EMPLOYMENT TRIBUNALS

Claimant: Mrs B Kruszelniuk

Respondent: Addo Food Group Limited

Heard: in the Midlands East region

On: 18th, 19th, 20th and 26th October 2021, 7th, 8th, 9th 10th & 11th February 2022

Before: Employment Judge Ayre sitting with members
Ms F French
Mr M Alibhai

Appearances

For the claimant: In person, assisted by friend Mrs T Magdesa
For the respondent: Mr N Hart, Solicitor

Polish interpreters: Monika Savage (18th October 2021), Marta Niedziolka (19th, 20th, and 26th October 2021, 7th,8th, 9th and 10th February 2022

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claim for failure to make reasonable adjustments is out of time and the Tribunal does not have jurisdiction to hear it.

2. The claim for discrimination arising from disability is out of time and the Tribunal does not have jurisdiction to hear it.

3. The claimant was not disabled by reason of painful and swollen hands, numbness and swelling of the hand joints during the period from February 2018 to June 2019.

4. The claim for direct discrimination fails and is dismissed.
5. The claim for unfair dismissal fails and is dismissed.

REASONS

Background

1. The respondent is a food manufacturing business. The claimant worked for the respondent from 17 June 2012 until 3 March 2020 when she was dismissed with immediate effect.

2. On 25th June 2020 the claimant brought a claim in the Employment Tribunal, following a period of Early Conciliation that started on 6th May 2020 and ended on 28 May 2020. She alleged that she had been unfairly dismissed and that the respondent had failed to make reasonable adjustments in respect of her disability and discriminated against her for something arising from her disability.

3. The respondent defends the claim. It says that the claimant was fairly dismissed for conduct, namely a failure to report an accident at work, and that the dismissal was fair. The respondent also denies all allegations of discrimination and argues that it took a number of steps to support the claimant in the workplace, including transferring her to lighter duties.

4. There was a Preliminary Hearing before Employment Judge Butler on 22 September 2020 during which it was identified that the following claims were being made:

    a. Unfair dismissal;
    b. Discrimination arising from disability (section 15 of the Equality Act 2010 ("**the EQA**"); and
    c. Failure to make reasonable adjustments (sections 20 & 21 of the EQA).

Proceedings

5. The case was originally listed for a 7-day hearing from 18th to 26th October 2021. The hearing had to be adjourned on 20th October due to the ill health of the judge, who had Covid. The hearing resumed on 26th October, and was then relisted for a further 5 days, from 7th to 11th February 2022.

6. We heard evidence from the claimant and, on her behalf, from her husband Piotr Kruszelniuk and her former colleagues Ewa Zielinska and Piotr Zielinski. On behalf of the respondent we heard from Jacci Jackson, HR Manager; Mikel Szkrobot, former Night Shift Manager; Jez Rhodes, former Operations Support Manager; Arnie Prasad, Head of Site Operations; Grzegorz Laton, Shift Manager and Raka Berhan, Team Leader.

7. There was an agreed bundle of documents which initially ran to 208 pages. During the hearing additional documents were added to the bundle by consent. Between the October hearing and the resumed hearing in February, the respondent produced an additional bundle of documents containing evidence of

the dates upon which the claimant had worked on Traceability between March 2018 and October 2019, together with a summary of the documents.

8. The respondent also submitted a chronology of events, for which we are grateful.

9. Mr Jez Rhodes, the dismissing manager, started his evidence at 3 pm on the 8th February. He was unable to give evidence earlier due to an internal meeting. The claimant cross examined him for an hour and then said that she had no further questions. The Tribunal was concerned that the claimant felt under pressure to conclude her cross examination quickly due to the lateness of the hour at which Mr Rhodes had started to give his evidence.

10. We therefore decided to call Mr Rhodes back on the following day (9th February) to conclude his evidence. We asked the claimant to think carefully overnight about whether there were any additional questions that she wished to put to Mr Rhodes and told her that we would give her the opportunity to ask further questions.

11. The claimant indicated on the morning of 9th February that she did wish to put further questions to Mr Rhodes, and she was allowed to continue her cross examination on that day.

12. On the evening of 9th February, the respondent sent written submissions to the claimant and to the Tribunal. The claimant told us that the written submissions had been translated for her.

The Issues

13. At the beginning of the hearing we discussed in some detail the issues that fell to be determined by the Tribunal. These are largely set out in the Record of the Preliminary Hearing before Employment Judge Butler on 22 September 2022 [pp.32-34 of the bundle]. That list was subject to some amendment to reflect the respondent's admission that the claimant was disabled by reason of leukaemia from the point of her diagnosis in June 2019, and the claimant's clarification that she is alleging that her dismissal was discriminatory.

14. The issues are as follows:

<u>Time limits</u>

a. Are some or all of the discrimination claims out of time? If so, would it be just and equitable to extend the time limits and/or was there a continuing act of discrimination?

<u>Disability</u>

b. Was the claimant disabled between February 2018 and June 2019 by reason of painful and swollen hands, numbness and swelling of the hand joints?

Discrimination arising from disability

c. Did the claimant's inability to undertake heavy work on the production line arise from her disability?

d. Did the respondent treat the claimant unfavourably because of her inability to carry out heavy work on the production line, by requiring her to carry out this work and not allocating her light duties or paperwork? The claimant alleges that the unfavourable treatment occurred:

    i. On 28 February 2018
    ii. In April 2018
    iii. Continuously until June 2019
    iv. In June 2019 when she disclosed her leukaemia diagnosis; and
    v. through to 10th October 2019?

e. Was the respondent's treatment of the claimant a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent is keeping the claimant in employment.

f. Has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Reasonable adjustments

g. Did the respondent apply the provision, criterion or practice ("**PCP**") of requiring employees to carry out their normal duties when medically unable to do so?

h. Did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the claimant was not permitted to undertake light duties even though her GP had recommended this, and this resulted in an accident at work causing personal injury?

i. If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

j. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

Direct discrimination

k. Did the respondent treat the claimant less favourably than a hypothetical comparator by dismissing her?

Unfair dismissal

l. What was the reason for the claimant's dismissal? Was it a potentially fair reason for dismissal? The respondent relies upon conduct as the reason.

m. Was the decision to dismiss the claimant fair or unfair under section 98(4) of the Employment Rights Act 1996?

Findings of fact

15. The claimant was employed by the respondent from 17 June 2012 until 3rd March 2020 when she was dismissed with immediate effect, without notice and without payment in lieu of notice.

16. The respondent is a food manufacturing company, and the claimant worked at the Tottle bakery in Nottingham, where the respondent produces pies. She was employed as a Stand in Senior Operative [p.40], working on the respondent's production lines.

17. On 1 April 2017 she was appointed to the position of Senior Operative and her duties involved taking on responsibility for running production lines.

18. On 12 June 2017 she transferred from the day shift to the night shift [p.79] at her request. The claimant's husband also works at the respondent, and he worked nights. The claimant wanted to work at the same time as her husband, and the respondent agreed. After moving to the night shift, the claimant worked as a general operative on the production line and was no longer a 'line leader' as the night management team did not consider her to be capable of performing this role well.

19. It was however very clear to us that the claimant was a very capable and experienced member of staff who was held in high regard by management and colleagues. She often worked on what is known as 'Traceability' and was described as 'the best that they had' on Traceability. Traceability is an entirely administrative but very important role which is designed to ensure that all of the products produced by the respondent are fully traceable.

20. As well as working on the production line and in Traceability the claimant also worked in 'dehooping' and in the paste room. Both dehooping and the paste room were considered to involve lighter duties than the production line with less heavy manual work. Dehooping involves moving metal trays into and out of a machine, and onto and off racks, as well as moving the racks themselves. The paste room is where pastry is made and put into plates and shapes using a special machine. Working in the paste room does involve some lifting but only of light weights.

21. In July 2017 the claimant signed a new contract of employment [p.98 - 101], which was the contract that was then in force through to the termination of her employment. That contract contained the following provisions:

a. Normal hours of work were Monday to Thursday from 6 pm to 6 am;
b. The right for the company to dismiss without notice or payment in lieu of notice in cases of gross misconduct;
c. A reference to the company's disciplinary and grievance rules; and
d. A reference to the Employee Handbook which contained other terms and conditions of employment covering areas such as hygiene, safety and conduct.

22. The claimant was also provided with a copy of the Employee Handbook and signed on 19th July 2017 to confirm that she had received the Handbook and understood that it was her responsibility to read and understand its contents [p.97].

23. The Handbook contains, amongst other things, the following provisions:

a. A disciplinary procedure which listed, as one of the examples of behaviour that could amount to gross misconduct: "*any breach of health and safety rules which places the employee or others in danger*" [p.92]; and
b. A Health and Safety Policy which provides that: "*All accidents must be reported as soon as is practical after the incident has occurred and before leaving site. If you fail to report an accidence on the day it occurs, you may be subject to disciplinary action. "[p.88]*

24. The respondent's full disciplinary policy is set out in a Partnership at Work Recognition and Procedural Agreement with Unite the Union [p.46] and also provides that any breach of health and safety rules which places the employee or others in danger is potential gross misconduct [p.73].

25. As a food manufacturer, the respondent takes health and safety very seriously. Any accidents or injuries at work, however serious, must be reported immediately so that an investigation can be carried out. Even a cut finger should be reported. The respondent takes steps to remind its employees of the importance of health and safety at work on a regular basis, including during daily team huddles or meetings where there is often discussion of a 'Safety tip of the day'.

26. If an employee is involved in an accident at work, the normal process is for the employee to report the accident to a supervisor, a dedicated First Aider or their line manager. First Aiders are readily identifiable on the factory floor because they wear white hair nets, whereas other staff wear hair nets of different colours. The respondent also maintains a First Aid book, and any First Aid administered must be recorded in this book.

27. Where an accident is reported, an investigation will be carried out promptly by either the shift manager or one of his team. An investigation is triggered by starting to fill in the First Aid book and reporting of the accident to the team leader, which would then go to the Shift Manager. The investigation process is set out in an Accident Investigation Form and involves taking witness statements, taking photos of the incident and the injury, and obtaining any

drawings or sketchings of the area. There is also a section on the form called "root cause analysis" which involves looking at the cause of the accident.

28. The investigation should be carried out as soon as possible after the accident is reported, to allow for a full investigation before any evidence is moved or misplaced. If the accident takes place on the night shift, the investigation should be carried out on the night shift. The night shift manager should send an email about the incident to the factory manager, the operations manager and all of the senior team.

29. The respondent is obliged to comply with statutory requirements in relation to the reporting of accidents, and its processes are designed to enable it to do so. The Accident Investigation Form is a statutory document required by the HSE and the Factory Inspectorate who monitor how many accidents a factory is having. If a factory is considered to have a high number of accidents, they may come in and inspect or investigate the factory.

30. In November 2017 the claimant began experiencing problems with her hands. In February 2018 she consulted her GP about these problems for the first time and on 28 February 2018 she obtained a fit note [p.104] signing her off work for 10 days due to painful and swollen hands. A further fit note signed her off until 13 March 2018, again due to painful and swollen hands [p.105].

31. The claimant told us that her hands restrict her ability to carry out heavy lifting, but that her writing, her ability to use a telephone and her ability to use a computer are not affected. She can prepare food although occasionally experiences pain if peeling a lot of potatoes. She also has occasional difficulty filling or carrying a kettle due to numbness in her hands and cannot lift more than a shopping bag. She sometimes drops things but has not difficulty tying shoe laces.

32. When her hands are sore she takes painkillers to relieve the pain

33. The claimant returned to work on 14 March and a return to work interview was carried out. The notes of that interview [p.107] record the claimant's absence as being due to a blood infection, but also noted that she was fit for restricted duties as she could not use her hands properly. The form also refers to the claimant being referred to occupational health. There was no evidence before us of the contents of that occupational health referral, due to a change in the respondent's occupational health provider which meant that it was no longer available.

34. On 15th March 2018 there was a 'health support meeting' between the claimant, Mr Szkrobot and Mr Laton, [p.108] at which there was a discussion about what could be done to assist and support the claimant following her return to work. The claimant speaks Polish and only a little English, so needs an interpreter in meetings which take place in English. Mr Laton is a fluent Polish speaker and was able to translate for the claimant during that meeting. The claimant said that she felt capable of working on Traceability, in the paste room and of running a production line.

35. Following that meeting the respondent tried to place the claimant, wherever possible, onto Traceability or other light duties, including completing paperwork in dehooping. Both Mr Szkrobot and the claimant's direct supervisor, Raka Berhan, specifically told the claimant not to carry out any heavy lifting or other manual duties that caused her pain or that she felt unable to do.

36. Another employee, Sonia, who was contracted to work permanently in Traceability, was transferred to the production line on a temporary basis, so that the claimant could work in Traceability. The claimant did still work on the production line from time to time. Given the nature of the respondent's business as a food manufacturer, there were very few duties that did not involve any manual work. Mr Laton's evidence was that all of the roles in the department in which the claimant worked involved some manual work.

37. We were provided during the period between the first and second parts of the hearing with additional evidence showing the number of dates upon which the claimant worked in Traceability. The evidence showed that, between March 2018 and 10th October 2019, the claimant worked 282 shifts. On 84 of those shifts there was evidence of her having worked on Traceability. She therefore worked on Traceability for approximately 30% of the time during that period.

38. The claimant's work in Traceability was highly rated by the respondent who considered to be the best employee they had performing that work. They therefore placed her on Traceability when they could. There were, however, no vacancies in Traceability on the night shift and the claimant was required to work wherever she was needed, although she was told to avoid heavy lifting.

39. After the claimant returned to work in March 2018 her doctor provided her with another fit note, dated 20 March 2018 [p.109] certifying the claimant as fit for work on amended duties, avoiding the production line and doing reduced manual handling, until 15 April 2018. On 10 April she was then signed off again by her doctor as unfit to work until 7 May 2018.

40. There was no evidence before us of the claimant having had any sickness absence between May 2018 and May 2019. On 7 May 2019 the claimant's GP signed a six month fit note, running through to 6 November 2019, stating that the claimant was fit for work on amended duties, the amended duties being that she should not do excessive manual work and should 'maintain her paperwork duties please'.

41. On 7th May 2019 there was a meeting to discuss the claimant's duties. [p.113-4]. The claimant was accompanied at that meeting by her daughter who translated for her. Mr Szkrobot was accompanied by Georgina Ponsford who was, at the time, the respondent's HR Manager.

42. The meeting notes refer to the claimant having been placed on Traceability and to being very strong in that role. The claimant had not been working all of the time on Traceability, however. It was then explained that Sonia, whose role on Traceability the claimant had been carrying out, could no longer fulfil the claimant's role on the production line because she was pregnant.

43. The respondent suggested a number of alternative roles to the claimant, but she discounted and rejected them all. She said that she hated computers, that she did not want to work in Traceability on the day shift because she wanted to work the same shift as her husband, and that her husband did not want to work on days. The respondent also suggested working in the Boxing department as a line leader, but the claimant said that the department was too cold. Georgina Ponsford asked if she would be willing to work in the respondent's site at Riverside, and the claimant said it would depend. Mr Szkrobot asked if the claimant would be interested in working in the Hygiene department and the claimant said 'no'.

44. The meeting ended with Georgina Ponsford commenting that they would look at what other roles might be available, and then meet again.

45. The claimant was off sick between 27th May and 9th June 2019 [p.118] with a virus and returned to work on 10th June.

46. When the claimant returned to work on 10th June there was a further meeting to follow up on the meeting of 7th May [p.115-6] at which the same people were present. During that meeting the claimant told the respondent that she had been diagnosed with blood cancer and was going to see her consultant on 25 June. She said that she needed to work in a "non stress" environment. Georgina Ponsford told the claimant that they would provide her with a suitable role until she knew more about her condition, but could not make up a role indefinitely.

47. Mr Szkrobot told her that there was a permanent role available in Traceability on the day shift. He offered both the claimant and her husband the opportunity to transfer to the day shift. The claimant rejected this suggestion, saying that her husband did not want to move to work on days.

48. She then said that she wanted to run the line, but the respondent was of the view that there were others who were better at doing that.

49. The question of a role in the Boxing department was again raised, as the respondent was advertising positions there. The claimant discounted it complaining that it was too cold. Georgina Ponsford asked the claimant if she would try a role in the Boxing department if the respondent provided gloves and PPE to keep her warm. The claimant was not willing to try it.

50. On 23 June 2019 Georgina Ponsford wrote to the claimant sending her copies of the notes of the meetings on 7 May and 10 June, and stating that "*we will support you for the short term by creating suitable tasks until such time as we understand the mid to long term prognosis*". Ms Ponsford also asked the claimant look at all the roles throughout the business to see if there are any roles other than Traceability that she would consider [p.120].

51. It was unclear to us exactly what duties the claimant was performing at this time. She did work on Traceability on a few days, but also worked doing administrative work in dehooping, light duties in the paste room, and on the production line.

52. Mr Szkrobot's evidence, which we accept, was that it was made clear to the claimant that she should not carry out any heavy work. He was given 'carte blanche' by HR for the claimant, on a temporary basis, to be an extra worker (ie in addition to the normal number of workers), doing nothing if necessary, on a temporary basis. We find, on balance, that although the claimant was required to carry out some manual duties, these were limited, and she was given clear instructions not to do anything that involved 'heavy' manual work. She was not required to do anything that caused her pain or that she found to be uncomfortable.

53. On or around 26 June 2019 the claimant received a formal diagnosis of Leukaemia. She subsequently approached Macmillan, the cancer charity, for support. On 15 August 2019 they wrote to the respondent on her behalf [p.123-124]. That letter, headed "Request to make reasonable adjustments in the workplace due to long term physical condition" stated that:

> *"I would like to make a request for reasonable steps to be taken to elevate the disadvantage I am facing.*
>
> *… Work has been one of those main stressors. For around a year now I have suffered with inflammatory arthritis in both of my hands. This causes my joints to become inflamed and swell up if I strain my hands for prolonged periods of time. I feel as though, the factory has not been accommodating to those needs, which in turn has had a severe impact on my mental health…*
>
> *Under the Equality Act 2010, employers are under a duty to make reasonable adjustments disabled persons.*
>
> *The duty to make reasonable adjustments has the purpose of addressing a situation in which a disabled person is placed at a substantial disadvantage, in comparison with persons who are not disabled….*
>
> *I would like you to consider the following reasonable adjustments which will help with my stress:*
>
> - *Following the doctors' notes and recommendations related to my workload, specifically reducing strenuous activities.*
> - *Taking into consideration that I am coming onto a shift and having a role planned for me rather than having to wait for an hour to be given a role.*
> - *Provide support from senior staff during my shifts…."*

54. The claimant told us that this letter had been translated for her and that she understood it at the time.

55. After the respondent received that letter a meeting was arranged between the claimant, Georgina Ponsford in HR and the then factory manager, Sean Hegarty. Shortly after that meeting Nick Porter replaced Sean Hegarty as factory manager and Georgina Ponsford wrote to the claimant inviting her to a meeting on 27 August to discuss reasonable adjustments [p.125]

56. On 27 August a meeting took place between the claimant, her husband, HR and the factory manager [p.125a]. During that meeting the claimant provided the respondent with more information about her cancer and said that she expected it to be monitored without treatment until after December. She referred to working in the paste room, on the production line and in Traceability, and said that only Traceability caused her minimal pain.

57. The claimant was however choosing to work overtime in the paste room on a voluntary basis, and said that when she worked overtime in the paste room it caused her pain and sickness, but that she did not want to stay home alone so did go into work. The claimant was asked for medical evidence and assured that the respondent wanted to find a long-term solution.

58. A further meeting took place on 30 August. Sean Hegarty had left the respondent by that stage and Nick Porter, the new factory manager, attended instead of him. The claimant provided the respondent with a document containing more information about her cancer and said that she could do any job for one night. Nick Porter told the claimant that he would need to find her administrative work not using her hands too much, and the claimant against said that she hated computers. It was left that Nick Porter would look into things and then arrange a meeting.

59. There was no evidence before us of any further meetings taking place.

60. The claimant regularly worked overtime and there was evidence before us of her having worked overtime on the following dates: 24th May 2018, 1st June 2018, 14th June 2018, 5th July 2018, 12 July 2018, 19th July 2019, 2nd August 2018, 9th August 2018, 16th August 2018, 23 August 2018, 31st August 2018, 20th December 2018, 27th December 2018, 21 March 2019, 28th March 2019, 11th May 2019, 11th July 2019, 18th July 2019, 25th July 2019, 5th September 2019, 17th October 2019.

<u>Alleged accident</u>

61. The claimant alleges that on 10th October 2019 whilst pushing heavily loaded racks she felt a terrible pain in her left shoulder and could not continue to work. She claims that she went into the office to report the incident to Raka Berhan, but could not find him so spoke to Ewa Zielinksa instead. Shortly afterwards Raka arrived and the claimant says that she told him she had suffered acute pain in her left shoulder whilst moving a heavy rack.

62. The claimant did not go off sick immediately after the alleged accident. On Saturday 12th October 2019 the claimant worked 6.2 hours overtime on Traceability during the day shift.

63. On 14th October 2019 the claimant consulted her GP [p.144]. The GP's notes of that consultation are as follows:

"*History: seen with daughter.*
Had a bad pain left arm
2 months worsening.
Non traumatic.
None exertional
Feels a lump posteriorly
Feels pain limiting range of movement and affecting her work…
Examination: pain around AC left shoulder joint anteriorly and posteriorly."

64. The claimant was issued with a fit note on 14th October [p.132] recording 'shoulder pain' and stating that she may be fit for work on light duties and shorter shifts. She returned to work, on her doctor's advice, and worked until 17th October 2019. The claimant worked 6.25 hours' overtime on 17th October before going off sick.

65. From 17th October the claimant remained off sick until 6th January 2020. When she returned to work, she was assigned to do paperwork duties and did paperwork only until the termination of her employment.

66. A fit note was issued by the claimant's GP on 24th October [p.137] signing the claimant off as unfit to work until 6 November 2019 with shoulder pain. The claimant saw her GP again on 25 October [p.145]. The GP notes of that consultation record "*2 months non traumatic left shoulder pain*".

67. On 31st October the GP's notes [p.146] record that the claimant was experiencing shoulder and arm pain, which had started 'two months ago after lifting at work'. The onset was described as sudden, which is inconsistent with what the claimant had told her GP on 12th and 14th October when she had described the pain as 'non traumatic and worsening over 2 months'. There is no mention of an accident at work anywhere in the GP records that were before us.

68. On 15th November 2019 the claimant was assessed by the respondent's Occupational Health provider. The report produced by Occupational Health contains no mention of an accident at work. It records the claimant as having said that she began to experience pain in her left hand in October 2017, and that more recently her pain had begun to radiate up her arm into her shoulder after she was placed on the line. It also says:

"*her physiotherapist believes that her ongoing pain has been caused by carrying out repetitive tasks whilst at work…*

Bogulsawa is very distressed, she states her hand pain was manageable and caused her no problems whilst carrying out the role of traceability. Recently she was placed on a line due to staffing levels and this caused her hand pain to become more intense and radiate up her arm. She sought advice from her GP who signed her off sick and referred her to physio. Physio feels the pain has been caused by repetitive movement for working on the lines for so long prior to her move into traceability…"

> *"She states she feels able to return to work at the end of the month if she is to return to her traceability role. She has been offered this role on days but is not happy as she usually works nights and so does her husband."*

69. On 14th December 2019 the respondent received a claim from a firm of solicitors acting on behalf of the claimant, alleging that the claimant had been involved in an accident at work. This was the first time that the respondent was made aware of the alleged accident, which had not been recorded in the Accident Book or reported to any member of the respondent's management team. The letter was not before us in evidence. The claimant told us that she had taken legal advice in relation to a potential personal injury claim, but not in relation to a potential discrimination complaint.

70. On 6th January 2020 the claimant was signed off by her GP as fit to work with a phased return to work, amended duties and altered hours. Her GP also recommended regular breaks and lighter duties if possible [p.151].

71. She returned to work on 6th January 2020 and a return to work meeting was carried out by Mikael Szkrobot [p.152]. The following day another meeting took place at which Ryan Swift from HR was also present [p.153]. The claimant was specifically asked how she was and replied: "*everything has been good*". She said that she was fine to work a full shift on Traceability. She was told that she would be kept on Traceability for the next four weeks as there was a potential role available for her to apply for in Traceability. She said that she could not do egg glaze on Traceability, and the respondent arranged for someone else to carry out that duty. The claimant was also reassured that any heavy lifting, pushing and pulling would be avoided.

72. From 6th January until the termination of her employment in March, the claimant was assigned only duties that she could do, and which did not cause her any pain or difficulty. She accepted in her evidence that she was only doing paperwork during this period.

73. There was no mention during the meeting on 6th January of the accident that the claimant alleges she had at work on 10th October 2019.

74. The Claimant was adamant in her oral evidence to the Tribunal that she reported the accident on 10th October to Raka Berhan shortly after it happened. She was however back at work for a week after 10th October. The claimant told us that she knew the process for investigating accidents but didn't chase up the report that she said she made to Raka Berhan or complain that the respondent had failed to investigate it or follow the proper procedure.

75. The respondent was very concerned that an accident may have taken place in the factory but had not been reported and decided to investigate the issue. On 22nd January 2020 the claimant was invited to and attended an investigation meeting [pp.155-6]. Gracja Kamasz attended the meeting as translator. The claimant was told that the reason for the meeting was to investigate the claimant's alleged failure to report the accident which her solicitors claimed had caused her a personal injury.

76. During the meeting the claimant said that she had been working on dehooping on the night in question, and that whilst she was pushing a rack which she said did not have the right wheels, she felt a very strong pain. She said she'd asked Raka if she could go home, and that Raka had refused. When asked if the pain had come on suddenly on the day or over a long period, she said that "*it came on during this one period*".

77. She was asked why she had not reported the accident and her reply was "*Everyone ignored her and has ignored her before when had issues, but this time nobody asked why she had pain and how it came about.*" This suggested that the reason for not reporting the accident was that she thought she would be ignored. There was no mention of the date of the alleged accident in that meeting.

78. The claimant also said that she "*didn't know was an accident at work that I had to report it*", suggesting that the reason she hadn't reported it was because she was unaware of the need to report accidents. She made no mention during that meeting of having allegedly reported the accident to Raka Berhan. She did however say at the end of the meeting that she was going to speak to her lawyer.

79. The respondent spoke to Raka Berhan who provided a statement on 28 January [p.159]. In that statement he said very clearly ["at no time did Boguslawa report any accident to myself".

80. A further investigation meeting took place on 29th January [pp.161-2]. The claimant was accompanied at that meeting by her husband. She was specifically asked if she wanted someone else there as a translator and declined. During that meeting the date of the accident was referred to as being the evening of the 17th October into the morning of the 18th October. The claimant said that she had been working on Traceability for some of that shift, and in dehooping for the rest of the shift. She said that the accident had taken place in dehooping.

81. The claimant had in fact been working in Traceability for the entirety of the shift from 17th-18th October. Mikel Szkrobot showed her evidence that she was actually on Traceability all of that shift. The claimant then said that the accident happened the week before, in the early hours of the 11th October.

82. Mr Szkrobot concluded that it was appropriate to take the matter forward to a disciplinary hearing. He was concerned that the claimant had changed the date of the alleged accident once she had been shown the Traceability paperwork for the 17th-18th October and realised that the accident could not have taken place that night. Mr Szkrobot's evidence was that he had asked the claimant three times if she was sure of the date of the accident, and that each time she had replied 'yes'. He believed that the claimant had not reported the alleged accident and was trying to defraud the company.

83. On 6th February the respondent wrote to the claimant inviting her to a disciplinary hearing the following week [p.163]. The letter informed the claimant of her right to representation at the hearing, warned her that a potential

outcome of the hearing may be a disciplinary a sanction up to and including dismissal, and enclosed a copy of her investigation statement, the reports showing her duties on the dates provided, and a copy of the disciplinary policy. The allegation set out in the letter was that the claimant had failed to report an accident at work which had led to a claim against the company.

84. The disciplinary hearing took place on 13th February 2010 and was chaired by Jez Rhodes, Operations Support Manager [pp.164-167]. The claimant accompanied at the meeting by her husband and by a trade union representative. Ewa Andruszka attended as a translator. During the meeting the claimant said that:

    a. Something had happened to her arm when she'd been pushing a rack;
    b. When she told Raka Berhan he 'did a silly laugh' and told her she could go home if she wanted. This is different to what she had said during the first investigation meeting when she alleged he'd refused her permission to go home and told her to go work on GMP;
    c. She had reported the accident to Raka;
    d. The accident happened on 10th Oct and that she had never said that it was on the 11th. She accepted that she had originally thought the date of the accident was the 17th;
    e. The time of the accident was 4 am;
    f. When pushing a rack, she'd had a massive pain in her shoulder and then the swelling meant she couldn't move her arm; and
    g. She believed Raka was taking some form of revenge against her.

85. The meeting was adjourned to allow further investigation to be carried out into what had happened at 4 am on 10th October.

86. Mr Rhodes interviewed Mikel Szkrobot and Raka Berhan on 18th February 2020 [p.167-8], and Mohammed Jami on 20th Feb [p.170]. Raka Berhan was adamant during his interview that the claimant had not reported an accident to him on the morning of 10th October. He said that there was a good accident record on nights and that if someone had come to him, he would have remembered. He also said that there are notices about accident reporting at the entrance to the factory, so staff knew that the needed to report accidents.

87. Raka Berhan had worked the night shift on 9th-10th October but was on holiday the following shift and was therefore not at work on the morning of the 11th October [p.169].

88. Mohammed Jami was the Senior Operative acting as supervisor on dehooping on the morning of the 11th October. He was asked whether the claimant had reported an accident to him and said that she had not. He also said that there was no dehooping taking place between 3 and 4 am, because between 3 and 4 am the dehooping staff have a 30 minute break and then spend 30 minutes helping out other departments. This was reflected in the paperwork which showed that between 3 and 4 am no pies had been dehooped.

89. The disciplinary hearing was reconvened for 3 March 2020 [pp.171-180.] In advance of the meeting the claimant was sent documents including the notes of

the previous meeting. At the start of the meeting some time was spent discussing the amendments that the claimant wanted to make to the minutes of the previous meeting.

90. During the tribunal hearing the claimant complained that she had not had the opportunity to comment on minutes of meetings and that they were inaccurate. She did not raise that at the time, and to the contrary there was evidence in the minutes of the reconvened disciplinary hearing showing that she had had the opportunity to comment on minutes of the earlier meeting. This caused us to question the credibility of the claimant.

91. At the reconvened disciplinary hearing the claimant was accompanied by her husband and by her nephew who acted as a translator. During the meeting the claimant:

    a. Changed the time at which she said the accident took place, from 4 am to 1 or 2 am (having previously changed the date of the accident) and then changed back to 'can't remember, before or after 4 am', and then said she had 'no idea' what time the accident had happened;
    b. Was presented with evidence showing that at 2.47 and 2.49 am on 10th October she had signed Traceability forms, indicating that she was working on traceability at that time;
    c. Described the accident as happening when a wheel fell into a drain – for the very first time; and
    d. Also referred to another incident that she said had happened a few weeks before the accident on the 10th October, this time in the paste room. The claimant said that on that occasion she had nearly fainted from the pain and had reported the incident to Raka Berhan who had sent her home. The respondent had no record of this earlier incident either.

92. At the end of the meeting Mr Rhodes adjourned to consider his decision. He decided to dismiss the claimant for repeatedly failing to report alleged accidents and for fraudulent behaviour. This behaviour in his view amounted to gross misconduct. After the adjournment Mr Rhodes told the claimant that she was being dismissed with immediate effect and the reasons for the dismissal. He also advised the claimant that she had the right to appeal against his decision.

93. Mr Rhodes confirmed his decision in writing in a letter dated 6 March [pp.181-2]. In that letter he wrote that, having reviewed the evidence, "*I found a systematic failure on your behalf in your duties as an Addo employee to report these alleged accidents. On the balance of probability, I found your claim to have had an accident to be unsubstantiated and your behaviour throughout the investigation and disciplinary hearing deliberately misleading and fraudulent. I confirm that I informed you that it was therefore my decision to summarily dismiss you without notice for this act of gross misconduct which constituted a serious breach of the company's health and safety policy*".

94. In his evidence to the Tribunal, which we accept, Mr Rhodes told us that he did consider alternatives to dismissal, and that if there had been just one failure to report an accident or injury, he may have considered a lesser sanction.

However, in his view the repeated failure to report showed a lack of respect for the company handbook. Failure to report could have resulted in someone else being injured.

95. The claimant's health did not come into play at all and was not a factor in the decision the dismiss the claimant. There was no evidence before us of the claimant having been treated less favourably than a non-disabled hypothetical comparator.

96. On 12th March the claimant appealed against the decision to dismiss her and was invited to an appeal hearing which took place on 23rd March 2020 [pp.191-4]. In her appeal letter [pp.183-4] the claimant raised a new issue – namely that on the day of the accident, in the early morning, she had told a colleague Ewa Zielinska what had happened, and that she was going to speak to Raka Berhan about the incident.

97. On 17th March Mr Rhodes interviewed Ewa Zielinksa [pp.187190]. Ms Zielinski, who is a friend of the claimant, told Mr Rhodes that between 3 and 4 am on a date that she could not remember, the claimant came to see her and told her that something had happened to her arm and that she was going to speak to Raka Berhan. She had subsequently seen the claimant taking to Raka but didn't know what had been said.

98. The appeal hearing on 23rd March was chaired by Arnie Prasad, the respondent's Operations Manager. The claimant was accompanied by her husband and also by her daughter who acted as translator. At the end of the meeting Mr Prasad told the claimant that he wanted to carefully consider everything that had been said and review the evidence.

99. Mr Prasad informed the claimant of his decision in a letter dated 1 April 2020 [pp. 199-202]. In his letter Mr Prasad responded to each of the points raised by the claimant in her appeal letter. He concluded, in summary, that:

   a. The claimant was aware of the process for correctly reporting an accident but had failed to do so;
   b. The disciplinary process had been carried out in a professional manner;
   c. There was no evidence to suggest that Mr Rhodes had ignored relevant evidence;
   d. The claimant had been offered a number of options, including a transfer to the day shift, by way of reasonable adjustments; and
   e. The claimant's length of service had been taken into account.

100. Mr Prasad upheld the decision to dismiss the claimant for gross misconduct. We are satisfied, on the evidence before us, that the claimant's health played no part in the decision on the appeal.

101. The claimant then raised a grievance about the decision to dismiss her, alleging that it was discriminatory [pp.204-5]. In response, Neil Parry, the respondent's General Manager, wrote to the claimant [p.203] inviting her to a meeting on 6 May 2020 to discuss her grievance. On 5 May 2020 the claimant's daughter called Jacci Jackson in HR and told her that the claimant

was self-isolating and therefore unable to attend the meeting. It was agreed that the claimant would keep in touch with HR and tell HR when she was able to attend a meeting. The claimant did not subsequently contact HR to rearrange the meeting.

The law

Time limits – discrimination claims

102. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

102. Section 123 (3) states that:

> "*(a) 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.*"

103. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule.

Disability

104. The burden of proving disability lies with the claimant. Section 6 of the Equality Act 2010 ("the EQA") defines disability as follows:

"(1) *A person (P) has a disability if –*

(a) P had a physical or mental impairment; and

(b) The impaiment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability."

105. In May 2011 the Secretary of State issued guidance under section 6(5) of the Equality Act: "Guidance on matters to be taken into account in determining questions relating to the definition of disability". The Tribunal "must take account of such guidance as it thinks is relevant" when deciding questions of disability (Para 12 of Schedule 1 to the EQA.

106. In Goodwin v Patent Office [1999] ICR 302, Morison J stated that four questions should be considered when deciding whether an individual is disabled:

i. Did the claimant have a mental or physical impairment
ii. Did the impairment affect the claimant's ability to carry out normal day-to-day activities?
iii. Did the impairment affect the claimant's ability to carry out normal day-to-day activities? Was the adverse impact substantial?
iv. Was the adverse impact long term?

107. Section 212(1) of the EQA defines 'substantial' as "more than minor or trivial".

Burden of proof

108. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

"*(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 subsection (2) does not apply if A shows that A did not contravene the provision…"

109. There is, in discrimination cases, a two stage burden of proof (see *Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931* and *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In *Igen v Wong* the Court of Appeal endorsed guidelines set down by the EAT in *Barton v Investec*, and which we have considered when reaching our decision.

110. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a

non-discriminatory reason for the treatment. This two-stage burden applies to all of the types of discrimination complaint made by the claimant.

111. In _Ayodele v Citylink Limited and anor_ *[2017] EWCA Civ. 1913* the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage.*"

112. The Supreme Court has more recently confirmed, in _Royal Mail Group Ltd v Efobi_ *[2021] ICR 1263,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

113. In _Glasgow City Council v Zafar_ *[1998] ICR 120*, Lorde Browne-Wilkinson recognised that discriminators 'do not in general advertise their prejudices: indeed they may not even be aware of them'.

114. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

115. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In _Madarassy v Nomura International plc_ *[2007] ICR 867* Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*"

116. In _Deman v Commission for Equality and Human Rights and others_ *[2010] EWCA Civ 1276*, Lord Justice Sedley adopted the approach set out in _Madarassy v Nomura_ that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

117. Unreasonable behaviour is not, in itself, evidence of discrimination (_Bahl v The Law Society_ *[2004] IRLR 799*) although, in the absence of an

alternative explanation, could support an inference of discrimination (Anya v University of Oxford & anor *[2001] ICR 847.*

Direct discrimination

118. Section 13 of the Equality Act provides that:

> "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*

119. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each case."* Shamoon v chief Constable of the Royal Ulster Constabulary *[2003] ICR* is authority for the principle that it must be the relevant circumstances that must not be materially different between the claimant and the comparators.

120. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:
   b. Was there less favourable treatment?
   c. The comparator question; and
   d. Was the treatment 'because of ' a protected characteristic?

Reasonable adjustments

121. Section 20 of the Equality Act 2010 states as follows:-

> "(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"*

122. Section 21 of the Equality Act 2010 provides that:-

> "*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"*

123. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in _Environment Agency v Rowan_ [2008] ICR 218 and in _Royal Bank of Scotland v Ashton_ [2011] ICR 632, both approved by the Court of Appeal in _Newham Sixth Form College v Sanders_ [2014] EWCA Civ 734. 65.

124. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage…"

125. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

e. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

f. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

g. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

h. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

i. Is the claim brought within time?

126. Paragraph 6.28 of the Code sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

j. The extent to which it is likely that the adjustment will be effective;

k. The financial and other costs of making the adjustment;

l. The extent of any disruption caused;

m. The extent of the employer's financial resources;

n. The availability of financial or other assistance such as Access to Work; and

o. The type and size of the employer.

127. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law (*Romec Ltd v Rudham* [2007] All ER(D).

Discrimination arising from disability

128. Section 15 of the Equality Act 2010 states that:

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

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

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

129. In a claim under section 15, no comparator is required, and the claimant is merely required to show that she has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

130. In *Secretary of State for Justice and another v Dunn EAT 0234/16* the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

p. There must be unfavourable treatment;
q. There must be something that arises in consequence of the claimant's disability;
r. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and
s. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

Unfair dismissal

131. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that

the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996.

132. Section 98(1) provides that: "*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.*"

133. Section 98(4) states as follows:

"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. "

134. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant:-

"*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.* "

135. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following:-

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

136. The leading case on contributory conduct is <u>*Nelson v BBC (No.2)*</u> *1980 ICR 110* in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-

t. There must be conduct which is culpable or blameworthy;
u. The conduct in question must have caused or contributed to the dismissal; and
v. It must be just and equitable to reduce the award by the proportion specified.

137. ‘Culpable or blameworthy’ conduct can include conduct which is ‘perverse or foolish’, ‘bloody-minded’ or merely ‘unreasonable in all the circumstances’ (Nelson v BBC (No.2))

Conclusions

Time Limits

138. The claimant began Early Conciliation on 6 May 2020. Early Conciliation ended on 28 May and the claim was presented on the 25 June 2020. On the face of it, therefore, any alleged acts of discrimination occurring on or before 6 February 2020 are out of time and the Tribunal does not have jurisdiction to hear them, unless it exercises its discretion to extend time.

139. The claims for failure to make reasonable adjustments and for disability related discrimination all relate to the period up to and including 10th October 2019. The claimant was off sick from 17th October 2019 until 6 January 2020 and makes no complaint about her treatment during the period that she was off sick.

140. The claimant returned to work on 6 January 2020 and, from then until the termination of her employment on 3 March 2020, she worked in Traceability doing administrative work. She makes no complaint of disability related discrimination or of a failure to make reasonable adjustments in respect of that period of time.

141. All of the complaints under sections 15 and 21 of the Equality Act are therefore out of time. The complaint of direct discrimination under section 13 of the Equality Act relates to the dismissal only and is in time. The claim for unfair dismissal is also in time. For the reasons that we set out below, we find that the dismissal itself was not discriminatory, and the complaint of direct discrimination therefore fails. Similarly, as the dismissal itself was not discriminatory, it cannot be said that there was a continuing act of discrimination ending with the dismissal on 3rd March.

142. We have considered whether it would be just and equitable to extend time in relation to the earlier complaints of discrimination.

143. We are conscious that the claimant is a litigant in person, who speaks very limited English and who requires the assistance of an interpreter to be able to communicate effectively in English. She was also off sick for periods of time during the course of her employment, most latterly between October 2019 and January 2020, and was clearly coping with a lot of issues, including a cancer diagnosis.

144. The claimant was however able to take advice in relation to her legal rights. She contacted Macmillan who, in August 2019, wrote to the respondent on her behalf. That letter has clearly been written by someone

with an understanding of discrimination legislation. It specifically refers to the Equality Act 2010 and to the obligation to make reasonable adjustments, citing elements of the legal definition of the obligation. Although the letter was written by someone else, it was translated for the claimant and she was aware of its contents.

145. The claimant therefore had knowledge of the Equality Act and of the obligation to make reasonable adjustments from August 2019 at the latest.

146. The claimant also took legal advice in relation to a potential personal injury claim from solicitors who wrote to the respondent on her behalf in December 2019. She was therefore able to instruct solicitors whilst off sick following the alleged accident in October 2019. On 22nd January 2020 at the end of the first investigation meeting she told the respondent that she would be talking to her lawyer.

147. The claimant was also represented by a trade union representative at the disciplinary hearing on 13th February 2020.

148. We are concerned that the allegations of a failure to make reasonable adjustment and disability related discrimination are significantly out of time. At the very latest Early Conciliation in respect of those complaints should have begun by 9th January 2020. It did not start until almost four months later. The claimant was back at work by 9th January and was able to instruct solicitors in relation to a personal injury claim before then.

149. The respondent submits that the cogency of the evidence is affected by the delay in issuing proceedings, and we have some sympathy with that argument. The claimant has not provided reasons for the delay in issuing proceedings, and even when she was dismissed on 3rd March, waited more than two months before starting Early Conciliation.

150. This is not a case in which new evidence or facts came to light which prompted the claimant to think she had been discriminated against – all of the complaints of discrimination contrary to sections 15 and 21 of the Equality Act relate to matters which had been within the claimant's knowledge for some time. She was aware of her rights, and specifically raised the issue of reasonable adjustments in August 2019.

151. Time limits in discrimination claims exist for an important public policy reason, and there is no presumption in favour of extending time.

152. Taking all of the above into account it is our judgment that it would not be just and equitable to extend time in respect of the complaints of failure to make reasonable adjustments and disability related discrimination. Accordingly, the Tribunal does not have jurisdiction to consider those complaints.

Disability

153. The respondent admits that the claimant was disabled by reason of cancer from June 2019 onwards, and that she was therefore a disabled person at the time of her dismissal on 3rd March 2020.

154. In light of our findings above, that the complaints of discrimination relating to the period prior to 7 February 2020 are out of time, it is not strictly speaking necessary for us to decide the question of whether the claimant was disabled by reason of swollen and painful hands, numbness and pain in the hand joints, during the period from February 2018 to June 2019.

155. We have however considered the question and find, on balance, that the claimant was not disabled by reason of the impairment to her hands between February 2018 and June 2019. In reaching our decision on this issue we have considered what the claimant cannot do, or can only do with difficulty, rather than what she can do.

156. Applying the tests set out in *Goodwin v Patent Office*, we find that the claimant does, and did at the relevant time, have a physical impairment to her hands.

157. We also find that the impairment had some impact on the claimant's ability to carry out normal day to day activities. It affected her ability to carry out heavy lifting and, occasionally, her ability to prepare food, to fill and carry a kettle and to carry other objects. It also affected her ability to work on the respondent's production line, although we find that this is not a normal day-to-day activity for most people, as it is an activity only carried out by a few people, namely those who work in the respondent's factory or similar factories.

158. We accept that the effect on the claimant's ability to carry out day-to-day activities was long term as it has lasted for more than twelve months.

159. We find, however that the impact on the claimant's ability to carry out normal day-to-day activities was not substantial. The statutory Guidance gives examples of factors which, if experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. That list, which is non-exhaustive, includes: "*Inability to move heavy objects without assistance*". The claimant is able to carry objects except those which are heavy.

160. The claimant's ability to carry other objects, such as a kettle, and to prepare food, is only impaired occasionally. Between May 2018 and May 2019, the claimant had no periods of sickness absence linked to her hands.

161. For the above reasons, we conclude that the claimant has not discharged the burden of proof and that she was not disabled between February 2018 and June 2019 by reason of painful and swollen hands, numbness and pain in her hand joints.

Discrimination arising from disability

162. The complaint of discrimination arising from disability is out of time, for the reasons set out above.

163. If we had to decide whether the claimant had been discriminated against contrary to section 15 of the Equality Act 2010, we would have found that she had not been.

164. Firstly, because the claimant's inability to work on the production line did not arise in consequence of her disability. Having found that the claimant was not disabled by reason of the impairment to her hands, the only disability is the claimant's leukaemia. There was no evidence before us of any direct link between leukaemia and the impairment to the claimant's hands. Equally, there was no evidence to suggest that the difficulties working on the production line arose from the claimant's leukaemia. Rather, they appear to have arisen from her swollen and painful hands, which we find is not a disability.

165. Secondly, we find that the claimant was not subjected to unfavourable treatment because of something arising in consequence of her leukaemia. The claimant was told clearly by the respondent not to carry out any heavy duties and that she could work in dehooping, or the paste room or in Traceability whenever possible. We also note that the claimant regularly worked overtime on a voluntary basis, mainly in the paste room where her husband worked.

Reasonable adjustments

166. This claim is also out of time, for the reasons set out above. The claimant had the reasonable adjustment she wanted from 6th January 2020 onwards.

167. If we had to decide the claim of failure to make reasonable adjustments, we could have found that the respondent did not apply the PCP of requiring the claimant to carry out her normal duties when medically unable to do so. There was no evidence before us that the claimant's leukaemia prevented her from working on the production line or placed her at a substantial disadvantage.

168. In any event, there was plenty of evidence before us that the respondent had discussed reasonable adjustments with the claimant and made reasonable adjustments to support her. There were several meetings with her at which adjustments were discussed, she was offered light duties including Traceability, and roles within other departments. She discounted all options except working on Traceability on the night shift.

169. Transferring the claimant to a role in Traceability would not have been a reasonable adjustment for leukaemia. In any event, she was offered a

permanent role in Traceability on days. She chose not to accept that because she wanted to work nights. The respondent also suggested a number of other roles, all of which she discounted.

Direct discrimination

170. Both the dismissing manager and the appeal hearer were very clear in their evidence that the claimant's health was not the reason why she was dismissed. Rather, she was dismissed because she failed to report accidents which she said had happened at work, and because they believed that she had tried to bring a fraudulent personal injury claim against the respondent.

171. We have considered the fact that respondents do not normally admit to discrimination, and that we have the power to draw an adverse inference against the respondent as to the real reason for the dismissal. The claimant has not however discharged the burden of proving facts from which we could, in the absence of an alternative explanation, conclude that the real reason for dismissal was the claimant's disability.

172. We found the dismissing manager, Mr Rhodes, to be a credible witness and accepted his evidence. He had, in our view, reasonable grounds for believing Raka Berhan's evidence that the claimant had not reported any accident to him, rather than the claimant's version of events.

173. The claimant made some very serious allegations about the respondent's witnesses, which were not supported by any evidence and which were not even put to the witnesses. For example, she alleged that Mr Rhodes had said 'see, I told you I could sack you' at the end of the disciplinary, and that Mr Szkrobot said 4 times 'don't bring a claim or you'll be sacked'.

174. We find these to be incredible allegations that are not supported by any evidence. They caused us to question the claimant's credibility, and where there is a conflict between her evidence and that of the respondent's witnesses, we have preferred the respondent's evidence. The claimant was adamant that there was an accident at work on 10th October 2019, but there was no mention of that in her GP notes, in the occupational health report, or in her return to work meeting.

175. In addition, the claimant changed her story during the disciplinary process. The respondent had good reason not to accept her version of events, which was contradicted by the documentary evidence. For example, the claimant changed the date and time of the alleged accident and did not mention Ewa Zielinski until the appeal.

176. We are satisfied that the claimant was not dismissed because of her leukaemia, and the complaint of direct disability discrimination therefore fails.

Unfair dismissal

177. We accept the respondent's evidence that the reason for the claimant's dismissal was her conduct, and specifically her failure to report alleged accidents, and fraudulent behaviour. There was no evidence whatsoever to suggest that dismissal was because of the claimant's disability. The respondent had known about the claimant's disability for many months before she was dismissed and had taken steps to support her. From January 2020 she was assigned to work only on administrative task in Traceability. The respondent had given her the role she wanted following the occupational health report.

178. The respondent had also gone to some lengths to try and keep her within the business, putting numerous other options to her when she said that she could not work on the production line, because she was a good employee.

179. The respondent has therefore discharged its burden of proving a potentially fair reason for dismissal.

Burchell Test

180. We find that, at the time of the dismissal, the respondent had a genuine belief that the claimant was guilty of misconduct. The dismissing manager Jez Rhodes was an impressive witness who had a good recollection of events. It was clear that he had not taken the decision to dismiss the claimant lightly. He was credible and genuine in his evidence, and thorough in the approach he took during the disciplinary process. He knew the respondent's processes well. He clearly understood and was able to articulate the importance of health and safety to the respondent, as well as his reasons for dismissal. His decision, and the reasons for it, were carefully thought through.

181. We also find that the respondent had reasonable grounds for its belief that the claimant was guilty of misconduct. The importance of health and safety to the respondent was clear from the evidence before us. There was a conflict of evidence between the claimant and Raka Berhan as to whether the claimant reported the accident on 10th October.The respondent had no reason to disbelieve Raka Berhan's evidence. The claimant's version of events during the investigation and subsequent disciplinary hearing was inconsistent. She changed the date and time of the alleged accident, and provided different reasons for not reporting initially, later saying that she had reported the accident.

182. She also gave different versions of what actually happened when the accident allegedly occurred – making no mention of the wheel going down the drain until late in the disciplinary process and making no mention of her alleged conversation with Ewa Zielinski until the appeal. There was no documentary evidence to support the claimant's version of event.

183. The investigation carried out by the respondent was, we conclude, a reasonable one. There were two investigation meetings and the respondent adjourned the disciplinary hearing to investigate the new evidence put forward by the claimant and carry out further interviews. There was nothing to suggest that Mr Rhodes was looking just for evidence of guilt.

184. The procedure carried out by the respondent was fair. The claimant was told of the allegations, sent the relevant documents, given the right of representation, and offered the right of independent appeal. A translator was present at each of the meetings and the claimant had the opportunity to state her case. There was a three stage process with different managers involved at the investigation, disciplinary and appeal stages.

185. We have then gone on to consider whether dismissal was within the range of reasonable responses. In doing so, we have reminded ourselves that we must not step into the shoes of the respondent or substitute our views as the appropriate outcome of the disciplinary process.

186. The claimant was a senior operative who'd been with the company for 8 years. She knew the respondent's policies and procedures, including those for the reporting of accidents.

187. The respondent is a food manufacturing business in which health and safety is of paramount importance. The respondent makes clear to employees the need to report accidents and that failure to do so may result in disciplinary action.

188. The claimant had failed to report not just one but two accidents / injuries, and had been inconsistent throughout the disciplinary process, causing the respondent to believe that she was bringing a fraudulent claim against the company.

189. It cannot be said that in these circumstances that dismissal is outside the range of reasonable responses.

190. For these reasons we find that the dismissal was both procedurally and substantively fair.

Employment Judge Ayre

9 March 2022

Sent to the parties on:

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For the Tribunal Office:

Case Number: 2602498/2020

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