EMPLOYMENT TRIBUNALS

Claimant: Mr H Alcam

Respondent: Warren James (Jewellers) Limited

HELD AT: Manchester **ON:** 19, 20 and 21 September 2017

BEFORE: Employment Judge Ross
Ms J K Williamson
Mrs S J Ensell

REPRESENTATION:

Claimant: In person
Respondent: Mr M Howson, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that the respondent discriminated against him pursuant to section 13 of the Equality Act 2010 when (1) it dismissed him; (2) management refused to allow him to wash his hands; (3) he sent an email to Occupational Health which was ignored, are all well-founded and succeed. The claimant's other complaints of direct discrimination do not succeed.

2. The claimant's claim that the respondent failed to make reasonable adjustments pursuant to sections 20-22 of the Equality Act 2010 in relation to a requirement to check the window display ("the window run") and to replace stock from memory is well-founded and succeeds. The claimant's other claims for failure to make reasonable adjustments are not well-founded and do not succeed.

REASONS

1. The claimant was employed by the respondent as a permanent sales adviser contracted to work part-time eight hours a week on Saturday at the respondent's Walthamstow branch. His employment was from 1 September 2015 until he was dismissed on 4 October 2015, although the dismissal was communicated to him on

30 September 2015. The reason given was that he had been unsuccessful during his probationary period. The termination date was in fact Friday 30 September 2016.

2. There was no dispute that the claimant suffered from impairments which caused him to be disabled within the meaning of the Equality Act 2010 at the relevant time. These were severe depression, anxiety, post traumatic stress disorder ("PTSD"), obsessive compulsive disorder ("OCD") and back pain. It was undisputed that these conditions arose as a result of a road traffic accident which occurred on 24 November 2015.

3. Prior to the claimant's road traffic accident his attendance at work had been good and he had not had any sickness absence.

4. The claimant brought claims to this Tribunal for direct discrimination and for failure to make reasonable adjustments pursuant to section 15 of the Equality Act 2010. The nature of the claimant's claims was identified at a case management conference before Employment Judge Holmes on 27 March 2017.

5. As requested by Employment Judge Holmes the claimant provided further particulars of his direct discrimination claim. Unfortunately, given that the claimant is a litigant in person, there was a lack of clarity about those particulars which are enclosed in the bundle (pages 14-25). At the outset of the hearing the claimant clarified that the less favourable treatment he was relying upon for his disability discrimination claim was dismissal and seven other detriments, namely:

(1) "Ms Toor and Ms Flynn would take me to the back of the branch in private and tell me my serving pace was too slow and I shouldn't write tasks on my note pad to remember things." (See page 21 bullet point 2).

(2) "On 25 June 2016 I was questioned twice about my pace by Ms Flynn and the covering manager, I believe her name was Layrsha, from the Hammersmith branch who was not aware of my condition at all." (See page 22 bullet point 2).

(3) That the claimant was not fully trained by the respondent. "On 6/2/16 Ms Toor stated the probation extension was due as "we have been unable to complete training"(see page 21 bullet point 5).

(4) Management refused to allow the claimant to wash his hands (page 25 bullet point 1): "I would have liked to have had the choice to wash my hands with hot water and soap at times and sanitiser wasn't effective. Ms Tour would try and stop me using the sink facilities even when I asked".

(5) Management tried to get me to take my medication after work (see page 21 bullet point 4). Ms Tour suggested "can't you take your pills after work?"

(6) "After the grievance meeting in July 2016 Eleanor took it upon herself to ignore me" (see page 22 bullet point 3).

(7) " An OHS,occupational Health service review/appointment if possible to help with amendments in the workplace. I requested this on15/9/2016 by email to Ms Jill Moss, HR. My request was ignored".

6. The claimant also brought a claim for failure to make reasonable adjustments. The provisions, criteria or practices were identified on page 23, namely:

(1) Three minutes serving customers.

(2) Lifting heavy drawers filled with jewellery to put into drawers on shop floor and back up.

(3) Window displays, putting out diamonds.

(4) 20 minutes to check the front windows and amend and organise jewellery in the back after from memory (window run).

(5) 15 minutes breaks.

(6) Authorised by my GP (two additional 15 minute breaks to amend back).

(7) Using hand sanitiser to clean hands on shop floor.

(8) Putting stock back from memory.

(9) Using heavy duty cleaning equipment.

(10) Bending down to fix gift boxes.

(11) Calling in by 9.20am if unable to come into work.

7. The reasonable adjustments contended for by the claimant were set out at pages 24 and 25. They were:

(1) A small note pad.

(2) To wash my hands at the sink in the back room.

(3) To have printed training in depth information to take home and revise to help with my training and progress.

(4) For management to have training course on mental health and employees' disabilities.

8. At the outset of the hearing although the respondent had conceded that the claimant was a disabled person at the relevant time the issue of knowledge was disputed. By the submission stage the respondent had agreed that the respondent had knowledge of the claimant's disabilities.

9. Therefore the issues for the Tribunal were as follows:

Direct Discrimination

(1) Did the respondent treat the claimant less favourably than a real or hypothetical comparator in the same set of circumstances, with the same limitations on ability as the claimant by dismissing him?

(2) Was the reason for dismissal the claimant's disability? When answering this question the Tribunal must take into account the burden of proof and a hypothetical comparator in the same set of circumstances with the same limitations on ability.

(3) In relation to the other allegations of less favourable treatment the Tribunal has to ask itself: did the claimant suffer less favourable treatment and if so was the reason for the claimant's treatment his disability? When answering this question the Tribunal must take into account the burden of proof and a hypothetical comparator in the same set of circumstances with the same limitations on ability.

Failure to make reasonable adjustments

(4) What is the provision, criterion or practice ("PCP")?

(5) How does the PCP put the claimant at a substantial disadvantage in relation to a relevant matter?

(6) What are the adjustments it was reasonable for the respondent to take to avoid the disadvantageous effect?

Findings of Fact

10. The Tribunal finds that the claimant suffered a road traffic accident on 24 November 2015 where he suffered a back injury. He was absent from work from that date until 22 December 2015. There is no dispute that prior to his road traffic accident the claimant's attendance was good and he had no sickness absence.

11. The respondent's witness, Ms Toor, suggested that the claimant's performance was poor prior to his accident.

12. The only evidence the Tribunal has of that is a note which Ms Toor says is in her writing at page 149 of the bundle, and some notes which Ms Toor says are in the handwriting of the deputy manager, Ms Eleanor Flynn, at pages 163-165.

13. The Tribunal notes that these documents are handwritten. The note of Ms Toor is undated. It is very general. There is no suggestion that Ms Toor ever showed this note to the claimant.

14. Ms Flynn's notes at page 163 and elsewhere in the bundle were treated with caution by the Tribunal. Ms Flynn did not attend the Tribunal and did not provide a witness statement. Accordingly the Tribunal had no opportunity to ask her about her notes. The notes are unsigned either by Ms Flynn or anyone else. There is no suggestion that they were shown to the claimant. The notes are also in an irregular

order. Page 163 refers to 3 October and 5 October and then page 164 refers again back to 3 October.

15. The claimant disputed the content of these notes and denied that what was alleged in them had taken place. The Tribunal has no way of knowing whether the notes are contemporaneous or accurate. In the absence of Ms Flynn's attendance at the Tribunal, the Tribunal is not prepared to attach any weight to her notes.

16. In her witness statement Ms Toor said she and Ms Flynn had "undocumented chats" with the claimant prior to his road traffic accident about his performance. The claimant disputed that was the case. The Tribunal prefers the claimant's recollection of events.

17. The Tribunal was referred to a document "Little Things Mean a Lot" (see pages 154-161). We find this document suggests there were a number of practical matters in relation to serving customers and stock which were brought to the attention of all staff, not just the claimant.

18. There is no dispute that the claimant communicated regularly with the respondent during his absence from work. His GP signed him unfit for work due to back pain. However during his absence the claimant developed psychological injuries as a result of his road traffic accident.

19. The sick note dated 18/12/15 notes that the claimant is suffering from back pain and a fit note from 21 December 2015 states "no heavy lifting for three weeks from 21/12/15" (see page 168). The claimant provided this information in the letter of 22/12/15 (page 169).

20. The respondent's Ms Toor conducted a return to work interview on 22 December 2015 (see pages 170-171). The note indicates that the claimant has been absent due to whiplash and back pain and he is taking strong painkillers which may cause drowsiness, and that his fit note suggests two additional breaks of 15 minutes each. There is no dispute that the usual break pattern for a member of staff was two 15 minute breaks and a 30 minute lunch break. The respondent agreed that the claimant should not do any heavy lifting for the next three weeks and that he would have two additional 15 minute breaks.

21. The claimant was absent again due to back pain from 24-27 December 2015. There was a return to work interview on 28 December 2015.

22. The claimant's mother on that occasion had contacted the respondent to advise the claimant was off work sick, and the claimant was reminded he should call in himself.

23. There is no dispute there was then a meeting on 9 January 2016. In her witness statement Ms Tour describes this as a "return to work meeting". The Tribunal doubts whether this heading is accurate because Ms Toor had already conducted a return to work meeting for the claimant's most recent absence on 24 December, on 28 December (see pages 173-174). The claimant was not further absent prior to 9 January 2016 (see page 150).

24. There was no dispute that the claimant was working under a fit note with amended duties and this document was due to expire. The Tribunal finds the notes of the meeting on 9 January 2016 are handwritten notes. There is no template as at page 173.

25. We find the content of page 175 as described in the heading “Review Meeting” was a meeting to discuss the claimant's performance. That document is signed by both parties.

26. The claimant had provided the respondent with a further fit note dated 15 January 2016 (see page 181) which confirmed he should continue to have breaks and no heavy lifting until 30 January 2016.

27. It is not disputed that on 16 January 2016 (page 184) Ms Toor conducted refresher training for the claimant. We accept the claimant's recollection of events that he became anxious during the retraining and Ms Toor’s response to this was to tell him just to tick and sign, and that the rest of the training was not completed. We find by 26 January 2016 Ms Tour knew that the claimant had been diagnosed with depression (see page 186 and page 187). The claimant’s sick note now states, “Depression and anxiety, back problem”.

28. We find the claimant was very ill during this period and had attempted suicide and self harmed. He does not dispute that he did not inform the respondent of these facts. Accordingly although Ms Toor knew the claimant was mentally ill, we find she was unaware of how ill he was.

29. The claimant was absent from work from 23 January 2016 to 6 February 2016. Ms Toor conducted a return to work meeting on 6 February 2016 (see pages 190-192).

30. The claimant informed the respondent that the side effect of his medication was drowsiness. There is no dispute that the respondent was continuing to grant the claimant two 15 minute breaks in relation to his back problem.

31. We find immediately after the return to work meeting Ms Tour conducted a probation review meeting (see pages 192-195).

32. The respondent stated that the reason for the probation review meeting was “due to the amount of absences you have had we have been unable to complete your training therefore your probationary period will be extended by three months which will allow us further time to complete your training. Your probationary period will end on 10 June 2016”. We find that the claimant asked if this was because he had had a car accident. Ms Tour told him “this is nothing to do with your road traffic accident. Your absence level has been high (six absences to date)”.

33. We find Ms Toor’s reply is inaccurate. We find that the only reason why the claimant had been absent from work was because he was suffering the consequences of a road traffic accident and accordingly the extension of his probation was connected to his road traffic accident and the illness he was suffering as a result.

34. The claimant specifically asked “this isn’t down to poor performance?” and was told “no”.

35. The Tribunal find that Ms Tour is disingenuous in this meeting when she informed the claimant that “I just want to make it clear that this has nothing to do with your medical condition”. The Tribunal finds that the probationary review meeting was connected to the claimant’s medical condition because the reason for his absence from work was his medical condition and that was why he had been unable to complete the training and therefore had his probationary period extended.

36. We find that the claimant's light duties and extra breaks were continued (see GP fit note dated 12/2/16 at page 196).

37. We find the claimant was sent a letter confirming that the reason for the extension of his probationary period was “a number of shortfalls in your performance. These shortfalls were high level absence which has restricted Warren James’ opportunity to complete your training”.

38. We find the claimant was absent from work sick on 13 February 2016 and 30 February 2016 (see page 200 and page 151).

39. There is no dispute that Ms Tour held a return to work interview with the claimant on 27 February 2016 (see pages 201-202). Immediately afterwards in the bundle there are notes (pages 203-204). Unlike the previous review meeting Ms Tour did not share these notes with the claimant. The claimant disputes the content of these notes.

40. We find Ms Tour contacted HR on 10 March 2016 (see page 205).

41. There is a further handwritten note of 12 March 2016 at page 206. The Tribunal was told these were the notes of Ms Flynn. The Tribunal has not taken these notes into account because it is unclear when these notes were made, whether they were ever raised with the claimant and we did not hear from Ms Flynn.

42. On 17 March 2016 a further sick note is provided for the claimant confirming he should stay on light duties and have extra breaks for his back pain. The claimant was off sick on 19 March 2016.

43. We find in the claimant's letter of 21 March 2016 at page 211 as requested by Ms Toor he provided a note from his GP covering his specific absences from work in addition to the fit note in relation to his amended duties which he had already provided.

44. Ms Tour conducted a return to work meeting with the claimant on 26 March 2016 (see pages 212-213).

45. The claimant was absent from work again on Saturday 9 and Saturday 16 April 2016. His absence note states anxiety and depression (see page 215). The return to work meeting was on 23 April 2016 at pages 216-217.

46. On the same day Ms Tour conducted a welfare meeting with the claimant (see pages 218-222). The claimant explained in detail in that meeting the medication he

was on, that his mental state had worsened and he was on a higher dose of medication, that he found learning something new difficult and that "I hope that performance before (his accident) is remembered as this slower performance isn't me it's due to the accident". There is a reference to the hand sanitiser: "Hussein has been advised to use the hand sanitiser on the shop floor". This is in reference to his mood and concentration being affected which is part of his anxiety and he needs to wash his hands because he gets sweaty palms from anxiety.

47. Ms Tour in her witness statement said that during the period April to June 2016 she was not in this branch regularly due to work commitments elsewhere and that she worked with the claimant only once in this period. She said that Eleanor Flynn had more communication with the claimant during this period, particularly as the claimant only worked one day a week.

48. We find that on 23 April 2016 the claimant asked Ms Toor for a day off on 28 May 2016. Ms Tour refused the request because she was on leave on 28 May and it would leave the shop short staffed. We find that it was on the morning of the same day the claimant made his request that Ms Toor's request for the same day off, 28 May, was authorised. We find the fact she was on leave on 28 May 2016 was not yet showing on the rota. See p225.

49. We find the claimant then contacted HR to find out the policy for taking leave. We find he raised the issue of his mental health. We find Ms Jill Moss from HR rang the claimant to inform him his request for holiday was declined (page 226).This was confirmed by letter.P234.

50. We find that the claimant provided a letter from his mental health therapist (see page 229) to the respondent. We find the therapist also telephoned Ms Toor to explain that the claimant needed the day off for therapeutic reasons (see page 227).

51. We find Ms Toor faxed the letter through to the HR department. We find that there is no dispute that the day off was then authorised. P235.

52. There are lengthy notes about this incident from Ms Toor (pages 231-233). There is also a note from Ms Flynn (pages 236-237). The further notes at pages 238-242.

53. We find that by this stage as a result of this incident in particular, the relationship between the claimant and Ms Toor of the respondent had broken down. Ms Toor did not believe the claimant was honest about the reason he needed annual leave on 28 May. She said the letter from the therapist was not genuine. In cross examination Ms Toor relied on the fact the typeface at the top of the page was not clear. See p229. In her witness statement she states: "I was of the belief, however, that the letter was not genuine and he went on a spa day as originally requested. This is because I saw a review on the hotel's Facebook page where the spa day was taking place (page 262). Eleanor found this review and showed it to me".

54. We find that this comment also shows that Ms Toor and Ms Flynn, who were friends, shared information about the claimant. When cross examined about how Ms Toor had been able to make notes about conversations with the claimant in May 2016, for example see pages 243, 246, 248-251, Ms Toor said that some of those

matters may have been matters which involved the claimant and Ms Eleanor Flynn and Ms Flynn had then related them to Ms Toor. This is not apparent from the notes.

55. We accept the claimant's evidence to find that the attendance at the spa was a matter of therapy. We rely on the medical evidence from the psychiatrist at page 62 of the bundle that during this period of time the claimant had been psychologically very unwell. He had been self harming and had attempted suicide. We accept the claimant's evidence that his therapist had suggested a night away so that he was not under the supervision of his parents as he had been since the suicide attempt. We accept his evidence that he could not afford to pay for a night away and that his sister had purchased it for him as a birthday present.

56. We find that at this time the respondent, although it knew the claimant suffered from anxiety and depression, did not know the extent of the nature of the claimant's illness. We find that the letter provided by the claimant's therapist was a genuine letter.

57. We find the claimant was absent from work sick on Saturday 21 May 2016. We find he telephoned the respondent at 9.20am. The claimant disputes that on that occasion he called in at that time – he says he called before 9.00am. This is difficult for the Tribunal to determine because Ms Flynn who wrote the note at page 252 did not attend the Tribunal. The claimant does concede that on one occasion he did call in late and on the occasion he did so he was having a panic attack and that was the reason for calling in late. He was unable to ask his mother to call because the respondent had previously told him their policy was that he must telephone himself.

58. Ms Flynn has written "sounds half asleep" at the bottom of page 252.

59. There is a note from Ms Flynn at pages 253-255 which is entirely duplicated at pages 256-258. The claimant disputed the content of that note as he disputed the content of Ms Toor's note at pages 248-251.

60. The Tribunal is puzzled by Ms Tour's notes at p243, 245,246-7,248-251 which are dated May 2016. This because Ms Toor said that she only worked with the claimant once in the period April –June 2016.It is not disputed she worked with the claimant on Sat 23 April as that was the day the claimant requested leave. These notes appear to relate to performance issues on 2 separate occasions in May: 7 May and 14 May. Secondly, it is entirely unclear when the notes were written. At the top of page 248 is the date 20 May 2016 but the incidents referred to occur on 7 and 14 May. There is a separate note in relation to 14 May at pages 246-247.There is an element of duplication in the notes. The concerns noted on p226 and 247 as occurring on 14 May appear to be duplicated in a different document at p248 and 249 also referring to 14 May. Finally the pages at 248-251 appear to be part of a document Ms Toor has sent to someone else because it ends "Kind regards". In cross examination Ms Toor said she was sent some information to HR at certain times.

61. There is another note dated 14 May at p245 which is clearly contemporaneous because it is signed and dated by both the claimant and Ms Toor.That note is short and relates only to the claimant's fitness to work note and his heath. There is no reference to any performance issues in this note.

62. We find that the performance concerns logged by Ms Tour, whether they were noted by her or Ms Flynn, were not specifically raised with the claimant as concerns.

63. We find the claimant had a return to work interview on 4 June 2016 arising out of his absence on 21 May 2016 (pages 259-260).

64. We find that the respondent invited the claimant to a probationary review meeting on 11 June 2016 (page 277) as his extended probation period was due to expire on 10 June 2016. We find the claimant called in sick on that day. The claimant agreed that he called in late at approximately 9.30am (see page 275). We find Ms Tour had prepared for the meeting and the blank documents are in the bundle at pages 263-274.

65. We find the meeting was rearranged for 25 June 2016.

66. We find that on 25 June 2016 the claimant attended work and made the respondent aware that his medication was affecting his concentration and memory. That note is signed by both Ms Flynn and the claimant (see page 280).

67. However, we then find that there are extensive notes which we are informed were written by Ms Flynn for Saturday 25 June 2016 (see pages 281-282, 283-290). We find these notes were not shown to the claimant.

68. We find that on 25 June 2016 the claimant was at work. It was not disputed that another branch manager, Ayeesha Iqbal, was at the Walthamstow branch on that day.

69. There were notes in the bundle at pages 292-295 entitled “statement of incident with Hussain on Sat 26th June” which we were told were made by Ms Iqbal. It is a handwritten document dated 20 June which is unsigned. Ms Iqbal did not attend the Tribunal as a witness so we had no opportunity to question her and neither did the claimant. The claimant disputes the version of the events at p292 and given the lack of attendance by Ms Iqbal we have attached limited weight to those notes.

70. On 4 July 2016 the claimant presented a grievance to the respondent (see pages 299-302). There is a summary of the grievance at page 302. In essence it is a grievance against his manager, Ms Sandy Toor, whom he alleges has failed him as a manager and is ignorant of his mental illness and capabilities.

71. A grievance meeting took place.

72. The claimant was absent from work on 9 July 2016 and had a return to work meeting with Ms Tour on 16 July (see pages 308-9).

73. The grievance was heard by Kuldeep Chehal.The report is at pages 366-379. There is some ambiguity about whether the meeting occurred on 21 July 2016 (see page 366) or 18 July 2016 (see page 379). The difference in date is not material. The claimant's grievance was unsuccessful. The outcome was notified to him by letter of 10 August 2016 (see page 379).

74. On 12 August 2016 the claimant was invited to attend a probationary review meeting on 20 August 2016. The claimant was absent from work on 20 August 2016 (see page 151). The return to work interview was conducted by Ms Toor (pages 384-385). Meanwhile the claimant had presented an appeal against his grievance outcome (see pages 381-383).

75. On 15 September 2016 the claimant attended a probationary review meeting. It was conducted by Mr Joseph Gill. There are no notes of that meeting, although we were told that Ms Moss attended as a "note taker". There is a report completed by Mr Gill at pages 396-404.

76. The Tribunal's attention was drawn to page 395. It was unclear when this note was created and by whom. It was suggested it was completed by Ms Toor. Ms Moss told the Tribunal she sent this document to Mr Gill, but there is no email to confirm that she did and there is no reference in the report compiled by Mr Gill to show whether he read this document or considered it or whether he raised it with the claimant. There are no independent minutes or signed statements of Mr Gill's interviews with the other witnesses he refers to in his report, namely Eleanor Flynn, Larissa Canwell-Bennett or Monika Konieczna.

77. Although Mr Gill completed the report, Ms Moss told the Tribunal that she was the one who made the decision to terminate the claimant's employment. The claimant told us the specific concerns at page 395 were not put to him. We accept his recollection.

78. We find that unlike the apparent preparation for the probationary review meeting done by Ms Toor due to take place on 11 June, where she had drafted a document with specific incidences of alleged poor performance by claimant to raise with him(See p264,265 266,268 269) , there is no evidence in his report to suggest Mr Gill raised these matters with the claimant.

79. The claimant was informed by telephone on 30 September 2016 and by letter on 4 October 2016 that his employment had been terminated because it had been "unsuccessful during your probationary period".

80. In Mr Gill's report he stated he recommended that the claimant "be dismissed by reason of failing to pass the probationary period".

81. Prior to the probationary review meeting, but on the same day, Mr Gill heard the claimant's grievance appeal. He found that there was no discriminatory behaviour and the claimant's appeal was rejected.

82. Late in the afternoon of 15 September 2016 the claimant asked to be referred to the respondent's Occupational Health service (see page 390). The claimant said, and it was not disputed, that he never received a reply to that email. Ms Moss told us that she had sent this request onto Mr Gill for him to consider although there is no evidence in the bundle, such as an email, to show that she did. Mr Gill does not refer to the request to be referred to Occupational Health in his report.

83. Indeed because Mr Gill does not list in his report the documents he had before him and because he did not attend the Tribunal, there is a lack of clarity about which documents he considered.

84. There was a return to work meeting on Saturday 17 September 2016 (see pages 391-394) in relation to the claimant's absence on 10 September 2016.

85. The claimant's appeal against dismissal was heard on 26 January 2017 by Ms Ramsden (see pages 448-453). We find the claimant presented extensive further medical evidence to Ms Ramsden on the day of the hearing. We find Mrs Grimes said she would ensure copies of the documents were sent to Ms Ramsden. There was no evidence in the bundle that this had been done. Ms Ramsden lists the documents before her at page 450 at the time she considered the appeal and there is no reference to the documents we find the claimant supplied to the respondent at page 437, pages 55-67 and pages 72-90 (excluding page 77). The Tribunal notes that Mrs Grimes stated she was the decision maker who rejected the claimant's appeal against dismissal although she stated she attended the appeal as a note taker. She had also been the decision maker of the claimant's original grievance (see page 379) which she had rejected. When asked whether the appeal against dismissal had been a review or an appeal, Mrs Grimes was unclear and said she thought it was both.

86. Mrs Grimes also indicated that although she had prepared notes and the hearing for the appeal against dismissal had been recorded she had not produced her notes and neither had a transcript been produced, neither for the Tribunal bundle nor for the claimant at any time.

87. The claimant's appeal against dismissal was unsuccessful and the outcome communicated to him on 21 February 2017 (see page 454).

88. The Tribunal finds there was a great deal of vagueness and lack of clarity about the areas in which the claimant's performance was said to be poor. The respondent relied on page 395. It was entirely unclear what this document was. The bottom of the document says "do I include slamming doors before storming out at 4.30pm on 25/6/16 when he was being asked about slow pace and chatting with customers as there were customers present?" We find this suggests that this was a working document being prepared for someone else.

89. At one point it was suggested to the Tribunal by the respondent's representative that p395 was prepared by Ms Toor although it is not referred to in her witness statement. On another occasion it was suggested it was Ms Flynn's list: she did not give evidence to the Tribunal so the Tribunal could not question her about this suggestion.

90. The Tribunal has already identified its concerns in relation to the notes at pages 246, 247, 248, 249, 250 and 251 of the bundle. Ms Toor was uncertain as to whether the recollections reflected in those notes were her own recollections or whether they were matters that had been told to her by Ms Flynn.

91. There is no dispute that no-one ever showed the list at page 395 to the claimant during the course of his employment. We find it was neither discussed with him prior to, nor at, his probationary review dismissal hearing.

92. In her witness statement Ms Toor deals with the claimant's performance at paragraph 41 onwards. These items of concern appear to be taken either from the

document at page 395 or from the notes referred to in the bundle made in May 2016. The Tribunal has treated this evidence with caution. Ms Tour said that the claimant was excessive slow doing the window run task and on one occasion took eight hours, which the Tribunal finds implausible

93. By contrast the claimant made concessions when giving his evidence. He accepted that he sometimes took longer than others to do the window run, although he said it took him no longer than 40 minutes. He believed that a non disabled person would probably take in the region of 20 minutes.

94. The Tribunal heard evidence that the window run was a routine task to check the respondent's extensive window display. We heard evidence that this was done by viewing the window from the front to look to see if any items were not placed correctly, and if so it was necessary to go back into the shop and "tweek" so that the item was in the correct position.

95. We find it was also important to check if any item was missing from the window because it had been sold. If there was no replacement stock a "sold out" sign should be placed in position and if there was stock in the shop the item should be replaced.

96. We heard evidence that this task was normally done twice a day, in the morning and in the evening. The claimant said because of his problems with memory and concentration he found it difficult to carry out this task. He had asked on a number of occasions for a note pad to assist him.

97. Mr Toor's evidence was that the claimant did not carry out the task properly. She said there were a number of modules of jewellery in the shop's window and the correct way of doing the task was to go module by module, A to E, and within each module, row by row. She said the claimant tried to deal with the whole window and she would not have been able to remember the missing or incorrectly placed items if she had done it in that way. The claimant disputed that he had done the task in that way. He said he did the task module by module and row by row as Ms Toor required but sometimes, because of his concentration problems, could not remember which items were missing and it was for that reason he wanted to use a small notebook. Ms Tour did not dispute that she did not allow the claimant to use a notebook because she thought it was not necessary if the task was done properly and she thought the claimant was not doing the task properly.

98. It was not disputed that each item had a code which had six digits. The claimant told us when cross examined that he sometimes forgot codes and wanted the pad to write them down so that when he went to check the stock he knew what the code was.

Issues

We turn to consider the first claim that the respondent discriminated against the claimant pursuant to s13 Equality Act 2010.

Direct Discrimination

(1) Did the respondent treat the claimant less favourably than a real or hypothetical comparator in the same set of circumstances, with the same limitations on ability as the claimant by dismissing him?

99. The Tribunal reminds itself that we must consider a comparator. The comparator must be in the same material circumstances as the claimant and those circumstances must include the disabled person's abilities. S23(2)(a) Equality Act 2010.The Tribunal reminded itself of the guidance in High Quality Lifestyles v Watts 2006 IRLR 850 and Stockton on Tees Borough Council v Aylott 2010 ICR 1278.

100. There was no direct comparator suggested in this case. We find that the appropriate hypothetical comparator is a sales assistant working the same hours as the claimant i.e. normally one day a week, with a poor attendance record (absence of 30%) who is slower in some tasks than other members of staff but not excessively so.

101. When considering whether the respondent treated the claimant less favourably than a hypothetical comparator in the same set of circumstances, with the same limitations on ability as the claimant by dismissing him, the Tribunal must first consider: was there less favourable treatment?

102. There is no dispute that the claimant was dismissed which the less favourable treatment is relied upon.

103. The Tribunal must then consider the reason for the dismissal.

104. We remind ourselves of the burden of proof provisions and the well known guidance in Igen v Wong 2005 ICR 931 CA.The Tribunal has reminded itself that there is rarely direct evidence of discriminatory treatment. We remind ourselves of the guidance in Nagarajan v London Regional Transport 1999 ICR 877 that discrimination can result from unconscious bias. In considering the reason for the dismissal the Tribunal has considered whether there is any evidence from which we could draw inferences of discriminatory treatment which could shift the burden of proof.

105. The Tribunal finds that the respondent was sympathetic to the claimant's physical disability and provided the adjustments required by his GP from the outset and throughout his employment. However, the Tribunal finds that from when the respondent was made aware in January 2016 of the claimant's mental health issues the respondent was far less sympathetic. In fact having regard to Ms Toor's evidence on occasion it was hostile.

106. We find Ms Toor said in her statement that "almost all of the performance issue we had with the claimant was simply down to laziness. The claimant wasn't bothered about the employment or trying".

107. When asked by one of the panel members why she put his behaviour down to laziness instead of, for example, forgetfulness, Ms Tour was insistent that the claimant was lazy.

108. Ms Toor also said that the letter from the claimant's therapist was a fake. She said in her mind she was clear that the claimant wanted the day off only because it was his birthday and then when he was refused, he changed the reason to therapy.

109. Ms Toor admitted that she had no training in how to manage employees who were disabled or any knowledge of mental health issues and had never before managed anyone with mental health problems.

110. The Tribunal finds this suggests that Ms Toor was unsympathetic to the claimant and did not consider his mental illness genuine.

111. There were also inconsistencies in the respondent's evidence. Although the claimant was explicitly told the extension of his probationary period was not due to his performance, the respondent said he was dismissed for poor performance.

112. In terms of the procedure adopted by the respondent the Tribunal has found there were a number of procedural irregularities or matters of procedure that were unusual. These include Mr Gill being involved in both the decision to dismiss the claimant by chairing the dismissal hearing and producing a detailed report and also the person who heard (on the same day) the claimant's appeal against grievance. The claimant's grievance appeal raised concerns he had suffered disability discrimination by reason of his mental illness from Ms Toor. (P381) The Tribunal finds there was an unusual situation of Ms Moss describing herself as being the note taker at the disciplinary hearing and yet she stated she was also the decision maker. Neither Mr Gill nor Ms Debbie Ramsden were witnesses at the Tribunal so not possible to question them about their reasoning which caused them to recommend the claimant's dismissal or to recommend the appeal against dismissal was rejected.

113. We find it unusual that Mrs Grimes was the note taker and yet also decision maker at the original grievance hearing. We find she conducted the same function at the appeal against dismissal. We find Mrs Grimes was not an impressive witness.

114. She did not consider there was any problem in the fact that she was the person who made the decision to reject the claimant's grievance and she was the person who decided his appeal against dismissal.

115. There is no dispute that in his grievance the claimant alleged that Ms Toor had bullied and discriminated against him and raised his mental illness as a factor in her treatment of him(P302). Mrs Grimes rejected his grievance.P379. The claimant alleged in his appeal against dismissal that he was discriminated against because of his physical and mental difficulties.p426. We find it surprising in large organisation employing thousands of people that Mrs Grimes was the decision maker in the claimant's appeal against dismissal. The Tribunal finds that given she had already rejected his grievance that Ms Toor had discriminated against him because of his disability it is unlikely that she could be truly objective hearing an appeal against dismissal on similar grounds.

116. In addition the Tribunal finds Mrs Grimes displayed a lack of understanding about the appeal hearing. When questioned she was unclear whether it was a review or a re-hearing and then said it was both. She accepted that although she said she was both a note taker and the decision maker, she did not attend with the chairman

of the meeting Ms Ramsden when she undertook further investigations: “Following the hearing DR visited the store to check the weight of the tray HR claimed was heavy. The tray was not heavy and DR could lift it easily.” P450.

117. The Tribunal finds that Ms Moss and Mrs Grimes both took notes at their respective hearings for appeal against dismissal and dismissal but they were not in the bundle. The Tribunal finds a lack of clarity of which statements were taken by Mr Gill for the purposes of the hearing which resulted in dismissal the probationary and a lack of clarity about when they were taken. It appears he interviewed Ms Eleanor Flynn after the hearing at which the claimant attended. We find there no opportunity for the claimant to comment on any statements taken by Mr Gill and in particular on any statement of Ms Flynn. The Tribunal was told that Ms Flynn had made a complaint on 15 September to HR about the claimant but that was never disclosed to the claimant, although Ms Moss said it was sent to Mr Gill who made a decision on the dismissal.

118. The claimant produced detailed medical evidence for the appeal hearing against his dismissal which Mrs Grimes agreed was produced but there is no evidence to show that it went before either the person compiling the report, Ms Ramsden (who lists the documents before her and the new medical evidence is not included) or that Mrs Grimes, who was not an impressive witness, gave any consideration to that medical evidence.

119. For all these reasons the Tribunal finds that the burden of proof has shifted to the respondent to show there was a non discriminatory reason for the treatment.

120. The Tribunal finds the respondent is unable to discharge this burden.

121. The respondent relied on the fact that the claimant was dismissed for failing to pass the probationary period as the non discriminatory reason.

122. In terms of a hypothetical comparator, the respondent did not adduce any evidence to show how a hypothetical comparator who similarly had a poor attendance record and was a little slower than other staff might have been treated. There was no evidence adduced by the respondent to suggest that such a person would have also been dismissed.

123. The Tribunal has regard to the case of **Nagarajan**. The person responsible for the decision to dismiss the claimant was either Mr Gill or Ms Moss. Both were aware that the claimant had a mental impairment. Ms Moss worked in HR and had received communications about the claimant's disability At p226 she made a note which we find has a slightly pejorative tone: “Huseyin tried to push the situation regarding his mental health”.

124. Mr Gill had conducted the claimant's appeal against grievance where he accepted that the claimant was a disabled person although he also stated he was not medically qualified. We find that grievance hearing covered much of the same ground as the dismissal hearing and was heard on the same day just prior to the dismissal hearing. Mr Gill had decided that the grievance appeal was not substantiated. He found in that hearing “there is no evidence of any form of discriminatory behaviour”.

125. Ms Moss knew the claimant wanted a referral to Occupational Health in terms of his disability because she accepted she had received the letter from the claimant of 15 September 2016 where he requested this (page 415).She informed us she had sent this to Mr Gill but he does not refer to it. Instead he says in his report " Huseyin seeks to attribute his slowness and forgetfulness to his condition/and or his medication. I am of course not qualified to give an opinion on this". Ms Moss informed us she was the decision maker and relied on the contents of Mr Gill's report. In these circumstances, it is puzzling why the respondent, if they were unclear as to whether concerns about the claimant's performance were related to his disability, did not refer the claimant to Occupational Health to find out if they were indeed caused by his disability or his medication. Ms Moss had no explanation why she had not done this other than to say she had referred the request to Mr Gill.

126. Accordingly the Tribunal is not satisfied that the respondent has shown that the claimant's dismissal was for a non discriminatory reason. The respondent knew the claimant was disabled, they found his performance to be poor, they knew he said his performance was related to his disability and yet appeared to take no account of this information or to establish whether it was correct by seeking an opinion from Occupational Health.

127. Taking all of this information into account the Tribunal is not satisfied that the respondent has discharged the burden of proof to show there was a non discriminatory reason for the claimant's dismissal.

128. The Tribunal turns to the next allegation of less favourable treatment :(1) **"Ms Toor and Ms Flynn would take me to the back of the branch in private and tell me my serving pace was too slow and I shouldn't write tasks on my note pad to remember things." (See page 21 bullet point 2).**

129. It is not disputed that Ms Toor told the claimant that his serving pace was too slow. The claimant himself accepted that because of his drowsiness and lack of concentration which flowed from his depression and from the medication he was taking he was slower than some of his colleagues. The Tribunal finds that being told that you are too slow can amount to less favourable treatment. The Tribunal must consider whether a hypothetical comparator in the same set of circumstances as the claimant with the same limitations on his ability but who was not disabled would have been treated in the same way by Ms Toor. The Tribunal finds that he or she would have done.

130. Ms Toor presented as a brisk manager keen to ensure her branch performed. The "little things mean a lot" training list at page 154 states on 14 September 2015: "When serving a customer if they wish to browse in the window during their sale serve another customer, do not stand and waste time! Three minute rule. Buy soon". We find that this instruction has been ticked by four other staff including the claimant and at the end of the box it states: "all staff aware". We find that this suggests that the issue of pace with every employee, including an employee with the limitations that the claimant had. Accordingly this claim does not succeed.

131. The Tribunal turns to the next allegation of less favourable treatment: **(2) "On 25 June 2016 I was questioned twice about my pace by Ms Flynn and the**

covering manager, I believe her name was Layrsha, from the Hammersmith branch who was not aware of my condition at all." (See page 22 bullet point 2).

132. The Tribunal relies on its findings of fact that the correct name for the individual for the claimant is referring to is Ayesha Iqbal who was a manager temporarily covering the branch on that particular day. The claimant told us that Ms Iqbal had no knowledge of his disability. The Tribunal finds that Ms Flynn was the deputy manager.

133. The Tribunal finds that it was important to the respondent's business that customers were served quickly, hence the "little things mean a lot" document. The Tribunal relies on its findings and reasoning above and finds that this claim does not succeed.

134. The Tribunal turns to the next allegation of less favourable treatment: **(3) That the claimant was not fully trained by the respondent. "On 6/2/16 Ms Toor stated the probation extension was due as "we have been unable to complete training" (see page 21 bullet point 5).**

135. The respondent accepted that the claimant was not fully trained. In the course of the evidence it was alleged that there were particular areas where the claimant had not been trained. It was alleged the claimant had not been trained in refunds. Ms Toor accepted the claimant had not been trained in refunds and said the reason for this was because it was a matter to be done in the later stages of the claimant's training and he had not progressed beyond the early weeks of training.

136. The second issue in relation to training was about putting stock away. The respondent agreed the claimant was not trained in this area but we accept the respondent's evidence that Saturday was the busiest retail day and new stock was not delivered on a Saturday. We find that the claimant did not normally work on other days, particularly after his accident, and we find the reason he was not trained in putting stock away was because it was a task he was not required to do because he only worked on Saturdays.

137. The next area where the claimant was not fully trained on the PDQ machine. During the course of the hearing the claimant said there was an additional button on the machine on which he was not trained. The respondent's evidence was that the claimant was trained in a staff meeting with other employees. This precise allegation was only at the Employment Tribunal hearing. The Tribunal accepts the evidence of Ms Toor and finds that all staff were trained on that button.

138. The Tribunal finds that the claimant was not fully trained. The Tribunal finds that this was due to a combination of reasons. It was partly because of the claimant's absence from work which caused his training to be put back and partly because Ms Tour perceived that the claimant was not competent to progress to the next stage of the training.

139. The Tribunal finds that Ms Tour lacked patience with the claimant. We find this is reflected by our findings in relation to the refresher training where we prefer the claimant's recollection of events. However, we must turn to consider whether Ms Tour would have treated a hypothetical comparator in the same set of circumstances

as the claimant with the same limitations on his ability in the same way. The tribunal finds that it would. The Tribunal is satisfied by Ms Toor's explanation that an employee with a similar absence record to the claimant, who worked only one day a week would have also been behind with his training.Accordingly the Tribunal is satisfied by the non discriminatory explanation for the treatment and this allegation fails.

140. The Tribunal turns to the next allegation of less favourable treatment **(4) Management refused to allow the claimant to wash his hands (page 25 bullet point 1): "I would have liked to have had the choice to wash my hands with hot water and soap at times and sanitiser wasn't effective. Ms Tour would try and stop me using the sink facilities even when I asked".**

141. The Tribunal finds that it was a rule at the respondent's premises that for security reasons there should be at least two staff in the shop at any one time. The Tribunal finds that the claimant asked to be able to wash his hands in the sink in the back room ten feet from the shop floor. According to Ms Tour she was willing to allow the claimant to do this but not when that would leave only one member of staff on the shop floor. On those occasions she asked the claimant to use sanitiser instead.

142. For the claimant he agreed that Ms Tour had offered him the hand sanitiser but said that she refused him permission to wash his hands even when more than two staff were on the shop floor at any one time. We rely on the respondent's evidence that Saturday was usually a busy day with a number of staff on duty.

143. When cross examined Ms Tour suggested that the claimant "never listened" which we find suggests that she did refuse to allow the claimant to wash his hands. We find this is suggestive of Ms Tour's mindset that she was unsympathetic to the claimant. She did not consider him to be genuine (see her evidence about believing the letter from his therapist was a fake and that he was lazy).

144. Accordingly we find that Ms Tour did refuse the claimant permission to wash his hands. We must consider whether this is less favourable treatment than a hypothetical comparator in the same set of circumstances as the claimant, and the reason for the treatment is the claimant's disability.

145. Having found that the respondent did refuse to allow the claimant to wash his hands, we find that this did amount to less favourable treatment because it was important to the claimant by reason of his anxiety condition to wash his hands with soap and water rather than with a sanitiser, and we rely on the other evidence identified in this case to suggest that the burden of proof has shifted to the respondent to show there was a non discriminatory reason for the treatment.

146. The respondent gave some other explanations as to why they did not permit the claimant to wash his hands, in particular the need to know where he was. We find this is a red herring. We find the shop was relatively small and the wash basin only 10 feet away.

147. We find Ms Tour referred to the fact that the claimant already had more breaks than other staff. We find this is suggestive of her mindset which was unsympathetic to the claimant. We are not satisfied; having found that she did refuse

the claimant permission to wash his hands, that there was a non discriminatory explanation for the treatment and consequently this claim succeeds.

148. The Tribunal turns to the next allegation of less favourable treatment: **(5) Management tried to get me to take my medication after work (see page 21 bullet point 4). Ms Tour suggested "can't you take your pills after work?"**

149. There is no dispute that the claimant raised with the respondent that his medication was making him drowsy and that Ms Toor asked the claimant if he could take his medication at a different time. According to Ms Tour, that was the end of the matter and she asked to see the packet. We find that her request to see the packet is suggestive of Ms Tour's mindset that she did not really believe that the claimant was mentally ill.

150. We turn to consider whether the claimant has been subjected to less favourable treatment. The Tribunal is not satisfied in the circumstances that asking the claimant to change the time he takes his medication amounts to less favourable treatment, and accordingly the claim must fail at that stage.

151. However, if we are wrong about that and asking him to change the time of his medication so he is not drowsy at work can amount to less favourable treatment, we must consider whether the reason for the treatment was the claimant's disability and in doing so we must consider whether the respondent would have treated a hypothetical comparator in the same set of circumstances in the same way.

152. We find that Ms Tour was keen to run her branch efficiently and we find it likely that she would have asked another individual who did not suffer from a disability but for whom drowsiness was a side effect of medication e.g. antihistamines, would have been treated in the same way. Accordingly this allegation fails.

153. The Tribunal turns to the next allegation of less favourable treatment: **(6)"After the grievance meeting in July 2016 Eleanor took it upon herself to ignore me" (see page 22 bullet point 3).**

154. We find there is a lack of evidence with regard to this allegation. The claimant said very little in relation to his relationship with Ms Flynn. In addition some of the information is slightly contradictory in that he states Ms Flynn ignored him, but he also states that she made offensive remarks to him. Unfortunately Ms Flynn did not attend the Tribunal so the Tribunal heard no evidence from her and has disregarded the handwritten notes which bear her name because the Tribunal cannot know when she wrote them and cannot ask her about them. The Tribunal is not satisfied that Ms Flynn ignored the claimant after his grievance. Accordingly this allegation fails.

155. The Tribunal turns to the next allegation of less favourable treatment: **(6)" An OHS,Occupational Health service review/appointment if possible to help with amendments in the workplace. I requested this on15/9/2016 by email to Ms Jill Moss, HR. My request was ignored".**

156. It is not disputed that the claimant, on 15 September after the conclusion of the probationary review meeting and the grievance appeal meeting, sent an email to the respondent asking to be referred to the Occupational Health Service .p390 He

indicated he deemed his medical condition to be a long-term illness and a disability under the Equality Act 2010.Ms Moss admits that she received that email. She admits she did not reply to the claimant although he remained in employment until 30 September 2016.

157. Ms Moss said she referred the email to Mr Gill who conducted the probationary review meeting which culminated in the claimant's dismissal. However, there is no email to show that she referred it to him, and he does not refer to it in his report. Indeed in his report in relation to the probationary review Mr Gill does not deal with the issue of whether the claimant was a disabled person. He lists, under the section relating to the claimant, that the claimant has read from a booklet about anxiety and depression and "his GP has confirmed that he suffers from these symptoms". He mentions that the claimant "seeks to attribute his slowness and forgetfulness to his condition and/or his medication". He goes on to say, "I am of course not qualified to give a medical opinion on this". If Mr Gill had received the claimant's request that he be referred to Occupational Health it is puzzling that he fails to refer to it. A referral to Occupational Health would have informed Mr Gill whether or not the claimant was a disabled person.

158. The matter remains a puzzle because Mr Gill dealt with the claimant's grievance appeal on the same day immediately prior to his probationary review meeting. In that report he said, "For the purposes of this appeal I shall assume he would be covered by the Equality Act 2010 legislation" (see page 415). It is therefore surprising if, for the purposes of the grievance appeal, Mr Gill considered the claimant to be a disabled person why he did not do so in the probationary review meeting. He was dealing with the same individual on the same day. If he was uncertain as to whether or not the claimant was a disabled person he could have referred the claimant to Occupational Health as requested by the claimant, to resolve the issue for him.

159. It is further puzzling why Ms Moss did not seek to clarify the matter for herself with OH as to whether the claimant was a disabled person by referring him. We draw an adverse inference from the facts we referred to earlier in this judgement in relation to the claimant's dismissal.

160. The Tribunal finds that the claimant has established a prima facie case that he suffered less favourable treatment in relation to a hypothetical comparator in the same set of circumstances. The Tribunal is satisfied that failing to respond or action the claimant's request can be construed as less favourable treatment. The Tribunal finds that the claimant has adduced sufficient evidence as described above to shift the burden of proof to the respondent. It is for the respondent to show that there was a non discriminatory explanation for the treatment. The Tribunal finds that the respondent has failed to do so. There is no clear explanation by the respondent why they did not reply to the claimant's email and why he was not referred to Occupational Health. Mr Gill did not attend the Tribunal so there was no opportunity to question him as to any conscious or subconscious motivation in relation to his actions. Ms Moss simply had no explanation other than she referred the request to Mr Gill.

161. In the absence of the respondent showing a non discriminatory reason for the treatment the Tribunal finds this allegation to be well-founded.

Failure to make Reasonable Adjustments.

162. The Tribunal turns to the claim for failure to make reasonable adjustments. The issues are:

(1) What is the PCP?

(2) Did it put the claimant at a substantial disadvantage in relation to a relevant matter?

(3) Did the respondent take such steps as is reasonable to have to take to avoid the disadvantage?

163. The Tribunal turns to the first PCP relied upon by the claimant: **three minutes serving customer.** The Tribunal relies on the "little things mean a lot" document which refers to this rule and finds that it is a provision, criterion or practice.

164. The Tribunal turns to the second issue: did this rule put the claimant at a substantial disadvantage in relation to a relevant matter? The Tribunal finds, based on the claimant's evidence, that by reason of his anxiety and depression and the side effects of his medication he took longer serving customers than his colleagues.

165. The Tribunal turns to the third issue: did the respondent make such adjustments as it was reasonable to make to avoid the disadvantage? The problem for the Tribunal at this stage is that the claimant did not in his document at pages 23-25 of the bundle identify an adjustment.

166. It is implicit in the claimant's argument that what he needed was more time and the respondent did allow the claimant to take longer to serve customers.

167. Accordingly this claim does not succeed.

168. The Tribunal turns to the second PCP relied upon by the claimant "**Lifting heavy drawers filled with jewellery to put into drawers on shop floor and back up**."

169. We find that this is a provision, criterion or practice and it is not disputed by the respondent.

170. We find it put the claimant at a substantial disadvantage in relation to a relevant matter because due to his back condition it was painful for him to lift.

171. We turn to the reasonable adjustments. We find the respondent made such adjustments as it was reasonable to have to make as there was no dispute that at the time the claimant provided the respondent with an amended duties note from his GP after he returned to work following his road traffic accident he was not required to lift. Therefore this claim does not succeed.

172. The Tribunal turns to the third fourth and eighth PCPs because they are related: "**Window displays, putting out diamonds.(PCP 3) "20 minutes to check the front windows and amend and organise jewellery in the back after from memory (window run)". (PCP4)** "**Putting stock back from memory".(PCP 8)**

173. There was no dispute that the respondent was very proud of the appearance of its shop window. The Tribunal was referred to pictures of the window in the bundle.

174. It was not disputed that twice a day staff were required to check the window to make sure none of the items of jewellery had slipped from their place in the display and also to note if any stock was missing and if so to identify the code for the item and then locate it in the stockroom and replace it, or if it was out of stock to indicate with an "out of stock" notice. It was agreed that the correct way of carrying out this job was to conduct a visual check by looking at the front window and then go into the window to adjust or replace the stock. It was agreed that the correct way to do this was module by module, A to E, and within each module, row by row.

175. There is a dispute between the claimant and Ms Toor as to how he did the job. The claimant said that he did it as trained by Ms Toor i.e. module by module and row by row. Ms Toor said she thought the claimant tried to check the window by looking at the entire window and that was why he could not remember the items.

176. There was no dispute that the code for each item was six digits and it could be a combination of letters and numbers.

177. The Tribunal finds that therefore there was a PCP involving window displays requiring the claimant to check the front window, to amend and organise the jewellery and to put stock back from memory.

178. The Tribunal finds that this task put the claimant at a substantial disadvantage in relation to a relevant matter because due to the problems with his memory and concentration caused by his depression and his medication he found it difficult to carry out this task.

179. The Tribunal turns to consider whether the respondent made such adjustments as it was reasonable to make to avoid the disadvantageous effect. The claimant asked for a note pad. He found it useful to note down the missing items and the codes required so that when he went into the back of the shop he had the code on a piece of paper to check whether the stock was available.

180. There is no dispute that the claimant asked to use a pad and that Ms Toor refused him permission to have a pad and stopped him from doing so. We find that this was based on her inaccurate assumption that the claimant was doing a task incorrectly and trying to do it all from memory rather than an understanding that because of disability he was suffering from a difficulty in carrying out a simple task. Accordingly this allegation succeeds.

181. The Tribunal turns to PCP 5 **15 minutes breaks** and PCP 6**"Authorised by my GP (two additional 15 minute breaks to amend back**)". We find this does not amount to a provision, criterion or practice. The Tribunal heard evidence that all staff were entitled to two 15 minute breaks and the claimant, because of his disability (back problem), was given two additional 15 minute breaks. The claimant agreed he was given those breaks.

182. The Tribunal is satisfied that for shop assistants there was a requirement for two 15 minute breaks. The Tribunal finds that this did put the claimant at a substantial disadvantage in relation to a relevant matter because two 15 minute breaks was insufficient for him and caused back pain. However, the reasonable adjustment which was to allow two further breaks to ameliorate the claimant's back condition was permitted by the respondent and accordingly this claim fails.

183. The Tribunal turns to PCP 7: **"Hand sanitiser to clean hands on shop floor"**

184. The Tribunal finds that this is not a provision, criterion or practice. In fact it was an adjustment allowed to the claimant. Accordingly the allegation fails at this stage.

185. The Tribunal turns to PCP 9: **"Using heavy duty cleaning equipment."**

186. It is agreed that this was a PCP. We find it put the claimant at a substantial disadvantage in relation to a relevant matter because of his back condition.

187. However, we find that the respondent did not require the claimant to use heavy duty cleaning equipment and the claimant agreed this. Accordingly the respondent made such adjustments as it was reasonable to have to make by not requiring him to use this equipment so this allegation fails.

188. The Tribunal turns to PCP 10: **"Bending down to fix gift boxes."**

189. We find that this is a provision, criterion or practice in the course of the claimant's employment.

190. We find it did put the claimant at a substantial disadvantage in relation to a relevant matter, because of his back condition he was unable to do this.

191. The claimant conceded that when he needed to do this he asked a colleague to do it for him, and accordingly we are satisfied the respondent made such adjustments as it was reasonable to have to make so this allegation fails.

192. The Tribunal turns to PCP 11: **"Call in by 9.20am if unable to come into work."**

193. We find this was a provision, criterion or practice of the respondent. We find it was a business practice so that the respondent could find cover if an employee could not attend work.

194. We find that on some occasions it did put the claimant at a substantial disadvantage in relation to a relevant matter. The claimant suffered from anxiety and depression and this included on occasions suffering from a panic attack. A feature of the rule was that it was not permitted to allow a relative to call in sick on his behalf. Accordingly we find that the rule did put him at a substantial disadvantage.

195. However, we turn to the reasonable adjustment. The claimant did not contend for any reasonable adjustment (pages 23-25). The claimant says this problem of him calling in after the deadline occurred on one occasion, the respondent says it

happened on two occasions. It is not disputed that no disciplinary action was taken against the claimant in relation to being late in reporting he was too ill to attend work.

196. Accordingly, because no disciplinary or other action was taken against the claimant we find in practice the rule was disapplied to the claimant on those occasions and we find this amounts to a reasonable adjustment so this allegation fails.

197. The case will proceed to a remedy hearing on **Monday 20 November 2017** at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing at **10.00am**.

Employment Judge Ross

Date 3 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 October 2017

FOR THE TRIBUNAL OFFICE