



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss I Broma

**Respondent:** Bakkavor Foods Ltd t/a Bakkavor Desserts Highbridge

**Heard at:** Bristol

**On:** 25, 26, 27 & 28 April 2017  
and 25 May 2017

**Before:** Employment Judge Mulvaney  
Ms J Cusak  
Ms J Le Vaillant

## Representation

Claimant: In Person

Respondent: Mr S Harding, Counsel

# JUDGMENT

The unanimous judgment of the tribunal was that the claimant's claims of unfair dismissal and of disability discrimination (direct discrimination under s13 Equality Act, failure to make reasonable adjustments under s20 Equality Act and discrimination because of something arising as a consequence of her disability under s15 Equality Act) did not succeed and were dismissed.

# REASONS

1. By a claim form dated 19 February 2016 the claimant brought claims of unfair dismissal and disability discrimination following the termination of her employment on the 2 November 2015.
2. The respondent is a food manufacturer, producing desserts for major retailers. The respondent employs 500 people at its Highbridge site on a rolling four shift programme, approximately 35 of whom work on the night shift. The claimant was employed at the respondent's Highbridge site as a night shift Production Operative. She reported to Jordan House, Night Manager.
3. The Tribunal heard evidence from the claimant, Mr Oskars Kuzmins, a former colleague and friend of the claimant's and for the respondent from Mr House, Night Manager and from Mr Anthony Ward, Operations Manager. A witness statement was provided for Mr Stephen Murphy, Head of Site Operations, who heard the

claimant's appeal against dismissal. Mr Murphy did not attend the Tribunal and that impacted on the weight that the Tribunal attached to his evidence.

4. The issues that the Tribunal had to determine were agreed between the parties and were as follows:

#### **Unfair Dismissal**

5. What was the reason for the dismissal? The respondent asserts that it was for a reason related to capability, a potentially fair reason.
6. Did the respondent have a genuine belief in the claimant's lack of capability on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?
7. Was the decision to dismiss a fair sanction, that is, within the range of responses open to a reasonable employer when faced with those facts?
8. In the event that the respondent's procedure was unfair, could the respondent prove that had it adopted a fair procedure that the claimant would have been fairly dismissed in any event, and if so to what extent and when?

#### **Disability Discrimination**

9. It was conceded by the respondent that the claimant's back condition amounted to a disability as defined under s6 Equality Act

#### **S15 Equality Act**

10. Was the claimant unfavourably treated because of something arising as a consequence of her disability?
11. The claimant asserts that:
  - 11.1. Her dismissal amounted to unfavourable treatment
  - 11.2. Her dismissal was because she could not stand for long periods of time and because of her absence, both of which arose as a consequence of her disability.
12. The respondent did not dispute the claimant's assertions but contended that the claimant's dismissal was justified because it amounted to a proportionate means of achieving a legitimate aim.
13. The aims that the respondent relied upon were
  - 13.1. Fair employment for all staff
  - 13.2. The need to have productive members of staff on its production lines.

#### **S20 Equality Act**

14. The claimant claimed that the respondent failed in its duty to make reasonable adjustments.
15. The claimant asserted that the respondent applied the following provisions, criteria or practices:
  - 15.1. The requirement to stand while working
  - 15.2. No rotation of machinery

- 15.3. No chairs were permitted on the factory floor
  - 15.4. No more than statutory breaks were permitted
  - 15.5. There was a requirement to go through competitive interview process for redeployment due to disability reasons
  - 15.6. No trial periods were permitted for alternative positions through the company
  - 15.7. The requirement to stay within certain absence triggers.
16. The claimant asserted that these requirements placed her at a substantial disadvantage because of her disability, causing her to be unable to work and leading to her dismissal.
17. The claimant asserted that the following adjustments could have been made:
- 17.1. Sitting during work
  - 17.2. Rotating with the machinery
  - 17.3. Having a chair on the shop floor
  - 17.4. Regular breaks
  - 17.5. Being offered a trial position without an interview
  - 17.6. Having a higher trigger for absence rates

### **S13 Equality Act**

18. It was unclear whether the claimant was asserting that her dismissal was less favourable treatment because of her disability that is an act of direct discrimination under s13 Equality Act. In the circumstances it was agreed that a claim under s13 would be considered by the Tribunal.

### **The Tribunal made the following findings of fact:**

19. The claimant is of Latvian origin and required the services of an interpreter at the Hearing. Although it appeared that the claimant could understand some of the questions put to her before they were interpreted, her spoken English was limited.
20. The claimant suffered from back pain early on in her employment with the respondent, and the condition deteriorated during her employment. The claimant's period of continuous employment with the respondent started in February 2011 and by the time of her dismissal on the 2 November 2015 she had worked for the respondent for four years.
21. The claimant worked on the respondent's night shift production line in its Low Risk area from the commencement of her employment. The Low Risk area operated in normal temperatures, whereas the High Risk area operated in cooler temperatures. The respondent operated four production lines in the Low Risk area on the night shift: the Rademaker line, the manual line, the autostomper/smart line and the offline. There were on average 5 operatives including a Line Leader working on each line who worked standing next to it. All lines apart from the Rademaker line required operators to work standing next to the lines in relatively static positions throughout their shifts. The Rademaker line was more automated and there was more opportunity for operators to change position but there were some lifting jobs (scooping and stamping crumb) involved in it. The claimant worked a 12 hour night shift from 6pm to 6am and operatives were generally allowed two 30 minute breaks during that period with additional short breaks for bathroom visits and to get a drink. Additionally cleaning down of the lines between production runs took about 20 minutes and provided respite from the static operation of the production lines.

22. Up to February 2012 the claimant had worked principally on the Rademaker line which allowed her some flexibility of movement. In February 2012 she was moved to the manual line, which was more static. The claimant wrote to the respondent on 12 March 2012 (92) informing it about the impact of her move to the manual line on her back pain.
23. Mr House met with the claimant on the 22 March 2012 to discuss her letter and told her he would look into a referral to Occupational Health for her (94). In the meantime the claimant remained on the manual line. The claimant then wrote to Dr Chitty, her GP, asking for his assistance in making recommendations to her employer (96). After examining the claimant, Dr Chitty wrote to the respondent on the 12 April 2012 recommending a return to the production line that was less static (97). The claimant was then absent from work from 25 April – 1 May 2012.
24. The respondent's referral to Occupational Health resulted in an assessment of the claimant being carried out by Sara Monaghan on the 21 May 2012. Ms Monaghan's report dated 24 May 2011 (104) included the following observations:
- the claimant had good range of movement and was pain free at the appointment and fit to continue her current role;
  - Although the claimant's GP was supporting a return to the Rademaker line, OH opinion was that the frequent bending and positions on that line might impact on the claimant's back condition in the long term;
  - Rotation of tasks every two hours would assist;
  - Manual handling of more than 5kgs should be avoided;
25. A meeting took place between the claimant, an HR representative and Mr House on the 28 May 2012 to discuss the OH report and the notes of that meeting recorded that 2 hour task rotation was discussed (106). The meeting was adjourned due to difficulties in communication and to allow the claimant to attend with Mr Kuzmins to assist with translating. Before the meeting was reconvened the claimant was absent from the 5 June 2012 – 18 June 2012 with back pain. She saw Ms Monaghan from OH again on the 5 July who reported (110):
- That the claimant said her back pain had been more manageable lately, and that she had been rotating all tasks on the Rademaker;
- that in OH opinion
- The claimant was fit to attend work and carry out all tasks;
  - that scooping and stamping on the Rademaker might impact on the claimant's back in the long term;
  - rotation of all tasks every 2 hours would assist;
  - although the claimant experienced back pain after one hour of standing, rotation of tasks every hour was difficult to accommodate and the claimant might need to manage the pain with medication.
26. The claimant met with Mr House and HR on the 12 July 2012, with Mr Kuzmins assisting as an interpreter, to discuss the report. The claimant said that she did not mind being rotated but would like to stick to one line. She was working on the Rademaker line at the time and she found that that particular line provided sufficient variety of movement to avoid back pain. The claimant was doing some paperwork tasks in addition to her production operative duties and she asked if she could continue with those. Mr House made clear to her that assisting with paperwork would not continue. In his evidence to the tribunal Mr House said that paperwork duties were for the supervisors and senior line leaders who carried responsibility for the accurate completion of paperwork. We found as a fact that in view of the importance to its business of ensuring that paperwork which related to production

dates, sell by dates etc. was accurate, it was reasonable for the respondent to allocate this responsibility to the more senior staff. It was agreed at the meeting that the claimant would remain on the Rademaker line for the time being as that was what she wanted. The situation would be kept under review and the claimant was encouraged to speak to Mr House if she experienced more pain or had any questions (112 – 114).

27. Mr House's evidence was that he told the claimant that she must take some responsibility for ensuring that job rotation was implemented. Mr House confirmed that he had informed the supervisors and line leaders on the factory floor of the need for the claimant to rotate tasks. He was not often present in the Low Risk area of the factory floor himself but he said that if he saw the claimant he would ask the claimant how she was and she would say that she was fine. The claimant's evidence at the hearing was that she asked to move "thousands of times" but was refused. The claimant had not made this assertion previously in the proceedings and was unclear about whom she had asked and when she had been refused. There was no evidence that she spoke to Mr House after the meeting on the 12 July 2012 to inform him that the agreed rotation was not taking place. The notes of the meeting of the 12 July 2012 recorded the claimant saying that she was not always allowed to move tasks every 2 hours or that if she was moved to another line she was in reality in the same position, but we found that she did not inform Mr House between 13 July 2012 and 25 September 2013 that the health advisors' recommendations were not being adhered to.
28. The claimant was absent with back pain from the 19 – 27 July 2012 and the respondent's short term absence procedure was triggered resulting in a letter being sent to the claimant setting up a meeting under Stage 1 of that procedure on the 8 August 2012 (119). This was consistent with the respondent's absence management policy, the claimant having had three periods of absence within a 6 month period (36). The claimant's GP wrote to the respondent on the 29 August 2012 passing on the claimant's physiotherapist's recommendations that the claimant should change job roles throughout the day and have an opportunity for a short rest and to change position to relieve pressure on her spine. There was no recommendation at this stage that the claimant be provided with a chair.
29. There was no documentary evidence to indicate any problems for the claimant in relation to her back pain at work between the end of August 2012 and the 25 September 2013 when the claimant again went off work with back pain and did not return to work until the 17 January 2014. On the 4 November 2013 Mr House wrote to the claimant to arrange a meeting under the sickness absence procedure (132). The meeting took place on the 21 November 2013 and the claimant informed the respondent that she was awaiting the outcome of an MRI scan and that she may need surgery on her back. She was not in a position to return to work. Mr House wrote to the claimant after the meeting and informed her that a Stage 2 meeting under the absence procedure would be held with her if she was still absent after a further three months and that medical evidence would be sought at that stage with her consent (136). The claimant's evidence was that she felt pressurised by the respondent's actions under the absence procedure and that this led to her returning to work sooner than she might otherwise have done. We found that the respondent was acting under its procedures to monitor the claimant's sickness absences and was not acting oppressively in so doing.
30. A letter dated 20 December 2013 was sent to the claimant by Mr Gill, an Orthopaedic Physiotherapy Practitioner, giving the results of the MRI scan which indicated lumbar disc problems and proposed treatment through physiotherapy and spinal root block injection. The letter stated that:

*'it would be appropriate if her work were able to support her with better seating to allow her to sit in a more upright position ideally with regular breaks so she is able to stand and move around without having to sit statically for more than 20 -30 minutes at a time, even if this is just a 1- 2 minute movement based break until physiotherapy and the root block hopefully address some of her symptoms". (138).*

Mr Gill's report was provided to the respondent by the claimant.

31. It was the respondent's evidence that a risk assessment had been carried out into whether production operatives could be allowed to sit whilst doing their work on the production lines. The risk assessment was carried on the 23 February 2013 and concluded that the introduction of chairs into the production areas would cause congestion in the area, increasing the risk of accidents and blocking emergency escape routes. In addition many tasks on the production line were not compatible with sitting down. (127 – 128). In the light of this assessment the respondent did not consider that seating could be provided to the claimant in the production area. Although Mr Gill's report of the 20 December 2013 recommended allowing the claimant to sit to do her work, his reports indicated that remaining seated for extended periods caused the claimant as much back pain as remaining standing for long periods. (138) The provision of a chair for the claimant, even if it had been possible, would therefore not have been a complete solution, as the claimant needed to alternate between standing and seated positions and not remain static in either.
32. On the 9 January 2014, prior to her return to work, the claimant was seen by Stuart Crossman of the respondent's Occupational Health Service. He informed the respondent of the claimant's condition as described by Mr Gill and stated that the claimant's GP had recommended a return to work for a maximum of 6 hours a day. Mr Crossman's report included the following observations:
- main triggers for the claimant's back pain are lifting weights in excess of 2 -3 kilos
  - static posture for a long period aggravates the claimant's symptoms
  - claimant indicated that within her job she can change movements and not remain static

Until a further assessment following the root block injection scheduled for the 14 February 2014, Mr Crossman recommended as follows:

- return to work on 6 hours per day as recommended by the GP
  - regular breaks of 5 to 10 minutes every 1½– 2 hours
- (140 – 141)

33. The claimant returned to work on the 17 January 2014. Her evidence was that during an initial period of working the reduced hours recommended by her GP and Mr Crossman she only had one break of 35 minutes which did not conform to Mr Crossman's recommendations. Her evidence was also that she was not rotated around tasks as had been recommended. There was no evidence that the claimant had complained about this to Mr House and Mr House's evidence was that so far as he was aware Mr Crossman's advice had been acted upon. There was no evidence of any written communication about adjustments to the claimant's work from HR or Mr House to those acting as supervisors or line leaders on the factory floor. Mr House's evidence was that he spoke directly to the supervisors and line leaders to pass on the recommendations. We found as a fact that Mr House was concerned to ensure that adjustments were made in accordance with the advice of OH but that there was a lack of written communication and no clear line of

responsibility for checking and monitoring the situation. We concluded that it was not made clear to the supervisors and line leaders the importance of ensuring that the recommended adjustments were adhered to. The claimant however had been informed that she must raise any issues with Mr House and she did not do so.

34. The claimant increased her hours back to 12 per day on the 5 April 2014 and at that point was given 3 breaks per 12 hour shift on the recommendation of her GP, one more break than was given to other production operatives. Her evidence was that the task rotation recommendation was still not implemented by the respondent and she was working the full shift on one machine.
35. We found as a fact that in 2014 adjustments were made to accommodate the claimant in her role. She was allowed a period of working reduced hours; she was provided with an extra extended break in addition to the two which other operatives had; she was allowed in addition to take short breaks to ease her back; she was rotated around tasks on the production lines to the extent that this was possible without disrupting the process. It was apparent that whilst such adjustments were feasible in the short term, the claimant's condition was long term.
36. There was a dispute on the evidence about whether the claimant was rotated on the production lines. The claimant said that this did not happen, Mr House said that rotation between the lines was facilitated as much as it could be within the constraints of keeping the production lines running. We accepted Mr House's evidence that in 2014 due to the loss of major contracts with Sainsbury's and the Co-Op there had been a downturn in the respondent's profitability. This had led to reductions in numbers of staff working on the lines and a recruitment freeze. Accommodating the adjustments recommended for the claimant was difficult. Some lines had to be stopped if an operative was on a break as all were required to be in place to keep the line going. Staff on the Rademaker line needed to be able to do all of the tasks on the line. The claimant could not all of the tasks on the line for example the crumb scooping and stamping. We found that the respondent allowed such movement on the production line as was compatible with not causing undue interruption to the production process and within the limitations on the claimant's capacity to lift.
37. On the 15 May 2014 Mr Crossman met with the claimant at work on the factory floor and produced a report addressed to Emma Corcoran, the respondent's Occupational Health Coordinator, and copied to two members of HR. He reported that the claimant had had a spinal root block injection and her pain levels had reduced. He made the following observations:

- the claimant's activities on the smart line meant that she worked in a static standing posture;
- Work on the Rademaker line involved a greater variety of movement which the claimant found useful although they involved loading crumb into the hopper on a regular basis which aggravated the claimant's symptoms;
- The supervisor had explained to Mr Crossman that chairs were not allowed on the line for health, safety and hygiene reasons;
- The claimant had indicated that she did not wish to work in the High Risk area as the cold temperature would aggravate her symptoms;

Mr Crossman recommended that the claimant be allowed to:

- take regular breaks every 3 hours;
- not lift weights above 4 kilos;
- not work in any static posture for more than 2 hours before rotating to an alternative activity;

- not fill the hopper on the Rademaker line.

Mr Crossman discussed his recommendations with the claimant's supervisor, Luis Pereira, who agreed to implement them (144 – 145).

38. On the 6 August 2014, Mr Crossman wrote again to Ms Corcoran having seen the claimant on that date and said that the claimant had said that she was not currently rotating between different tasks and that this was exacerbating her symptoms. Mr Crossman also wrote to the claimant's physiotherapist asking for specific advice on adjustments that might assist the claimant with performing her role (146 – 148).
39. Ms Corcoran emailed Mr House on the 8 August 2014 to enquire why the recommendations made by Mr Crossman in his letter of the 15 May 2014 were not being followed (150). Mr House's response to Ms Corcoran on the 12 August 2016 was that adjustments and allowances had been made for the claimant but that they had caused disruption as well as ill will amongst the team (150). There were not enough different roles to comply with Mr Crossman's recommendations. Mr House's evidence to the Tribunal was that, in view of the loss of some major supply contracts, the respondent had had to reduce its employee numbers. He required the remaining staff to be as flexible and versatile as possible. It was not possible to make all of the adjustments required for the claimant whilst maintaining an efficient production line.
40. On 4 September 2014 a meeting took place between the claimant, Mr House, Ms Corcoran and Mr Crossman at which the claimant's condition and options for adjusting her work were discussed. The claimant was on pain medication for her back, nevertheless she experienced significant levels of pain when standing for long periods. She was to have a further assessment by the Orthopaedic Physiotherapy Practitioner on the 22 September 2014 and although she might receive a further injection to treat the pain, this had not effected a long term improvement when done previously. The meeting notes (154) recorded that the adjustments currently being made for the claimant were:
- for her to have 3 breaks rather than 2 per shift,
  - not to lift weights of more than 4kg
  - being rotated as much as possible on the line
  - working primarily on the auto stomper line which was the right height for the claimant.

At the meeting other options were discussed including:

- Whether a chair could be provided in the production line
- Whether the claimant could work different hours or shifts
- Whether the claimant could move from Low Risk to High Risk work
- Whether the claimant could be considered for a QA Assistant role

It was agreed that the claimant would move to doing 2 out of four 12 hour shifts for a short period before a further review.

41. Of the options discussed the only one taken forward was the option to consider the claimant for the QA Assistant role. The respondent relied on the risk assessment in relation to the chair question and did not consider whether a single chair introduced into the manufacturing area for the claimant might be a possibility. The claimant was not prepared to work different hours or shifts within the role she currently carried out, although her evidence was that she may have considered a change if a different role had been available. The claimant did not want to move to the High Risk work due to the cold temperature in that area adversely affecting her back



pain.

42. On the 26 November 2014 Mr Crossman wrote to the respondent having seen the claimant at work. In the light of the claimant's physiotherapist's recommendations Mr Crossman asked if a seated role could be found for the claimant for part of her shift, rotating between 2 hours of standing and 2 hours of sitting (170). The claimant was signed off sick from the 1 December 2014. She was signed fit to return on the 15 February 2015. Her fit note advised that she should work amended duties and hours, recommending: '4 days 1 week, 12 hr shift work, 2 hrs standing then 2 hrs sitting alternating, max lift 4 kg' (297).

43. Mr Joliffe of the respondent's HR passed this recommendation on to Mr House who said he could not accommodate the recommendation as there was no seated work for the claimant for 6 hours of a 12 hour shift. As a consequence, the respondent did not make provision for the claimant to return in accordance with the Mr Crossman's recommendations. On the 20 March 2015 Sue Cox, HR Manager, wrote to the claimant informing her that it could not accommodate the adjustments recommended by the claimant's GP for the following reasons:

*"We are not able to provide seats within the manufacturing areas due to health and safety and hygiene concerns*

*There are no office roles available on the night shift that could accommodate this adjustment*

*We are not able to accommodate a situation where you work 2 hours in manufacturing and then come out of the factory for 2 hours (to take a seated break for example) as it would be difficult to fill your position on the production line in this way."*

44. Ms Cox invited the claimant to a meeting with her and Mr Ward, the Operations Manager, on the 25 March 2015 to discuss her condition and the possibility of a return to work. If a return to work date could not be agreed the respondent would seek medical advice either from the claimant's doctor or OH and might have to consider terminating the claimant's employment. (177 – 178).

45. At the meeting on the 25 March 2015, the notes recorded that the claimant said that she could not do 12 hours standing in one position. Two hours was the most she could do in any one position. She said that she thought her doctor would say that she was not capable of doing the job she was employed to do. Other options were considered: the claimant suggested that she could work in New Product Development but the respondent's evidence was that that work was being relocated to Newark, a location approximately 180 miles away from Highbridge, which the claimant agreed was too far for her to travel. The claimant said she would be interested in the Quality Assurance (QA) role that had been mentioned previously (179 – 180).

46. Ms Cox wrote to the claimant on the 30 March 2015 confirming what had been said at the meeting and inviting the claimant to attend a meeting with the QA Manager to assess her suitability for working in the QA Department (181). As part of her assessment for the QA role the claimant was asked to take a literacy assessment and had a meeting with the QA Manager. The outcome of the literacy assessment was that the claimant's English did not reach the standard required for the role. The outcome of the meeting with the QA Manager was that the claimant's attitude and skills were not suitable for the role. The claimant disputed the assessment outcome, but we found that the claimant's spoken and written English was limited

from evidence in these proceedings and that report writing and good communication with others was a required part of the role. We also found that the claimant's attitude at the hearing had on occasions been confrontational and discourteous. She frequently did not stop talking to listen to her interpreter when he was interpreting what witnesses, counsel or the Employment Judge were saying. In her oral evidence the claimant said she had had a difference of opinion with the QA Manager about where responsibility lay for an incident which gave rise to a customer complaint and believed this was the reason she was not offered the role. We found that the reason given by the respondent for the claimant not being offered the job was the standard of the claimant's English and her attitude and that its conclusion that she was not suitable for the role was reasonable.

47. With the claimant's consent the respondent wrote to the claimant's GP and to Dr Daffeda the Orthopaedic Physiotherapy Practitioner on the 18 May 2015 asking for an update on the claimant's condition. Dr Daffeda replied with a report dated the 25 August 2015 but not received by the respondent until the 8 September 2015 (195 -196). Dr Daffeda said that the prognosis for the claimant was difficult to predict but:

*"the fact that she has had these symptoms for 2 years and has shown minimal improvement with a variety of conservative management strategies is suggestive".*

He went on:

*"Return to work- I do not believe that this lady is capable of performing her designated duties at this time as prolonged standing postures undoubtedly make her symptoms worse. As mentioned previously we would recommend a phased return on modified duties and reduced hours which will hopefully facilitate a successful return to work. Should this not be possible, it is unlikely that she will be able to return to her full duties any time within the near future."*

48. The claimant's fit note from her GP dated 10 September 2015 provided a more limited recommendation for amended duties than the one dated 15 February 2015: '6 hour shifts, 1 hour standing, 1 hour sitting, alternating'. The respondent then asked the claimant to attend an appointment with Dr Reynolds, an Occupational Physician, on the 7 September 2015. Dr Reynolds provided his report on the 8 September 2015 (202- 203). His opinion was that the claimant would not be able to return to her role in the foreseeable future. He suggested that consideration be given to redeployment for a different role if that was feasible and queried whether it was possible for operatives to work on the production line in a seated position. He concluded:

*"If adjustments in respect of working on the production line are not possible, and there is no redeployment option, then realistically, it may not be possible for this lady to continue working for the company."*

49. The claimant was invited to an ill-health capability meeting on the 21 September 2015. She was informed that one of the outcomes might be the termination of her employment and she was invited to bring a representative to accompany her at the meeting (205).

50. The meeting was conducted by Ms Mercer-Mathews from HR and Mr House attended. It had been intended that Mr Ward would attend the meeting but he was unable to and he asked Mr House to attend in his stead. The claimant said that she was considering whether to have an operation on her back which would require at least 12 months recovery time. She said that sitting or standing in the factory for

more than one hour resulted in considerable pain. There was some discussion of alternative work options but Mr House indicated that there were no suitable alternatives.

51. On the 25 September 2015 Mr Ward wrote to the claimant informing her that the respondent had decided to terminate her employment on grounds of ill-health/capability (212 -213). This decision was made in the light of the fact that the claimant had been absent from work due to ill health since 1 December 2014, that she was still unable to sit or stand for periods of longer than an hour and the medical advice had not been able to indicate when or if that might change. Mr Ward said that the claimant had been assessed for the QA role but had not been suitable and that it was not possible to provide a chair in the production line.
52. Although Mr Ward had not attended the meeting with the claimant on the 21 September 2015, he, rather than Ms Mercer-Mathews or Mr House, made the decision to dismiss the claimant. He spoke to Ms Mercer Mathews but did not speak to Mr House prior to reaching his conclusion. Mr House acknowledged that he had not given any further consideration at the time as to whether it would be possible to allow one chair into the production area. He relied on the risk assessment which had concluded that chairs in the production area would be a health and safety risk.
53. At the Tribunal hearing, Mr Ward's evidence was that when making the decision to dismiss he had considered in his own mind whether it would be possible to allow one chair into the production area and had concluded that it was not. The gaps between the four production lines were narrow and were required to accommodate people walking and large tubs of ingredients being wheeled up and down them. A chair would obstruct that flow of movement and obstruct emergency exits. Additionally the production lines had no space under them so that being seated next to them with legs against the line would mean that the work on the line would be difficult to reach. The height of the lines varied but most lines were of kitchen worktop height so an ordinary chair would not be the correct height. Most of the work on the line required some movement to fetch goods so that being seated for extended lengths of time was not feasible. We found as a fact that provision of seating at the production line was not consistent with health and safety or with the efficient running of the line. We found that Mr Ward had considered the possibility and rejected it.
54. The claimant appealed the respondent's decision on the 8 October 2015. The appeal was heard by Stephen Murphy, Head of Site Operations. Mr Murphy was not at the Tribunal to give evidence although he had provided a statement. The appeal meeting notes in the bundle showed that there was discussion of the claimant's health and of potential alternative roles. The claimant accepted that she could not work in production and Mr Murphy went through other possible roles, but because of the claimant's limited English and restriction on prolonged sitting or standing there was nothing suitable. Mr Murphy confirmed the dismissal.

## **Conclusions**

55. In reaching its conclusions the Tribunal considered all the evidence it heard and the documents to which it was referred and which it considered relevant. It also had regard to the submissions of the parties. Having taken oral submissions from the parties on the last day of the hearing: 28 April 2017, the Tribunal subsequently received written submissions from the claimant on the 2 May 2017. Although the claimant had been given additional time at the hearing to prepare her oral submissions and the written submissions had clearly been prepared by legal advisors who had not been present at the hearing to hear the evidence, we

nevertheless read the written submissions. They did not alter our conclusions on the basis of the evidence we had heard and so we have not sought the respondent's comments on them which we would otherwise have done.

56. We considered first of all the claimant's disability discrimination claims.

**S 20 Equality Act 2010, Failure to make reasonable adjustments.**

57. s 20 Equality Act imposes a duty on an employer:

*.....where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.*

58. The EAT in the case of **Environment Agency v Rowan 2008 ICR 218** stated that in a claim of failure to make reasonable adjustments, a Tribunal must consider:

- The provision criterion or practice (PCP) applied by the employer
- the identity of non-disabled comparators (where appropriate)
- the nature and extent of the substantial disadvantage suffered by the claimant.

59. In this case the claimant identified the following PCPs

- (a) The requirement to stand while working
- (b) No rotation of machinery
- (c) No chairs were permitted on the factory floor
- (d) No more than statutory breaks were permitted
- (e) There was a requirement to go through competitive interview process for redeployment due to disability reasons
- (f) No trial periods were permitted for alternative positions through the company
- (g) The requirement to stay within certain absence triggers.

60. The claimant conceded that in respect of (d) the respondent had permitted her to have three breaks rather than the statutory 2 allowed to other production operatives so she did not pursue this point.

61. We concluded that the respondent did apply the provisions (a) and (c) that operatives working on the production line must stand whilst working and that chairs were not permitted on the factory floor. Because of her back condition, this put the claimant at a substantial disadvantage in comparison with others who did not have her disability because she was unable to stand continuously for periods of more than one hour and could not take seated breaks in the manufacturing area or work in a seated position. Ultimately this meant that the claimant could no longer work for the respondent and led to her dismissal.

62. In relation to (b): no rotation of machinery, which is perhaps more properly expressed as a provision that production operatives remain working on one production line without rotation, we concluded that the respondent did not apply this provision without any flexibility, but it did apply it to the point that it disadvantaged the claimant. The claimant's back condition meant that remaining in one position for an extended length of time (more than one hour) caused her significant pain. The respondent allowed some rotation between jobs on the production line and between different production lines but not on the regular basis suggested by the

medical advisors. Because of her back condition, this put the claimant at a substantial disadvantage in comparison with others who did not have her disability because she was unable to remain in a static position for periods of more than one or two hours. Ultimately this meant that the claimant could no longer work for the respondent and contributed to her dismissal.

63. In relation to (e), we found no provision applied that employees must go through a competitive interview process for redeployment due to disability reasons. The claimant was put forward and assessed for the QA role. She did not undergo a competitive interview process. She was required to demonstrate her suitability for the role by undertaking a literacy test and having an informal interview with the QA manager. These provisions did not put her at a substantial disadvantage because of her disability compared with others without her disability, who would have needed to demonstrate suitability for the role in the same way.
64. In relation to (f): no trial periods were permitted for alternative positions through the company, we found no such provision was applied by the respondent. The only alternative position identified by the respondent was the QA role for which the claimant was found not to be suitable.
65. In relation to (g): the requirement to stay within certain absence triggers, we found that once the claimant's absence was deemed to be long term, the respondent exercised its discretion in relation to managing the claimant's sickness absence. Although it applied its absence procedure triggers in 2012 after three absences by the claimant, subsequently, in 2014, the respondent applied its long term sickness procedures. These did not have absence triggers, allowing the respondent discretion to manage long term absences on an individual basis. We concluded that the respondent's provisions in this regard did not place the claimant at a substantial disadvantage because of her disability.
66. We then considered the question as to whether it was reasonable of the respondent to take action to avoid the disadvantage suffered by the claimant in relation to the requirements to work standing, the prohibition on seating in the production area and the limited rotation on the production lines. The relevant adjustments suggested by the claimant were:
  - (a) Sitting during work
  - (b) Rotating with the machinery
  - (c) Having a chair on the shop floor
67. We considered whether the respondent should reasonably have allowed the claimant to sit whilst doing her work. We concluded that such an adjustment would not have been practical in the production line environment where the claimant worked. There was limited gangway space between the production lines along which operatives had to be able to walk and to push large wheeled tubs. A chair would have obstructed the flow of movement. This would have impacted on production and on health and safety creating trip hazards and obstructing access to fire doors as identified in the risk assessment. In addition, there was no space for legs under the production lines which would have meant that the claimant would have been awkwardly positioned against the line having to stretch her arms across her legs to reach the line. The lines were not all the same height so one chair would not have suited all lines and in order to accommodate the claimant's need for rotation, the chair would have to have been moved from line to line.
68. We concluded that even if it had been practical to allow the claimant to sit whilst working, it would not have been wholly effective in removing the disadvantage as the claimant could not remain seated for more than an hour without suffering severe pain. She would then need to stand for an hour at which point the chair

would have been superfluous and in the way. The claimant's impact statement indicated that movement whilst in a seated position could also cause back pain and we were not satisfied that this adjustment would have enabled the claimant to carry out her duties on a 12 hour shift.

69. We then considered whether the respondent should reasonably have allowed the claimant to rotate between jobs on production lines and between production lines. On the evidence we found that the respondent had provided some rotation on the production lines for the claimant. However there was limited rotation that could be provided. Four of the lines required the operatives to remain static whilst they worked on them. The claimant could be moved from one of these lines to another but this meant that she moved from one static position to another static position, which would not have alleviated her back pain. The Rademaker line allowed operatives some movement whilst working on the line but operatives on that line had to be able to carry out some lifting which the claimant could not do. Such rotation as the respondent could allow whilst maintaining a working production line had not enabled the claimant to continue performing her role as production operative.
70. Frequent and regular rotation of the claimant between the lines was disruptive to the production process. The production lines had to be stopped if someone took a break unless they were replaced by another operative. The lines were operating on minimal staff due to economic constraints and the respondent could not afford to employ a substitute operative to be available to replace the claimant when necessary or to be an additional operative on the Rademaker line to carry out lifting duties that the claimant could not manage.
71. Rotation between the lines would not have been effective in removing the disadvantage because the claimant required one hour sitting and one hour standing so the rotation had to be combined with a change between being seated and standing. As we had concluded that allowing the claimant to carry out her work whilst seated was not a reasonable adjustment, allowing more regular rotation without allowing her to sit would not have enabled her to return to work. We concluded that increasing the level of rotation offered to the claimant was not a reasonable adjustment that could have been made by the respondent.
72. We then considered whether a chair could have been provided on the shop floor. We have considered this as a separate adjustment to that of allowing the claimant to sit whilst working and have considered whether the claimant could have been provided with a chair to rest on for an hour after having worked standing for an hour. We concluded that even if it had been feasible to put a chair on the shop floor where it would not cause an obstruction, it was not economically viable for the respondent to pay the claimant for a 12 hour shift for which she only worked 6 hours. It would have had to fill the claimant's place on the production line with another paid operative but it would not have been possible to engage someone to work on a one hour off one hour on basis. We concluded that this was not an adjustment that it would have been reasonable for the respondent to have made.
73. The respondent had made a number of adjustments for the claimant. It had allowed some rotation on the production lines, it had allowed the claimant an additional break during her shift; it had considered alternative employment; it had allowed her to work reduced hours. Adjustments were required by the claimant on an ongoing basis. This was not a question of making a short term adjustment to enable the claimant's back condition to improve. She had been off work for 10 months and her condition had deteriorated. The prognosis was for there to be no improvement in the foreseeable future. In those circumstances we found that there was no failure by the respondent to make reasonable adjustments and the

claimant's claim did not succeed.

## S 15 Equality Act 2010

74. a 15 Equality Act provides:

*A person (A) discriminates against a disabled person (B) if –*

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means fo achieving a legitimate aim.*

75. The Tribunal considered the claimant's claim under s15 EqA. No comparator is required. The respondent conceded that it had treated the claimant unfavourably by dismissing her because she could not stand for long periods of time and because of her absence, both of which arose as a consequence of her disability.

76. The respondent contended that the claimant's dismissal was justified because it amounted to a proportionate means of achieving a legitimate aim. The aims that the respondent relied upon were

76.1. Fair employment for all staff

76.2. The need to have productive members of staff on its production lines.

77. The test to be applied in relation to justification is that set out in the case of **Hampsom v DES [1989] ICR 179**. In order to be 'justifiable' an objective balance must be shown between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. In the case of **MacCulloch v. Imperial Chemical Industries plc [2008] ICR 1334**, the EAT provided guidance on the application of the test and the manner in which tribunals should apply it:

10. *The legal principles with regard to justification are not in dispute and can be summarised as follows:*

*(1) The burden of proof is on the respondent to establish justification: see **Starmer v British Airways [2005] IRLR 863** at [31].*

*(2) The classic test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317** in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see **Rainey v Greater Glasgow Health Board (HL) [1987] ICR 129** per Lord Keith of Kinkel at pp 142-143.*

*(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.*

*(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no*

*'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA.*

78. As indicated, the burden is on the respondent to establish the defence under s15.
79. The respondent relies on the aims of fair employment for all staff and the need to have productive members of staff on its production lines. We found that both of these represent legitimate aims on the part of the respondent. It is not fair to staff employed by the respondent if a member of staff is allowed to continue in employment notwithstanding that she is unable to carry out her duties nor to attend work. An employer must have employees who are able to carry out the work that they are employed to do. The respondent's business was the production of cakes and confectionary through a manufacturing process. It was a reasonable requirement of the respondent's that in a difficult market it have production operatives who could work productively on its production lines, maintaining efficient and smooth production levels. The claimant as a production operative was required to work on the production line to contribute to the respondent's operation. The claimant was unable to do so. Had the respondent failed to make reasonable adjustments to enable the claimant to carry out her duties and to attend work then it would not have been proportionate for it to have dismissed her for failing to do so. However we have concluded that the respondent had made such adjustments as were reasonable to enable the claimant to perform her duties but was unable to reasonably accommodate the recommendations of the medical advisors that she work alternating hours seated and standing. In the circumstances dismissal of the claimant was a proportionate means of achieving its legitimate aim.
80. We concluded that the claimant's claim under s15 Equality Act did not succeed and was dismissed.

### **S 13 Equality Act Direct Discrimination**

81. Although it is not clear whether the claimant wished to argue that her dismissal amounted to direct discrimination and if so on what basis, for the sake of completeness we considered that claim.
82. S13 EqA provides:

*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.*

83. We concluded that the reason for the claimant's dismissal was that she was unable to work for the respondent. We concluded that another employee in the same material circumstances as the claimant, that is a person who was unable to work but who was not disabled, would have been treated in the same way.
84. We concluded that the claim of direct discrimination did not succeed and was dismissed.

### **Unfair Dismissal**

85. We found that the reason for the claimant's dismissal was that given by the respondent: capability, a potentially fair reason for dismissal under s98 ERA. At the date of her dismissal the claimant had been absent from work for a period of 10 months due to her back condition which meant that she was unable to stand for prolonged periods of time and so could not perform her role.
86. In assessing the fairness of a dismissal for capability reasons where an employee



has been on long term absence from work a Tribunal must consider whether the employer can be expected to wait longer for the employee to return (*Spencer v Paragon Wallpapers Ltd 1977 ICR 301 EAT*). In addressing that question, the Tribunal must consider:

- The nature of the illness and the job
- The needs and resources of the employer
- The effect on other employees
- The likely duration of the illness
- How the illness was caused
- The effect of sick pay and permanent health insurance schemes
- Alternative employment and
- Length of service.

87. The claimant had a long term and painful back condition for which there was limited treatment. Injections into the spine had reduced her back pain for a limited time only. Otherwise the pain was managed through medication. The medical advisors did not anticipate an improvement in the foreseeable future. An operation was being considered but this would have resulted in 12 months' recovery time. The claimant's job required her to be standing for long periods of time in a relatively static position. The claimant could only do this if she had regular breaks; after each hour being allowed to move to a seated position. The respondent could not accommodate this for reasons already set out at paras 67 -72 above.
88. The respondent was a relatively small operation which was experiencing a downturn in business. It was operating with reduced staff numbers and it required staff to be flexible to enable it to run its production process smoothly and efficiently. The claimant's continued absence meant that it had to rely on agency staff and put a greater burden on its existing permanent staff. It had endeavored to identify alternative employment for the claimant but the claimant was not suitable for the QA role that was available and there were no other suitable vacancies. We were satisfied that the respondent had considered alternative options for the claimant including different hours, different shifts and a move to the High Risk work area but the claimant had been unwilling or unable to explore these and in the light of the claimant's condition it is doubtful that a suitable role could have been found. There is no duty on the respondent to create a suitable opportunity for an employee if one does not exist or to appoint them to a position for which they are not suitable.
89. The claimant contended that her back condition had been caused by the respondent but we made no finding that that was the case. Her back condition had deteriorated over the period of her employment with the respondent but there was no evidence to indicate that, had she not been working for the respondent, her back condition would have been any different. In fact during a lengthy absence from work of several months in 2015 her condition appeared to have deteriorated so that her GP who had been suggesting two hour alternating periods of sitting and standing in February 2015 was by September 2015 recommending one hour alternating periods. The claimant's impact statement prepared for these proceedings in September 2016 did not suggest there had been any improvement in the claimant's condition despite the fact that she had not been working from her dismissal up to that date.
90. We also considered whether the respondent had followed a fair procedure prior to the claimant's dismissal. The respondent had throughout the period that the claimant had been experiencing back pain made appropriate referrals to Occupational Health and sought information from the claimant's medical advisors. This continued up to the date that it decided to dismiss the claimant. It also obtained an independent medical report from Dr Reynolds shortly prior to the dismissal. The respondent had several meetings with the claimant to discuss her

current state of health and any possible options to enable her to return to work. The claimant herself acknowledged that she could not return to the role she had been doing.

91. We did have some concerns about the respondent's procedures. It would have been preferable if Mr House had communicated his instructions about adjustments to the claimant's line managers in writing and copied the claimant in so that it was clear what adjustments were being made for the claimant. It would have been preferable if there had been a clear system for monitoring whether those instructions were being complied with. However we concluded on the evidence that adjustments were made for the claimant and that those adjustments were reviewed, changed or continued according to what the claimant or her medical advisors reported about her current condition.
92. We were also concerned that there was no documentary evidence to indicate that the respondent applied its mind prior to dismissal to the question of whether a chair could be provided for the claimant in the manufacturing area. We nevertheless accepted Mr Ward's evidence that he considered the point prior to dismissal and concluded that it would not be possible to put a chair on the production area for the reasons set out at para 53.
93. We had concerns about the respondent's procedure immediately prior to her dismissal. The final consultation meeting with the claimant was held by Mr House and Ms Mercer-Matthews. However Mr Ward made the final decision to dismiss without having attended that consultation meeting with the claimant. We considered that best practice would have been for the decision maker to be present at the final consultation meeting. We concluded that these omissions in the respondent's procedures did not render the dismissal unfair. The situation remained unchanged from the meeting that Mr Ward had attended with the claimant previously. The claimant was still absent from work, there were no alternative roles she could undertake and the adjustments being recommended by the medical advisors could not reasonably be accommodated by the respondent. In those circumstances the outcome was inevitable.
94. We concluded that dismissal of the claimant for reasons of capability was within the range of responses of a reasonable employer and fair under s98(4) Employment Rights Act.
95. The claimant's claims were dismissed.

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Employment Judge Mulvaney

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Date 1 June 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

2 June 2017

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FOR THE TRIBUNAL OFFICE