line which would allow this. Today you have expressed that due to wrist pain you are unable to work on the fast side of this line. As part of the meeting today we explored, and you expressed your preference to return to K3, if stools can be available."*

43. Fit notes were provided throughout the claimant's absence. Each of the fit notes described the claimant as not fit for work. The reasons given were plantar fasciitis, depression, and wrist inflammation or pain the precise reasons on each note varied slightly). The last fit note was for two months from 30 June 2020 (253) and was for mixed anxiety and depressive disorder, plantar fasciitis, and urinary urgency.

44. An occupational health report was provided by Ms Duggan dated 16 January 2020 (232). In that report she said:

> *"Joanna will need to be seated for most of her shift and must not be weight bearing for long periods, for the next 2 months.*
>
> *I would envisage a return to full duties within 3 months.*
>
> *<u>Recommendations</u>*
>
> - *Must work seated initially for the first 2 months.*
> - *Regulation occupational health reviews.*
> - *No K1 production line for first 2 months."*

45. The claimant met with David Robinson, Ms Burns and Ms Duggan on 22 January 2020. On 23 January 2020 Ms Burns wrote to the claimant (233) and summarised the meeting and the update on the claimant's health. In the letter Ms Burns stated,

> "*David Robinson informed you that we have no issue with you using a stool whilst working on the piano on K3 and this will be arranged for your return*".

46. It was Mr Bourne's evidence that the K3 line had ceased to operate in November 2019. He was challenged on that evidence in the light of the fact that the letter of 23 January 2020 appeared to envisage the claimant returning to K3 at that time. Mr McLeod was also asked about it and stated that it probably reflected what he had told the factory, which was that there was a possibility that the line would be running again in the future. The Tribunal did not hear evidence from Ms Burns (who wrote the letter) or any of the respondent's attendees at the meeting. However, based upon the evidence heard, the Tribunal found that the letter contained a positive commitment to provide seating for the claimant on her return (where possible to do so).

47. Notes of a further meeting between the claimant and others on 20 February 2020 were provided (234). There was a further meeting on 4 March 2020 (236). At the end of that meeting, the claimant asked about K3 and it was recorded that it was explained that it would not stand idle and something else would run on K3 (which was consistent with Mr McLeod's evidence about what was hoped, albeit K3 has not run (at least consistently) since that meeting). A further meeting took place with the claimant on 28 April 2020 (241 and 243).

48. A detailed occupational health report was provided following an assessment on 24 June 2020 (244). That was the report which Mr Bourne took into account when he made his decision about the claimant's capability to remain in employment. The content of that report was important. Included with in it were the following:

> *"Normally recovery time for plantar fasciitis is within 6 to 18 months. Joanna is in month 17 and after 7 months at home resting, she has not seen any improvement in symptoms. She is hoping to be referred for steroid injections in the near future, which may improve symptoms. However at this stage the*

condition is chronic and may require multiple interventions to stabilise her pain levels and see a full recovery

… Is able to stand for periods one and half hours, but get high levels of pain in her feet, left foot mainly.

… Is unable to stand all day and would require a chair.

Cannot work on K1, due to musculoskeletal issues

… January, March and June 2020 OH reviews, Joanna's managers were able to offer reasonable adjustments for her return to work on K3. Joanna does not feel ready to return to work at this point in time

… Joanna will not be able to stand for longer than an hour, and walking should be restricted to a minimum of 30 minutes. A seat needs to be provided during her work hours.

Joanna may find the new 12 hour shifts very difficult due to the underlying health conditions causing sufferers to be fatigued. The additional hours would also be detrimental to her musculoskeletal joint pain and plantar fasciitis.

K1 provides seating for employees, it is suitable for her RTW relating to her plantar fasciitis, however her underlying musculoskeletal joint issues do not make this suitable for Joanna, due to the speed of the line.

A much slower line or reduced workflow would suit Joanna's return to work.

… Joanna requires long term work adjustments, she needs to be provided with a seated job and must be allocated a line that is very slow or her line is purposely slowed to allow Joanna to work comfortable.

12 hours would be detrimental to Joanna's health and alternative shorter days should be arranged to facilitate a safe return to work …

Recommended Reasonable Adjustments

- *A seat is provided for her shift.*
- *No lifting.*
- *Can only stand for 1 hours at any given time.*
- *2 additional short breaks to allow her to leave the line/desk.*
- *She should be considered for a job away from the production line and in an office."*

49. Entirely unrelated to the issues in this claim, the respondent moved to an entirely new shift pattern at the Kirkham factory. It was the respondent's evidence that this was agreed with the trade union(s). The shift pattern moved to 24/7 operation, which was particularly important for some of the lines operated by the respondent. As a result, the shifts changed from being eight-hour shifts, to being

twelve-hour shifts. There was no dispute that what was agreed with the claimant about this change was that she would undertake two twelve-hour shifts on a two on and six off shift pattern. The claimant agreed to this arrangement. A contract which recorded the part-time hours agreed, was included in the documents (81). That contract stated that the claimant's start date for continuous employment was 12 November 2018, the new role commenced on 6 September 2020, and it was signed on 14 July 2020.

50. The claimant was sent a letter on 12 August 2020 inviting her to an ill health capability meeting on 19 August 2020 (258). The claimant was offered the opportunity to be accompanied. The occupational health report was referred to. Three things which were to be discussed were set out. The third was, *"Make a decision regarding your ongoing employment, consider terminating your employment due to ill health capability".* The letter went on to say, *"It is only fair to forewarn you that if you are unable to give an indication of a return to work in the foreseeable future then we may have to consider a termination with contractual notice".* It was the claimant's evidence that she thought that what was said was just standard wording and it was very clear from her evidence (and her reaction in the meeting on 19 August) that she had not understood that what was said in the letter to be a genuine statement of what might be the outcome of the meeting.

51. On 19 August 2020 the claimant attended a meeting with Mr Bourne and Ms Burns (who was accompanied by someone shadowing her). Unfortunately, full notes were not available for the meeting. Two brief notes were provided, which appeared not to have been made contemporaneously. There were handwritten notes (260), and typed notes (259). It was Mr Bourne's evidence that the claimant said in the meeting that there had been no change to her health, which was recorded in the handwritten note. The occupational health report was discussed. What the typed notes recorded that Mr Bourne then said was,

> *"I told Joanna that I had been unsuccessful in finding an alternative role for her within the business and that sadly we had no other option available but to terminate her employment on the grounds on capability. Joanna became very distressed and appeared to have a panic attack which lasted for several minutes".*

52. There was no dispute that the claimant's reaction to being informed that she was being dismissed, was significant. She was very distressed. There was also no dispute that Mr Bourne endeavoured to assist the claimant with her panic attack, and indeed both the claimant and Mr Dytkowski confirmed that he had done so. The claimant was very upset for the remainder of the meeting.

53. In her witness statement the claimant alleged that in the meeting:

> *"Mrs Rachael Burns said to me ironically: 'Didn't you really expected we are going to dismiss you today?'"*

54. In her witness statement, the claimant appeared to suggest that this comment was made before the claimant had been told that she was being dismissed. The Tribunal did not accept that the comment would have been made prior to the claimant being informed that she was dismissed, as what was alleged to have been said only made sense as a comment if it was made after the claimant had been told

about her dismissal. In his witness statement, Mr Bourne said that he did not recall Ms Burns saying what was alleged. When he was challenged in cross-examination, he accepted that it was possible that she may have said it but he had not heard it, emphasising how upset the claimant was and that he was focussed upon assisting her.

55. In his evidence, Mr Dytkowski described how he had seen the claimant exit the factory following the meeting, and he emphasised in his evidence how upset the claimant had been. Mr Dytkowski took the claimant straight to the GP and she was extremely unwell for a few days afterwards.

56. The outcome of the meeting was confirmed in a letter dated 20 August which was sent from Ms Burns, but detailed a decision which Mr Bourne evidenced was his own (261). The letter referred to the fact that the respondent believed that it had exhausted all alternative options and it was with regret that it had been decided to terminate the claimant's employment as of 19 August 2020 on the grounds of capability due to ill health. The decision letter referred to the length of the claimant's absence, the occupational health advice of 24 June and said, *"We carried out a review of your role and confirm that you are unable to return in the foreseeable future to your contracted role. I looked for an alternative role within the offices here at Kirkham but unfortunately there are no suitable vacancies".* The payments being made to the claimant were confirmed.

57. The claimant appealed in a letter dated 21 August 2020 (263). The claimant attended an appeal meeting heard by Mr McLeod on 30 September 2020 (275 and 284). The meeting was also attended by Ms Kay (a Human Resources Manager), someone to take minutes, the claimant, and a trade union representative. In that meeting, the claimant told Mr McLeod that she did not need to sit down every half an hour, and she could stand a lot longer than she had been able to. She also believed that a future injection would make her condition better. The claimant also said that her mental condition had changed, and her physical condition had improved.

58. Mr McLeod undertook investigation following the appeal hearing. He spoke to Mr Bourne and Ms Burns on 5 October (291). He spoke to Mr Patel on 6 October (303). He spoke to Ms Duggan on 6 October (306).

59. Mr McLeod also asked for an updated occupational health report. One was provided by Ms Duggan following a telephone appointment on 15 October 2020 (310). There was a delay in the report being provided as the claimant did not initially consent to its release.

60. The Tribunal was provided with a copy of the updated occupational health report following the telephone conversation on 15 October 2020 (a note said that it was received on 9 November) (310). The report confirmed that the claimant had secured a new job on 22 September 2020, where she was working twenty hours per week. The report stated that the claimant had said that she could return to work with no restrictions, save that she was unable to work on the K1 line due to the speed of the line. What the occupational health adviser said was:

> *"Joanna in my opinion is fit to return to work in a role within Fox's biscuits with adjustments, although her current work role involves being on her feet all day*

with strenuous work activity, no restrictions and limited breaks, she is not under the care of an occupational health team.

Fox's biscuits must follow best practice and provide a work safe environment for Joanna to ensure she remains pain free and given she remains under the care of specialists for her plantar fasciitis and is currently waiting for an MRI scan, we must provide adjustments to prevent her returning to her previous chronic stage.

Joanna should be allocated a seat and work no more than 8 hours a day until occupational health is satisfied that the plantar fasciitis is resolved or her work is unlikely to cause her harm, especially given the level of pain and chronic nature of the previous episode and the length of her previous absence …

Recommendations

- *Standing should be limited to 1 hour.*
- *A seat must be made available to allow Joanna to rest her feet.*
- *Regular occupational health reviews.*
- *Specialist safety footwear should be provided.*
- *Maximum shift 8 hours.*

61. The claimant emailed Ms Kay on 6 November criticising the report's conclusions (313). She also confirmed in a subsequent email that she was unable to get any report from her specialist doctor (312). It was clear that the claimant did not agree with the advice which the occupational health provider provided in that subsequent report.

62. A decision letter was sent to the claimant in a document dated 18 November 2020 (316). That was a lengthy letter written by Mr McLeod and explained the process he had followed and the decision that he had reached. There was some criticism from the claimant of the time taken between receipt of the occupational health report and the letter that Mr McLeod sent. The letter was sent by post on 18 November but was only emailed on the following day (322), something which the claimant also criticised.

63. In the letter, Mr McLeod addressed the various recommendations in some detail. He emphasised that as part of the new 24/7 shift operation there might be times that the respondent would be able to provide a seated job, but it could not guarantee that on all shifts or even every night, depending on which production lines were needed. He addressed the need for rotation to ensure that no-one stayed in one place for too long. He stated that he was satisfied that Mr Bourne had sought to understand the claimant's medical condition, given her an opportunity to put forward any representations and suggestions, and also had considered ways to help her to return to work. He referred to the recent occupational health report and the particular adjustments made. His conclusion was as follows:

> *"After reviewing all the recommendations made by our Occupational Health Advisor we are unable to accommodate these. The offer of a chair to aid your return to work in January, March and June 2020 was feasible as you worked on K3, which you refused. This line is now no longer fully operational, and we are therefore not able to provide a chair for you to sit down every hour.*
>
> *As you know a high number of the roles require you to be stood and even with the strict rotation we have in place, there are areas where a seat is not possible. Only K1 has the option to sit on a regular basis but you have stressed to the OH Advisor that you are unable to work on K1 due to the speed of the line. Even this line requires more than 1 hour stood at times.*
>
> *The site here at Kirkham moved to a 12 hour shift operation from 6th September 2020, the report recommends a maximum of 8 hours which would cause issues if you were only to work 8 hours, even looking at just covering break times would still require you to work at least 11 hours.*
>
> *Based on the above findings, I have made the decision to uphold the decision to dismiss you.*
>
> *Once you are in a better situation you are more than welcome to apply for a role in the future at Fox's Biscuits."*

64. In their evidence, both Mr Bourne and Mr McLeod explained in some detail the way the factory operated and the basis upon which they had reached their decisions. Both individuals gave some evidence about a part of the line which involved stacking, on which certain types of biscuit with a filling were processed. Within that stacking operation would be four roles which would rotate, two of which were standing and two were sitting. On that stacking operation, if it had run permanently, it would have been possible to accommodate an employee sitting down for 50% of their working time and standing for no more than an hour. However, it was the evidence of both of them that the stacking system only operated 40% of the time that the relevant line ran, which was itself only approximately 60% of the total time. It appeared that another employee was, on occasion, accommodated on the stacking system to assist them with their own adjustments. However, their evidence was that the limited time when the stacking operated, meant that it was not a reasonable adjustment for the claimant.

65. In his evidence, Mr Bourne provided a detailed account of each of the lines and the work locations on the lines. We entirely accepted the evidence which he gave. He explained that there were eight sitting roles on line K1. There were two sitting or inspection roles on each of lines K2, K3 and K6. There was one sitting role on K4. There were no sitting roles on K5. However, for all of the lines where there were sitting roles (with the exception of K1), Mr Bourne explained the need for rotation of those working on the relevant line and he highlighted that the seating roles were an important part of the rotation to enable those working to have a period of their shift sitting down in between the other standing roles.

66. There appeared to be no dispute that the respondent had sought to identify an office role for the claimant prior to the capability meeting at which she was dismissed, and none had been identified. The claimant did not provide any evidence about any office roles which she could have undertaken.

The Law

Employment status and continuity of employment

67. The definitions of employee and contract of employment are in section 230 of the Employment Rights Act 1996. That says:

> **"In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."**
>
> **"In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."**

68. Section 108 of the Employment Rights Act 1996 provides that the right not to be unfairly dismissed does not apply unless the employee has been continuously employed for a period of not less than two years ending on the effective date of termination.

69. Section 212 of the Employment Rights Act 1996 says that any week in which an employee's relations with his employer are governed by a contract of employment, count towards computing the employee's period of employment.

70. Section 231 of the Employment Rights Act 1996 provides for circumstances in which two employers are treated as being associated employers. Section 218(6) provides that continuity of employment is maintained where an employee is taken into the employment of an associated employer without a break.

71. The key starting point in determining whether someone is an employee is the Judgment of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433, where he said the following:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ….*"

72. In his submissions the respondent's counsel referred to a number of authorities which addressed what is required for an employment relationship. He highlighted that without mutuality of obligation there can be no contract of employment at all (**Autoclenz v Belcher** [2011] ICR 1157, **Montgomery v Johnson Underwood** [2001] EWCA Civ 318 and **Carmichael v National Power** [1999] ICR 1226). He also quoted from **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471. He listed a series of factors which should be taken into account in considering employment status.

73. The key case in relation to agency relationships is **James v London Borough of Greenwich** [2008] ICR 545 (upon which the respondent's

representative relied). What Mummery LJ said in that case was (initially with reference to the decision of the Employment Appeal Tribunal, which he approved):

> *"After a valuable review of the relevant case law covering the range of circumstances which give rise to the question whether a contract of employment exists and, in particular, the circumstances of agency workers, in which there is normally no express contract of any kind between the end-user and the worker, it was stated that the question is whether some contract, pursuant to which work is being provided between the worker and the end-user, can properly be implied according to established principles. The judgments of this court in Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437 and Cable & Wireless plc v Muscat [2006] ICR 975 were cited and analysed. It was correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213 , 224: "necessary … in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*
>
> *…The real issue in "the agency worker" cases is whether a contract should be implied between the worker and the end-user in a tripartite situation of worker/agency/and end-user rather than whether, as in "the casual worker" cases where neither the worker nor the end-user has an agency contract, the irreducible minimum of mutual obligations exists. In the agency worker cases the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker's provision of work to the end-user or the fact of the end-user's payment of the worker via the agency. Those facts and the relationships between the parties are explicable by genuine express contracts between the worker and the agency and the end-user and the agency, so that an implied contract cannot be justified as necessary*
>
> *…In conclusion, the question whether an "agency worker" is an employee of an end-user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end-users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end-user.*

74. In interpreting the agreement between the parties, including any documents which record the relationship, the question the Tribunal must ask is what was the true agreement between the parties? The terms of any written agreement can assist in determining this, but sometimes in employment the terms do not reflect the reality.

Unfair dismissal

75. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for capability, being the reason relied upon. If the respondent fails to persuade the tribunal that it dismissed the claimant for that reason, the dismissal will be unfair.

76. If the respondent does persuade the tribunal that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

77. Section 98 of the Employment Rights Act 1996 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3) In subsection (2)(a) —

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's

undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

78. The proper application of the general test of fairness in section 98(4) is well documented and addressed in a number of cases. The Employment Tribunal must not substitute its own decision for that of the employer. The question is rather whether the employer's conduct fell within the "band of reasonable responses":

79. **BS v Dundee City Council [2014] IRLR 131** identifies three important themes from the authorities: whether or not, in the circumstances of the case, a reasonable employer would have waited longer before dismissing the employee; there is a need for the employer to consult the employee and take her views into account; and there is a need for the employer to take steps to discover the employee's medical condition and her likely prognosis. A fair procedure is essential.

80. In his submissions the respondent's representative relied upon the **BS** case and also listed six other authorities which we took into account but will not reproduce in this Judgment.

Direct discrimination

81. The claim relies on section 13 of the Equality Act 2010 which provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

82. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include disability.

83. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

84. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

"(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".

85. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

86. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

87. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute (**Hewage v Grampian Health Board** [2012] ICR 1054). Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

88. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

89. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

90. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment.

91. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] IRLR 332; **Shamoon v Chief Constable of the RUC** [2003] IRLR 285; **Igen Limited v Wong** [2005] ICR 931; **Madarassy v Nomura International PLC [2007]** ICR 867**; Royal Mail v Efobi** [2021] UKSC 33. The burden of proof also applies to the harassment and duty to make reasonable adjustment claims (but will not be re-produced in those sections on the law).

92. In his submissions, the respondent's representative relied upon **Anya v University of Oxford** [2001] IRLR 377, **Qureshi v The University of Manchester** [2001] ICR 863, **Nazir v Aslam** EAT/0332/09 and **Warby v Wunda Group** EAT/0434/11. The latter two authorities emphasised the importance of context when considering the evidence.

Harassment

93. Section 26 of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

94. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

95. The respondent's representative emphasised what was said in **Richmond Pharmacology**, that unlawful harassment was not designed to capture every slight or every clumsy conversation, and he said that was particularly the case where those things had the claimant's interests at heart. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. The assessment of whether it was reasonable is vital to ensure that the Tribunal does not encourage a culture of hyper-sensitivity. The words used in the definition are significant words and Tribunals must not cheapen the significance of the words used. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment (**Betsi Cadwaladr University Health Board v Hughes** EAT/0179/13).

96. The alternative bases of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose

(and vice versa). For effect, the Tribunal must also consider whether it is reasonable for the conduct to have that effect. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

97. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, it is always relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may point strongly towards or against a conclusion that it was related to any protected characteristic.

The duty to make reasonable adjustments

98. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer’s puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer.

99. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

100. **Environment Agency v Rowan** [2008] IRLR 20 is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

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

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

101. The requirement can involve treating disabled people more favourably than those who are not disabled.

102. The respondent’s representative quoted from **Royal Bank of Scotland v Ashton** [2011] ICR 632 in which it was said:

> “*Thus, so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not — and it is an*

error — for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

103. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for the Tribunal. The focus is on the impact of the impairment and whether it satisfies the statutory test and not the label given to any impairment.

104. When considering reasonable adjustments, the Tribunal can take into account the EHRC Code of Practice on Employment. The respondent's representative placed reliance upon the list of factors which might be taken into account at paragraph 6.28 of the code. He also referred to **Smith v Churchill's Stairlifts plc** [2006] IRLR 41 and stated that the test of reasonableness is objective and to be determined by the Tribunal.

Time limits/jurisdiction

105. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme.

106. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. Subsequent case law has said that

those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This was reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

107. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

108. Both parties made submissions at the end of the hearing. In this Judgment we have not reproduced all that was said in those submissions, but we have considered all that was said.

Conclusions – applying the Law to the Facts

109. As the Tribunal emphasised that it would, it restricted its decision to the issues outlined in the List of Issues which is appended to this Judgment (the same list which had been agreed at the preliminary hearing on 22 September 2021 and which had been appended to the Case Management Order that followed from that hearing).

Employment status and unfair dismissal

110. The first issue related to the claimant's employment status. Issue 1.1 asked, *“Was the claimant working under a contract of employment and therefore an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?”*. The answer to that question was yes, but the critical question was when that first occurred. The end of issue 1.1 asked, *“During what period was the claimant working under a contract of employment?”*. What was in dispute was the start date of that continuous employment – the claimant said her employment started on 27 July 2018 and the respondent that it had only started in November 2018.

111. We found that the claimant was only employed by the respondent with continuity of employment from 12 November 2018. Prior to that date, the claimant was an agency worker provided by Staffline Recruitment (we will refer to Staffline in this document as Staffline, whilst it was not clear what was the accurate/correct name of the Staffline entity which engaged the claimant, that is not something which we needed to decide). There was an arrangement in place between the claimant and Staffline and that was the contractual relationship which she had at the time. There was a contract between Fox’s Biscuits and Staffline for the provision of agency workers. As a result, the claimant worked at Fox’s Biscuits as an agency worker provided by Staffline. In circumstances where someone is provided to an end user as part of such an arrangement, there is no contractual relationship between the worker and the end user. Such a contract can be implied in some circumstances, but such a contract between the worker and the end user should only be implied where it

is necessary to do so or where there is something about the arrangement which otherwise leads to such an implied contract. In this case there was no need to imply such a contract. The contractual relationships were clear. The claimant was engaged by Staffline and provided to Fox's Biscuits by Staffline. There was a clear agreement between Staffline and the respondent's predecessor at Fox's Biscuits for the provision of agency staff. There was no need to imply a contract between the claimant and the respondent's predecessor organisation. As a result, there was no contractual relationship in place between the claimant and Fox's Biscuits.

112. The claimant's representative placed some emphasis on the relevant documents at the time. What the documents recorded was that the claimant would work at Fox's Biscuits not that she would work for them. The respondent's representative made submissions on the absence of mutuality of obligation. It was correct that the requisite obligations were not in place between the respondent (or its predecessor organisation) and the claimant, for an employment relationship to exist, albeit that was because there was no contractual relationship between the claimant and Fox's Biscuits at all.

113. In the bundle, the respondent had included a document which had been produced by some advisers (365). In cross-examination some emphasis was placed on that document. That document did not record a matter of legal authority which this Tribunal was obliged to follow (and we have restricted ourselves to applying the law). That document stated that someone who works for an agency at an end user could be found to be an employee. That is technically correct, as explained in the section on the law above and as it is a possibility in some circumstances. We have not found it to have been the position in the circumstances of this case. In the circumstances of this case, the agency workers (including the claimant) were identified separately, were recruited by Staffline, received holiday pay and sick pay through Staffline and notified them of holiday and sickness, had no obligation to work at Fox's Biscuits, Fox's Biscuits were not obliged to offer them work, they were paid by Staffline, and Fox's Biscuits paid Staffline for the provision of the agency staff. That arrangement was one under which the claimant (and other agency staff) was engaged by Staffline and was not employed by the respondent (or its predecessor). The claimant's subsequent employment by the respondent and the similarity of the work undertaken upon being directly recruited, did not (and could not) alter our findings about the relationships which existed prior to the claimant being recruited as a permanent employee.

114. Sections 231 and 218(6) of the Employment Rights Act 1996 do provide that employment via an associated company will count towards continuity of employment where there is no break between the engagements. That is legally important and would be a potential circumstance where someone provided by an agency to an end user would retain continuity of employment when taken on by the end user. However, in this case we were provided with no evidence whatsoever that Staffline and the relevant operator of Fox's Biscuits at the time were associated companies. In his evidence, Mr McLeod denied that there was any such relationship. That evidence was not disputed, and we accept that it was correct.

115. Issue 2.1 asked whether the claimant had the requisite qualifying period of employment as required by section 108(1) of the Employment Rights Act 1996, so as to bring a claim of unfair dismissal? The answer to that question was that the

claimant did not have the requisite continuity of employment, as she had less than two years' service on the date of her dismissal (and would have had on the effective date of termination). The claimant's continuous employment with the respondent began on 21 November 2018. Her employment was ended on 19 August 2020. The claimant did not have two years' service as at the effective date of termination of her employment.

116. As a result of this decision, the claimant did not have the ability to claim unfair dismissal. We did not need to go on and decide whether the dismissal was fair (or would have been had the right existed) and/or what the chances were that the claimant would have been dismissed in any event. Issues 2.2, 2.3, 2.4 and 2.5(b) did not need to be determined. The claimant's representative in his submissions did accept that the respondent terminated the claimant's employment for the reason of capability. We noted that the respondent took the steps set out in **BS** before doing so. There was consultation with the claimant about her health and the termination of her employment. There was a series of meetings. The claimant was informed about what would be considered at the decision-meeting (albeit she did not believe that would be what was discussed). Her capability was discussed. Alternatives to dismissal were considered. The respondent did obtain medical advice upon which the decision was based. The respondent also obtained further updated medical advice for the appeal. We accept that the respondent carefully considered the position and the options available. We found that Mr Bourne and Mr McLeod were both individuals who carefully considered the issues. We were particularly impressed by the evidence of Mr McLeod who emphasised that he had overturned decisions in the past when hearing an appeal, and it was clear that he did not simply rubberstamp the decision that had been made. Rather, he looked into the issues carefully and obtained a new updated occupational health report. However, as a result of our finding on the claimant's continuity of employment, we did not need to determine whether the dismissal would have been found to be fair, as the claimant did not have the right to claim unfair dismissal.

117. We would however make one observation about matters emphasised by the claimant and her representative. We noted the absence of contemporaneous notes for the capability hearing. The absence of such notes was obviously not ideal. Good practice would have been for there to have been detailed contemporaneous notes, which would have assisted the claimant when she chose to appeal. We did not accept that the reason for the absence of notes for the majority of the meeting was because the claimant became upset towards the end. Clearly the provision of notes at an important meeting, and those notes having been made contemporaneously at the time, would have been good (and standard) practice.

Jurisdiction and disability discrimination

118. Issue 2.6 related to the jurisdiction that the Tribunal had to consider the discrimination and harassment claims based upon the time when the claims were entered at the Tribunal. We did not consider that issue separately but addressed it alongside each of the findings made for each claim. As explained below, we did not find that the claimant was unlawfully discriminated against or that she was harassed related to disability. As a result, it was not possible to determine whether any of the earlier allegations were part of a continuing series of acts extending over a period with later acts, as we have not found that later acts were unlawful

discrimination/harassment. However, for each allegation where time was an issue, we separately considered the time of the claim and whether time would have been extended on a just and equitable basis.

119. As was recorded at issue 2.7 and as was emphasised to the claimant's representative during the hearing, it was not in dispute that the claimant was someone who had disabilities at the relevant time, in relation to both plantar fasciitis and depression.

Harassment related to disability

120. We considered the claims for harassment related to disability. In doing so, we considered each of the issues as set out at 3.1.1 and 3.1.2 separately, applying the required steps at 3.2-3.5 to each of them in turn.

121. Issue 3.1.1 was recorded in the List of Issues as being that it was alleged that, on or around 15 November, Mr Patel said *"maybe you should go off sick"*.

122. As the respondent's representative emphasised in his submissions and we agreed, it was important that we considered the full words that the claimant recorded in her witness statement that Mr Patel said. What the claimant said in her witness statement (at paragraph 55) was *"maybe you should go off sick if you are unable to do your job".* Based upon the claimant's evidence, we found that what was said to her was what she recorded in her witness statement. There was no evidence which contradicted what the claimant said. We accepted that was said to the claimant by Mr Patel.

123. We also found that the comment was unwanted. The claimant made that clear in her evidence. We accepted that evidence.

124. The next question (issue 3.3) was whether the comment related to the claimant's disabilities? In his submissions, the respondent's representative submitted that it did not. We found that it did. We found that the references to going off sick and to being unable to do the claimant's job, were related to the claimant's disability or disabilities. Her disability or disabilities were the reason why she would go off sick or be unable to do her job. What was said was related to her disability or disabilities.

125. For this allegation we considered issue 3.5 before considering issue 3.4 (that is we considered effect before purpose). We accepted from what the claimant said in her evidence that the comment made did have the requisite effect upon her because that was the evidence that she gave us. However, the harassment test on the effect of conduct, is not simply about what the claimant felt, it also has an objective element. We did not find that it was reasonable for the comment made to have had the relevant effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We found that the comment made was one that a manager may appropriately make. It is important when considering whether it was reasonable for it to have had the requisite effect, to consider both the context in which it was said and the manner. There was no evidence that the comment was made in a particularly negative manner. There was no evidence that it was said in an inappropriate way. We accepted that it was important to consider the full quote as the claimant included in her evidence, rather than the shortened version included in the List of Issues. That full quote explained

why the comment was made. The claimant was unable to provide us with evidence about the conversation in which the words were said, and she could not recall what had been said immediately prior to the comment relied upon. On that basis, we found that it was a perfectly reasonable thing for a manager to say when issues were being discussed about the claimant's ability to work. It was not reasonable for it to have had the requisite effect on the claimant in those circumstances.

126. We then turned to the issue of the purpose of the conduct as set out in issue 3.4. We found that to be a more difficult issue to determine, as we had not heard the evidence of Mr Patel about why he made the comment. In practice, there was little evidence available to us about the purpose of the comment made. On that basis we considered the words in the light of the burden of proof explained in the section on the law above. We concluded that there was insufficient evidence to shift the burden of proof to the respondent and to prove that the purpose of the comment was that required for unlawful harassment. We found that the words said, in and of themselves, did not evidence the requisite purpose. In those circumstances and in the light of the context in which the words were said and the other evidence heard, we did not find that the burden of proof shifted to the respondent.

127. Even had we found that the comment made by Mr Patel had amounted to unlawful harassment, we would have found that we did not have jurisdiction to consider it, as the claim had not been brought within the time required and it would not have been just and equitable to extend time. In relation to the issue of time, the comment was made in or around 15 November 2019. The claim was not entered at the Tribunal until 22 December 2020, that is well over a year after the event. The relevant factors when considering the discretion to extend time on a just and equitable basis would have been: that the claimant's partner had knowledge of time limits for Employment Tribunal claims and had already brought such a claim; he and the claimant had discussed Tribunal claims; the claimant also had access to a trade union official, as she had been accompanied to her appeal meeting by a trade union official; the delay was significant; and the respondent had highlighted that there was some prejudice as a result of the delay in the matter being raised and memories receding. Whilst there was clearly significant prejudice to the claimant if she was not granted a just and equitable extension (being unable to pursue a potentially meritorious claim – albeit in fact we have not found for her), considering all the other factors and the length of the delay we would not have found that it was just and equitable to extend time.

128. The Tribunal next considered all of the relevant issues in the List of Issues as they applied to allegation 3.1.2. That was an allegation that a comment was made at the dismissal meeting on 19 August 2020 by Ms Burns. The claimant alleged that what was said was *“didn’t you really expect that we were going to dismiss you?”.*

129. We found that words along those lines were said by Ms Burns to the claimant, based upon the claimant's evidence. We found that what was said was what the claimant recorded in her witness statement, rather than what was said in the allegation in the list, being “*Didn’t you really expect we are going to dismiss you today?*”. We accepted the claimant's evidence that she recalled exactly what was said because of the importance she attached to it. The claimant was very clear in her evidence that the comment had been made. We do note that Mr Bourne denied that the comment was made, albeit in his evidence he accepted that it was a possibility

that it was said but he could not recall it. For the claimant, it was clear that the comment was one of utmost importance and therefore she recalled it. For Mr Bourne, concerned as he was for the claimant's upset and endeavouring to alleviate it, it was a comment to which he did not attach any importance.

130. We did not find that the comment was made before the claimant was dismissed, as we found that the comment only made sense if it was said after she had been informed that she was dismissed. We found that the comment was made after the claimant had been informed that she was being dismissed and in the light of the claimant's significant reaction to being told of her dismissal. We found that Ms Burns would have said the comment in surprise at the claimant's reaction, in circumstances where a letter had been sent prior to the meeting explaining that dismissal was a potential outcome.

131. In her witness statement, the claimant recounted that the comment was made ironically. She did not really explain exactly what she meant when she said that. We did not have the benefit of hearing Ms Burns' evidence about how the comment was said or intended to be said. However, the Tribunal found that had the comment been made in a particularly sarcastic or negative way, Mr Bourne would have recalled the comment. Whilst we have accepted the claimant's evidence that what was said was what she alleged, we did not accept her statement about how it was said. We particularly note that, at that point in the meeting at which the comment was made, the claimant was very upset and distressed. In those circumstances we did not find her evidence about the nuanced way the words were said to be entirely reliable. We found Mr Bourne to be a truthful and genuine witness who was very concerned for the claimant's health in that meeting and have no doubt that he would have recalled such a comment made in a particularly sarcastic or negative way.

132. Based upon those findings, we did find that the comment made was unwanted conduct based upon the claimant's evidence and her reaction in the meeting. However, considering issue 3.3, we have not found that the comment was related to the claimant's disability. The fact that the comment was made in a discussion about the claimant's health and ability to return to work did not mean that it was related to disability. The fact that the claimant's health also might have resulted in a more significant reaction to the comment, also did not mean that it was related to disability. The comment was an expression of surprise in the light of the claimant's reaction to her dismissal, having been forewarned that it was a possibility in her invite letter. The comment was not related to disability.

133. As we did not find that the comment was related to disability we did not need to go on and find the purpose of the comment or the effect which the comment had. However, had we needed to do so and considering what was said, we would not have found that it was reasonable for the comment said to have had the requisite effect. We also would not have found that the purpose of the comment was that required for unlawful harassment.

Direct disability discrimination

134. In considering the direct disability discrimination claims, the Tribunal considered issues 4.2.1 and issue 4.2.2 separately, and applied each of the steps set out at 4.2-4.5 to each of them in turn.

135. Issue 4.2.1 arose from the events of 13 and/or 14 November 2021 when Mr Hussain took a chair away from the claimant and when she asked about it, said that it was *"not his problem"*. The Tribunal accepted the claimant's evidence about what occurred, having heard no direct evidence to the contrary. As part of that finding, we accepted what the claimant said in her evidence, which was that Mr Hussain said that the chair was his and that was why he asserted he was taking the chair away.

136. In his submissions, the respondent's representative addressed the identity of the relevant comparator for the direct discrimination claim. He submitted that the appropriate comparator would be someone who was not disabled, but who Mr Hussain saw using his chair or stool. We agree with that submission, or at least the relevant comparator would be someone in practice who Mr Hussain perceived to be using his chair or stool (whether he was correct would be immaterial to the comparison). On that basis, we found that Mr Hussain would have conducted himself in the same way to anyone he perceived to be sitting on his chair or stool, irrespective of whether they had plantar fasciitis, depression, or not. There was no evidence that the claimant's depression or plantar fasciitis were the reason for the treatment alleged or for the stool/chair being taken away from her. As a result, we did not find that the claimant's claim for direct discrimination (based on issue 4.2.1) succeeded.

137. In any event, even had we found that the events of 13 or 14 November 2021 amounted to direct disability discrimination, we would have found that the claim had been entered out of time and we did not have jurisdiction to hear the claim. It would not have been just and equitable to extend time. Our reasons for not exercising the discretion would have been the same as those we have explained in relation to allegation 3.1.1.

138. Allegation 4.2.2 was the claimant's dismissal. The claimant alleged that the reason she was dismissed was because of her plantar fasciitis and/or depression.

139. In considering issue 4.2.2 we focussed upon why the claimant was dismissed. We did not find that that the reason for the claimant's dismissal was her disabilities. The claimant's representative accepted that the reason for the dismissal was the claimant's capability. We agree with that. We have no doubt that the reason that the claimant was dismissed was for the very reasons that were evidenced by Mr Bourne, and the reason the appeal was not upheld was for the reasons evidenced by Mr McLeod. Their reasons arose from the restrictions placed on the claimant, her period of absence, and their decision that she was unable to return to work in a role available. Irrespective of the medical condition(s) which the claimant had which had led to her being off work and to the restrictions which applied, she would have been subject to the same decision if the same restrictions had applied. In those circumstances, the claimant's claim for direct disability discrimination did not succeed. The respondent did not dismiss the claimant because of depression. The respondent did not dismiss the claimant because of her plantar fasciitis.

The duty to make reasonable adjustments

140. Issue 5.1 was the first issue in the claim of breach of the duty to make reasonable adjustments. The issue focussed upon when the respondent knew, or could reasonably have been expected to know, that the claimant had the disability or

disabilities. The relevant disability for the purposes of the reasonable adjustment claims, was the claimant's plantar fasciitis. We found that the respondent knew about the claimant's disability, and the substantial disadvantage at which she could be placed as a result, on 12 November 2019 when the claimant walked into the Occupational Health department and saw Ms Duggan. The record of the meeting was provided on 13 November 2019 (217), but the meeting on 12 November was when the respondent was first aware of that condition and the disadvantage suffered.

141. The claimant presented some evidence that she spoke to Mr Patel about her condition and requested a chair. Whilst we accept that the claimant spoke to Mr Patel from a date in or around June or July 2019 about chairs and her feet generally, we did not find that the respondent knew of the claimant's disability and the disadvantage suffered from those conversations, based upon the (limited) evidence we have heard about what was said in those conversations. There was insufficient evidence to show that the respondent either knew or reasonably should have known about the claimant's disability and/or the disadvantage suffered. We did not accept that it was credible that the claimant made dozens of requests to Mr Patel as asserted, that being inconsistent with the other evidence we heard and what was recorded about what the claimant said in subsequent meetings. The claimant's evidence was not sufficiently specific about what was said when she spoke to Mr Patel or how frequently. Knowledge of disability is not imputed just from a request or requests for a chair and complaints about feet generally from an employee required to stand up for the majority of their shift. We found that there was insufficient evidence to conclude that the respondent knew of the claimant's condition (or should have known) prior to the occasion when the claimant visited Occupational Health. We did note, in particular, that the respondent had an Occupational Health Adviser permanently on site available to employees. Whilst we heard from the claimant in her evidence about her difficulty in going to see Occupational Health, there was no evidence that she had been stopped from going to Occupational Health and, once she did so, the respondent was given the requisite knowledge.

142. Issue 5.2 recorded that the provision, criterion or practice ("PCP") which was being considered was a requirement that the claimant stand in order to undertake her work. In practice the position was not nearly as straightforward as appeared from the PCP relied upon. All employees were required to stand for some tasks for some of their shift, and the claimant accepted that was a necessary part of the rotation. That was a PCP applied by the respondent. However, there was not a requirement for all employees to stand for their entire shift, or at least that requirement was not applied to the claimant on the lines upon which she worked.

143. Issue 5.3 asked whether the PCP put the claimant at a substantial disadvantage? The Tribunal accepted that the need to stand for extended periods during her shift, did place the claimant at a substantial disadvantage compared to someone without plantar fasciitis, because her condition caused her pain at the relevant time.

144. The Tribunal considered together the issues of physical features, auxiliary aids and PCPs as set out at paragraphs 5.4 to 5.7. In considering them all, we noted that the date of the claimant's visit to Occupational Health was 12 November 2019, and the date upon which she commenced ill health absence was 21 November.

During that period, as explained in the facts above, it was not entirely clear when the claimant had worked and on what occasions during those shifts the claimant had sought to sit down, had been placed in a position on the line where she could sit down, and/or where there had been chairs unavailable. It was clear from the evidence that there were some chairs available. The claimant suggested that for her shift there were fewer chairs available than for others. Mr McLeod gave evidence that chairs were available, but that they moved around the factory, for example when a line was not operating. Some of the duties had to be undertaken standing up. Some of the duties could be undertaken sitting down. Everybody needed to rotate. After the accident described above, one of the positions where people had previously sat down was a place where they were no longer able to do so for understandable and sensible health and safety reasons. On K1 there were greater opportunities to sit down, but the claimant was unable to work on K1 (albeit it was unclear whether in fact in the period between her visit to Occupational Health and her ill health absence she did so). There was no evidence that chairs were not available on K1 where people were sat down. It was also notable that the Occupational Health recommendation at the time was not that the claimant be provided with a chair, but rather that there be regular changes between sitting and standing, albeit we accepted that it would have been implicit in that advice that a chair should be available where sitting was possible.

145. In reaching our decision on the reasonable adjustments claim, we noted the very short period of time involved. The evidence was not clear about which line or lines the claimant had worked on during that period, whether there had been chairs available when she had reached a location where she was able to sit down, and when one had been unavailable. We did not find there to have been a breach of a legal duty by the respondent during this period based on the evidence that we heard. There was simply no evidence that chairs had not been provided on specific occasions in specific places during the rotation when it would have been reasonable to do so.

146. In relation to this allegation, we also would have found that any breach of the duty was out of time and was not one which we would have had jurisdiction to consider. We would not have found it to have been just and equitable to extend time. Had a breach of the duty had been found, the breach would have necessarily occurred before the claimant commenced ill health absence on 21 November 2021, and for the same reasons already explained in relation to other allegations, the Tribunal would not have found it just and equitable to extend time even had we found that there had been a breach of the duty to make reasonable adjustments. In particular for this allegation, we note that there was a lack of specific evidence about what the arrangements were on each day during the relevant period of time and where the claimant worked, and that lack of evidence was in part due to the delay in the issues being raised and materially affected the cogency of the evidence. Had we needed to consider whether to exercise our discretion to extend time, we would have considered it to have been a factor which would have been relevant to our decision that it would not have been just and equitable to extend time.

147. After the claimant's absence commenced, the respondent did meet with the claimant frequently, did discuss matters with her, and did commit to making chairs available for the claimant following her return to work when she needed to sit down and was able to do so. We heard no evidence that was inconsistent with the

commitments that the respondent made. We found that the respondent was prepared to make, and committed to making, the reasonable adjustments sought after her absence commenced and had she returned to work.

148. To the extent that the claimant sought to be able to sit down more frequently than was possible based upon the lines upon which she worked and the locations where sitting down was possible, the Tribunal did not find that providing a chair or the opportunity to sit down on other lines or in other places would have been a reasonable adjustment. The Tribunal accepted Mr Bourne and Mr McLeod's evidence about the reasons why they could not accommodate all of the claimant's required adjustments recommended by the respondent's occupational health advisor on the lines available, and on that basis would not have found that providing the claimant with a chair or the opportunity to sit down more frequently than they were able would have been a reasonable adjustment. The arrangements for the respondent's lines were carefully thought-through. We entirely understood and accepted the need for rotation to protect all employees' health and accepted that a step which stopped or materially curtailed such rotation for other employees would not have been a reasonable adjustment. We accepted the evidence we heard from both Mr Bourne and Mr McLeod which confirmed that allowing someone to sit down at the place where there had been the accident was not appropriate/reasonable for health and safety reasons. To the extent that the claimant required to be able to sit for longer than was possible, we accepted the respondent's evidence that would not have been a reasonable adjustment.

Summary

149. For the reasons explained above, the Tribunal did not find for the claimant in any of her claims. The claimant did not have the length of continuous employment required to claim unfair dismissal. For the reasons explained, the claims for disability discrimination and harassment did not succeed.

Employment Judge Phil Allen

Date: 6 December2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 11 December 2023

FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix
List of Issues

1. Employment status

1.1 Was the claimant working under a contract of employment and therefore an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996? During what period was the claimant working under a contract of employment.

2. Unfair dismissal

Jurisdiction

2.1 Did the claimant have the requisite qualifying period of employment per Section 108(1) Employment Rights Act 1996 (ERA) so as to bring a claim of unfair dismissal.

2.2 Was the claimant dismissed for a potentially fair reason in accordance with Section 98(1) of the ERA. The respondent submits that the claimant was dismissed for the potentially fair reason of capability.

2.3 Did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant? This is to be determined in accordance with equity and the merits of the case, Section 98(4) ERA.

2.4 Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances.

2.5 If the claimant's dismissal was unfair is the claimant entitled to a basic award and/or compensatory award and if so should there be:-

(a) any reduction to the compensatory award on the basis the claimant has failed to take all reasonable steps to mitigate her loss;

(b) any reduction or limit in the award to reflect the chance that the claimant would have been dismissed in any event and that any procedural errors accordingly make no difference to the outcome in accordance with Polkey.

(c) any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code.

(d) any reduction to account for sums received by the claimant following her dismissal.

Disability Discrimination

2.6 Were all the claimant's complaints under the Equality Act 2010 presented within the time limits set out in Sections 123(1)(a) and (b) of that act? Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and//or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a just and equitable basis and when the treatment complained about occurred.

2.7 The respondent has conceded that the claimant is a disabled person by reason of Plantar Fasciitis and Depression.

3. Harassment related to disability (Equality Act 2010 section 26)

3.1 Did the respondent do the following:

3.1.1 On or around 15 November did Mr Patel say "maybe you should go off sick";

3.1.2 Was a comment made "didn't you really expect that we were going to dismiss you";

3.2 If so, was that unwanted conduct?

3.3 Was it related to disability?

3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

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

4.1 The claimant has Plantar Fasciitis and Depression and she compares herself with people who do not.

4.2 What are the facts in relation to the following allegations:

4.2.1 On 13 November Mr Hussain took a chair from her which an occupational health advisor had advised that she should have. The chair was taken the following day on 14 November 2021 as well. Mr Hussain having taken the chair indicated that it was "not his problem". She was forced to stand which aggravated her condition.

4.2.2 Her dismissal was a direct act of discrimination based on her disability as the respondent would not allow her to return to work.

4.3 Did the claimant reasonably see the treatment as a detriment?

4.4 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability was or would have been treated? The claimant relies on a hypothetical comparison.

4.5 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

4.6 If so, has the respondent shown that there was no less favourable treatment because of disability?

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

5.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

5.2.1 A requirement that the claimant stand in order to undertake her work;

5.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it aggravated Plantar Fasciitis?

5.4 Did a physical feature, namely the lack of a chair, put the claimant at a substantial disadvantage in that standing aggravated her condition.?

5.5 Did the lack of an auxiliary aid, namely a chair, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it aggravated her condition?

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

5.7 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

5.7.1 The provision of a chair as indicated by the occupational health report;

5.8 By what date should the respondent reasonably have taken those steps?

6. Remedy for discrimination or victimisation

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

6.2 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

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

6.9 Did the respondent or the claimant unreasonably fail to comply with it?

6.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?