Case Number: 3200978/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Wieslawa Zubowicz**

Respondent: **The Co-Operative Group Limited**

Heard at: **East London Hearing Centre**

On: **13, 14, 15 February 2018 and (in chambers) 16 February 2018**

Before: **Employment Judge Foxwell**

Members: **Ms K Labinjo**
Mr ML Wood

Representation

Claimant: Mr Zubowicz (Claimant's husband)
Respondent: Ms Anderson (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent subjected the Claimant to unlawful discrimination contrary to section 15 of the Equality Act 2010 by commencing investigations into her level of sickness on 7 July 2016, 19 December 2016 and 15 May 2017.**

2. **Contrary to sections 20 and 21 of the Equality Act 2010 the Respondent failed to make a reasonable adjustment on 15 May 2017, namely increasing the trigger point for commencing its sickness absence investigation procedure for the Claimant from 3 absences in a rolling 12 month period to 6 absences.**

3. **The Claimant's other claims of disability discrimination are not well-founded and are dismissed.**

4. **The remedy to which the Claimant is entitled will be decided at a hearing on 14 May 2018.**

REASONS

1 The Claimant, Mrs Wieslawa Zubowicz, is Polish. Despite having lived in the UK for many years she is not a confident English-speaker.

2 On 22 June 2007 she began working for the Respondent, The Co-Operative Group Limited, as a warehouse operative at its depot in West Thurrock. The depot is one of a number serving Co-Op stores throughout the UK. While not the largest, it is a reasonably substantial undertaking with 325,000 square feet of warehousing and approximately 800 employees, including drivers, based there. The Claimant continues to be employed by the Respondent and to work at the West Thurrock depot.

3 On 13 August 2017, having gone through early conciliation between 27 June 2017 and 10 August 2017, the Claimant presented complaints of disability discrimination and sex discrimination to the Tribunal. Her claim of sex discrimination was based on her alleged treatment in the months after the birth of her daughter in 2010. She claimed to be disabled because of two conditions, glaucoma and depression.

4 The Claimant was diagnosed with glaucoma, that is raised pressure, in her right eye in 2011. She required laser treatment and a trabeculectomy (eye surgery). The Claimant was treated at the Moorfields eye hospital. The Claimant was understandably worried about her sight and this led to symptoms of depression including disturbed sleep, tearfulness and lack of concentration. The Claimant was diagnosed with glaucoma in her left eye in 2015. At one time it was thought that she would need surgery on this eye too but that has not happened so far.

5 The Claimant has told us, and we accept, that frequent bending and lifting can cause high intraocular pressure which causes eye pain and headaches. She must also avoid wind pressure on her eyes (as you might experience on a tall building on a windy day) and the risk of dirt causing an infection.

6 The Respondent acknowledges that it was aware of the Claimant's conditions and that they were disabilities within the statutory definition in Section 6 of the Equality Act 2010 from at least October 2013 when it received occupational health advice to this effect. Accordingly, the Respondent accepts that at all times relevant to this claim the Claimant was disabled.

The Issues

7 The Claimant has acted in person throughout these proceedings assisted by her husband. She has drafted documents such as her grounds of claim and witness statement in Polish and Mr Zubowicz has translated these into English.

8 The Claimant and her husband attended a Case Management Hearing on 6 November 2017 before Employment Judge Russell. They were assisted at the hearing by a Tribunal-appointed interpreter, Mrs Buchan. Judge Russell identified the issues in the claim at that hearing as follows:

"I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

Disability

8.1 Did/does the Claimant have a physical or mental impairment, namely (a) glaucoma; and/or (b) depression?

8.2 If so, did/does the impairment have a long term, substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

Section 15 – Discrimination arising from disability

8.3 Did the Respondent treat the Claimant unfavourably by:

(i) Commencing the sickness absence review procedure
(ii) Mr Steve Radley (Shift Manager) telling her on 9 January 2016 that she was only 50% productive.

8.4 If so, was it because of something arising in consequence of disability? The Claimant relies upon her absences and/or her inability to undertake the full range of Warehouse Operative duties as the "something".

8.5 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following need to maintain a healthy and stable workforce and/or efficient service delivery as legitimate business aims.

8.6 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Reasonable adjustments: sections 20 and 21

8.7 Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely (a) the requirement to undertake the full duties of a warehouse operative; (b) the requirement to maintain consistent and satisfactory attendance.
8.8 Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

8.9 Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant's case is that it would have been reasonable for the Respondent (a) to have removed duties requiring heavy lifting or moving heavy pallets; (b) disregarded disability related absence.

8.10 Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Sex Discrimination

8.11 Did the Respondent treat the Claimant less favourably because of her sex by:

(i) For approximately a year from August 2010, requiring the Claimant to take sick leave in order to breast feed her baby;
(ii) In August 2010, refusing to permit her to return to work to the same position as held before maternity leave.
(iii) Not formally agreeing the Claimant's request for flexible working made in March or April 2010.

8.12 Are any of the complaints of sex discrimination presented in time?

8.13 If not, was any complaint presented within such other period as the Employment Tribunal considers just and equitable?"

9 Judge Russell observed that the sex discrimination claims appeared to have been presented substantially out of time. Subsequently, on 18 November 2017, the Claimant withdrew this claim and all that remains, therefore, is the disability discrimination claim.

10 The parties corresponded with one another and with the Tribunal after the hearing before Judge Russell about the issues in the claim. The trial bundle before us contains separate proposed lists of issues from the Claimant and Respondent. That from the Respondent is in the same terms as Judge Russell's Preliminary Hearing Summary. We note that on 20 December 2017 Judge Russell caused a letter to be written to the parties confirming that the issues in the claim were those set out in her Preliminary Hearing Summary. We reconfirmed this at the commencement of this hearing but added that we would consider all the circumstances when dealing with those issues.

The Hearing

11 The Claimant and Mr Zubowicz were assisted before us by a Tribunal-appointed interpreter, Ms D Krogulewska. We are very grateful to Ms Krogulewska for the care that she took and the skill she demonstrated. This hearing would have been very difficult without her assistance.

12 Mr Zubowicz represented his wife and chose to put his questions to witnesses and to make his closing submissions in Polish. Two of the Respondent's four witnesses are Polish speakers themselves but the questions of them were translated into English for our benefit and they replied in English.

13 The Claimant gave evidence in support of her claim and was cross-examined on this by Ms Anderson. The Claimant chose to speak in Polish. Mr Zubowicz also gave evidence though understandably much of his account was based on what the Claimant had told him. He also chose to speak in Polish. The Claimant produced signed statements from three witnesses, ***Lucas Sabovik***, ***Anna Sabovikova*** and ***Edyta Szul***. We read these statements and have considered them as part of our deliberations but explained to the parties that the weight we could attach to them was less than had they attended to give evidence in person. That said, it did not seem to us that the evidence of

these witnesses took matters much further in any event.

14 The Respondent called four witnesses:

Stephen Fry: Mr Fry is a warehouse shift manager. He has been employed by the Respondent for about 15 years. He dealt with a grievance raised by the Claimant in 2015.

Artur Puwlaski: Mr Puwlaski is employed as a team leader and has worked for the Respondent for about 11 years. He is Polish. He was the Claimant's team leader and line-manager between 2013 and September 2017.

Steve Radley: Mr Radley is a warehouse dayshift manager and has worked for the Respondent for about 12 years. He is Mr Puwlaski's line manager and was therefore the Claimant's second line manager until she moved to another team in September 2017. Mr Radley is said to have described the Claimant as *"50% productive"* in a conversation with her on 9 January 2016.

Natalia Popiel: Mrs Popiel is a team leader and has worked for the Respondent for about 11 years. She is Polish. She became the Claimant's line-manager in September 2017. She does not report to Mr Radley.

15 In addition to the evidence of these witnesses we have considered the documents which we have been taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle.

16 Finally, we received closing submissions from the Respondent and the Claimant. Both had prepared a written outline of their submissions and Ms Krogulewska had assisted Mr Zubowicz in translating his into English. Ms Anderson referred us to one case in particular, *Griffiths v Secretary of State for Work & Pensions [2015] EWCA CIV 1265*, a decision of the Court of Appeal concerning the interrelationship between the duty to make reasonable adjustments and trigger points under a sickness management policy. We have considered that case and the parties' wider submissions in reaching the conclusions set out below.

The legal framework

17 The Claimant alleges discrimination arising from disability and failure to make reasonable adjustments. As noted above, disability is conceded by the Respondent.

Discrimination arising from disability

18 Section 15 of the Equality Act 2010 provides as follows:

> *"(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.*

19 To establish discrimination arising from disability a Claimant must produce evidence consistent with her being treated unfavourably because of "something" arising "in consequence of her disability": a double causation test (see *Basildon & Thurrock NHS Trust v Weerasinghe* [2015] EAT 0397). If she does so, the Respondent may still be able to defeat the claim by showing that the reason for the relevant treatment was wholly unconnected with disability or that it was not known that the Claimant was disabled at the time or by establishing the defence of "justification".

20 Unfavourable treatment because of something arising in consequence of the Claimant's disability will be justified only if the employer shows that it was a proportionate means of achieving a legitimate aim. It is therefore for a Respondent to establish the defence of justification. The test to be applied by a Tribunal in considering this is an objective one and not a band of reasonable responses approach (*Hardy & Hansons plc v Lax [2005] IRLR 726*, *CA*). Furthermore, a Tribunal must not conflate the issues of the existence of a legitimate aim and proportionality: they are separate and require separate consideration.

21 What amounts to a legitimate aim is not defined in the Equality Act and is a question of fact for the Tribunal. The measure in question must pursue the aim contended for but it is not necessary for this to have been specified in those terms at the time, an *ex post facto* rationalisation is possible (see *Seldon v Clarkson Wright and Jakes [2012] IRLR 590*). An aim which is itself discriminatory cannot be legitimate; an example (in the context of age discrimination) might be a trendy fashion store having a policy of employing young people only.

22 The principle of proportionality requires a Tribunal to strike an objective balance between the discriminatory effect of a measure and the reasonable needs of the employer's business. Once again, the Equality Act provides no guidance on what is proportionate and, therefore, this is something the Tribunal must assess. In general terms, however, the greater the disadvantage caused by the unfavourable treatment, the more cogent the justification for it must be.

23 Some evidence is required to establish the defence of justification but Elias P (as he then was) explained the function of Tribunals in this context in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT* as follows (paragraph 73):

> *"We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."*

Failure to make reasonable adjustments

24 The relevant parts of Sections 20 of the Equality Act 2010 provide as follows and should be read in conjunction with section 21 and Schedule 8 to the Act:

> *"(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."*

25 A claim of failure to make reasonable adjustments requires a Tribunal to consider a number of questions. Firstly, it must identify a provision, criterion or practice (which really means no more than a way of doing things) and/or a physical feature of premises occupied by the Claimant's employer which is in issue. Secondly, it needs to consider who the non-disabled comparators are. Thirdly, it needs to identify the nature and extent of the disadvantage the Claimant has suffered or will suffer in comparison with the comparators. Only then can the Tribunal go on to judge whether any proposed adjustment is reasonable *(Environment Agency v Rowan* [2008] ICR 218*).*

26 Even if all of these questions are resolved in the Claimant's favour, liability will not arise unless the employer knew or ought to have known that the Claimant was disabled and that she was liable to be affected in the manner alleged (*Secretary of State for Work & Pensions v Alam* [2010] ICR 665). Whether an employer had actual knowledge of both these matters is a factual question to be resolved on the evidence. Whether an employer who lacks actual knowledge ought to have known requires an assessment of the evidence by the Tribunal.

27 If the duty to make reasonable adjustments arises it does not require an employer to make every adjustment that could conceivably be made, only those which are reasonable. Reasonableness is a matter for the Tribunal to assess objectively; accordingly, the mere fact that the employer considers its approach to be reasonable does not make it so (*Smith v Churchills Stairlifts Plc* [2006] IRLR 41). An adjustment is unlikely to be reasonable if it will not address the employee's disadvantage.

28 In summary, therefore, the questions which a Tribunal must address in determining a reasonable adjustments claim are as follows:

28.1 What is the relevant PCP?

28.2 Who is the Claimant comparing herself with or is a comparator

unnecessary?

28.3 What is the adverse effect on the Claimant of the PCP?

28.4 Is the effect substantial?

28.5 Did the employer know that the Claimant was disabled and that she was likely to be affected as she describes?

28.6 If the answer to (5) is 'no', ought the employer to have known these things?

28.7 Is there an adjustment which, judged objectively, ought reasonably to have been made to reduce or eliminate the adverse effect?

The burden of proof under the Equality Act

29 Section 136 of the 2010 Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(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".*

30 These provisions require a Claimant to prove facts consistent with her claim: that is facts which, in the absence of an adequate explanation, could lead a tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof shifts to the Respondent to prove that it did not commit the unlawful act in question (*Igen v Wong* [2005] IRLR 258). The Respondents' explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic.

31 We have borne this two-stage test in mind when deciding the Claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. We have not however separated out our findings under the two stages in the Reasons which appear below. We have reminded ourselves that detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims

32 An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see *Anya v University of Oxford* [2001] IRLR 377). We have considered the guidance given by Elias J on this in the case of *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (*Madarassy v Nomura International plc* [2007] IRLR 246).

33 A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

The time limit for claims under the Equality Act

34 The time limit for claims under the Act is contained in Section 123 which provides as follows:

> *"(1) Subject to section 140A proceedings on a complaint within section 120 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*
>
> *(b) such other period as the employment tribunal thinks just and equitable*
>
> *……*
>
> *(3) For the purpose of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

35 It can be seen from this provision that time does not begin to run in respect of acts continuing over a period until that period has ended. This might suggest that a failure to make a reasonable adjustment is a continuing act but, as was explained by the Court of Appeal in *Kingston upon Hull CC v Matuszowicz* [2009] ICR 1170, the correct position is that a failure to make a reasonable adjustment is an omission which is deemed to have

been done either when the omission was decided upon or, if there is no evidence of a deliberate decision, when the omitted act might reasonably have been expected to be done (there is contrary authority at EAT level but we are bound by the decision of the Court of Appeal). This can give rise to a situation where the primary time limit for a claim for failure to make reasonable adjustments has expired at a time when the Claimant could not have reasonably known this. In such a case a Tribunal is likely to be willing to allow a reasonable extension of time on just and equitable grounds.

Findings of Fact

36 We make the following findings of fact unanimously and on the balance of probabilities.

37 The West Thurrock Depot has a number of different work areas; for example, the "ambient area" is one which is not temperature controlled whereas the "chilled" and "produce pick" areas are. Warehouse operatives work in different areas across the depot but not all operatives work in all areas. Some operatives have additional training to operate specialist equipment such as forklift trucks or powered pallet trucks (known as PPTs). PPTs are, as the name implies, powered trucks for moving pallets; they have a small platform at the rear for the operator to stand on.

38 The Respondent referred the Claimant to Occupational Health in 2013 because of her eye symptoms and the report of Dr Curran, a Consultant Occupational Physician, dated 14 October 2013 is at pages 53 – 54. Dr Curran thought that the Claimant was probably disabled and noted that the Claimant believed that manual handling was not compatible with her eye condition. Dr Curran said, however, that physical activity was generally good for people with glaucoma.

39 Dr Curran prepared a further report, dated 7 January 2014, in which she recommended that the Claimant not undertake tasks requiring repetitive bending at the waist or lift weights above 12 kilograms. She confirmed that the Claimant was likely to be covered by disability legislation.

40 The Claimant's absence records show that she had a 60-day absence for stress and depression in 2013. In 2014 she had two periods of absence, 24 and 9 days long respectively. In 2015 she had absences in January for an eye problem, in April for headache, in September for eye pain, in October for eye pain, stress and headache and in December for similar symptoms. These absences were 11 days, 13 days, 27 days, 12 days and 1 day respectively.

41 The Respondent operates a sickness management policy along the lines set out in the document at page 187. We are not sure that this particular version of the policy applied to West Thurrock but we find on the balance of probabilities that the West Thurrock policy was not materially different. The Respondent's policy provides for employees to have up to 30 weeks of contractual sick pay after ten years service. This entitlement was based on a rolling 12-month period. The Claimant qualifies for this generous sick pay provision because of her length of service.

42 The policy says as follows in respect of persistent absences:

"Where there is a marked and sustained increase in absenteeism by any individual employee then the Society, in consultation with the trade union, may take the following action;

- *Introduce three waiting days (regardless of hours) where payment will not be made.*
- *Request the production of a medical certificate before any payment is made regardless of the length of absence.*
- *Withdraw that individual employee from cover by the scheme."*

43 In a separate section headed *"Persistent short-term absenteeism"* the policy says as follows:

"frequent and persistent short-term absences resulting in three occasions in any 12-month period will be investigated by management. This may result in disciplinary action being taken

If the employee's attendance fails to improve, this will result in the escalation of the disciplinary process in the normal manner."

44 The Respondent holds return to work meetings after each significant period of absence and there are a number of examples of these in the bundle. One of the Claimant's more general complaints (though it is not a specific issue) is that she felt under pressure because of these meetings and that she felt that she always had to justify and re-explain her conditions. The written records of these meetings do not give a flavour of how they took place but we accept that the Claimant found them stressful and was conscious of the possibility of three-day waiting being imposed when they took place.

45 The three-day waiting sanction was discretionary but could be applied for repeated absence. The issue of three-day waiting was raised at a return to work meeting in October 2013 (page 56) and on 13 October 2015 a shift manager, Keith Blowes, wrote to the Claimant telling her that three-day waiting might be applied to further occasions of absence (page 77).

46 When Mr Blowes actually applied three-day waiting in October 2015 the Claimant raised a grievance (page 78). She was particularly upset by Mr Blowes saying that there were no mitigating circumstances for her absence. The grievance was dealt with by Mr Fry and he gave his decision in a letter dated 23 November 2015 (page 80). He upheld her complaint and arranged for payment for the three unpaid days of sick leave. He said this in his decision letter:

"My decision is as follows:

- *I have reviewed your case and agreed that the 3 day waiting process should have not applied to you and I will request that this will be repaid to you and that currently you should not be on 3 day waiting.*

- *I have addressed this with Keith Blowes as I believe that he could have looked more closely at your circumstances and reasons, to this effect I have also addressed the depot JCC meeting and have made it clear to all shifts that 3 day waiting will only be reviewed once an investigation has taken place so all information can be gathered and any mitigation can be viewed before any sanctions are in place. This has been an issue across all 3 shifts and not just Keith Blowes decision.*

- *I will speak to Steve Radley and recommend that if he is not dealing with a case then he should still listen and make the manager that is dealing with a case aware of any conversations.*

- *I will ask Days Manager to inform your T/L to complete 4 weekly review for you regarding the work adjustment process I am hopeful this will help and support you and make you feel more comfortable."*

47 The Claimant had worked in the chilled area in the earlier part of her employment but at some point, we believe in about 2015, she was moved to "goods-in receiving". The work done in this area is called, "ambient receiving". There are two aspects to ambient receiving; unloading pallets using a PPT, which is known as "tipping"; and scanning pallets and assigning numbers to them which is known as "receiving". The Claimant could manage receiving, which is light work, but could not do tipping as the movement of the PPT generated a draft which affected her eyes. It appears that she was not required to do tipping.

48 The Claimant was at work on 7 January 2016; the manager in charge was Keith Blowes and he put her to work on "security". What this work entailed was not explained to us in detail, save that the Claimant said that the work involved repetitive lifting and bending. She had done this type of work in the past and had complained about it which had led her to being moved to ambient receiving. When the Claimant complained about being relocated to security on 7 January 2016 she was moved to working on "trays" but left work after two hours or so because of eye symptoms. As we understand it, working on "trays" involves repetitive lifting but not of particularly heavy weights (certainly less than 12 kilograms). The Claimant was paid for the whole of her shift on 7 January 2016.

49 The Claimant lodged a grievance against Mr Blowes on 7 January 2016 alleging that he was victimising her for having complained about him previously (page 81). She also said that the four-weekly review meetings directed by Mr Fry had not taken place.

50 The Claimant was on a prearranged rest day on 8 January 2016 and returned to work on Saturday, 9 January 2016. On this occasion the manager in charge was Mr Radley. On arriving at work the Claimant was distressed to discover that she was not rostered in ambient receiving. She spoke to Mr Radley through an interpreter, Ms Szul, and the Claimant's recollection is that Mr Radley told her that she was *"only 50% productive"*. Mr Radley agreed that he spoke to the Claimant on 9 January 2016 through a colleague acting as interpreter but says that he cannot recall using these exact words. He told us that he may have said something along these lines but in a different context and not in a derogatory way. He told us that the workforce was planned on the preceding day to reflect expected workload and that at weekends only one person was normally required in ambient receiving because of a lower rate of deliveries. This person would

have to be able to do tipping and receiving. He said that this is why the Claimant was put on a week day rota not involving weekend work. Accordingly, his evidence was that, if he said anything, it was to reflect this and not the Claimant's general capacity for work. In any event, having said there was no work for the Claimant, Mr Radley sent her home on sick leave: she was paid for this.

51 The Claimant returned to work on 12 January 2016 and lodged a grievance against Mr Radley relating to the events of 9 January 2016. The grievances against Mr Bowes and Mr Radley were considered by Mr Fry who provided outcomes in letters dated 16 February 2016 (pages 83 & 85). The Claimant was also referred for a further Occupational Health review and she was seen by Dr Kerry Freer, Consultant Occupational Physician, on 12 February 2016. Dr Freer's report is dated 16 February 2016. She noted that the Claimant had bilateral glaucoma and psychological symptoms. She said that the Claimant was fit for her current work in ambient receiving but could not do work involving bending of lifting. The Claimant confirmed in evidence that since this time she has worked in ambient receiving doing receiving but not tipping.

52 On 21 February 2016 the Claimant wrote to Mr Radley and Mr Blowes asking why they had not made reasonable adjustments for her and referred to her rights under the Equality Act 2010 (page 90). The Claimant was also unhappy with Mr Fry's grievance decisions and sought to pursue this further with Gareth Holt (pages 91 – 92). These letters were treated as further grievances which were dealt with by the depot operations manager, Phil Ferrier as appears at pages 97 and 99. This grievance was upheld in part.

53 The Claimant's absence between 7 and 12 January 2016 was marked as sickness absence in the Respondent's records. She began another period of absence on 9 March 2016 because she had twisted her ankle in an accident at work. This absence lasted 36 calendar days and 25 working days. On 17 May 2016, following her return to work, Wayne Horsfall, a dayshift transport manager, wrote to the Claimant inviting her to a disciplinary meeting concerning an allegation that she had done an unsafe act which had led to this injury (page 101). This treatment is unrelated to the Claimant's disabilities and we were not told that she was subject to a disciplinary penalty.

54 The Claimant had a further 3 days absence for blood pressure between 15 and 17 July 2016. On 5 July 2016 Mr Puwlaski wrote to the Claimant inviting her to an investigation meeting fixed for 7 July 2016 to discuss her level of sickness (page 102). The Claimant's evidence was that a meeting took place on 7 July 2016 for which no minutes have been produced but in which she asked for the trigger points for waiting days to be changed in her case as a reasonable adjustment. The Claimant told us that she raised this issue at every meeting and we accept this. The meeting notes which the Respondent has produced may either relate to a different meeting as they are dated 11 July 2016 and may be incomplete because they do not contain any reference to a request for this adjustment (pages 103-104). We observe that the notes produced by the Respondent do not contain the same cover page as later similar notes (an example is at page 110). We think it probable that the Claimant asked for the trigger point for sickness review meetings to be increased in her case in the meeting(s) in July 2016.

55 When asked by the Tribunal what she did when the trigger points were not reviewed as she had requested, the Claimant said that she waited for change to happen and that this eventually occurred in July 2017 in the circumstances we describe below.

56 The meeting notes dated 11 July 2016 (pages 103 – 104) suggest that Mr Puwlaski was broadly supportive of the Claimant and there is no suggestion there that she was subjected to any disciplinary sanction or financial penalty because of her level of absence.

57 The Claimant had a day's absence on 14 July 2016 because she was feeling unwell, had eye problems and headache. She had five days absence for a rash beginning on 15 August 2016. On 18 November she began a further period of sickness absence for high temperature and headache which lasted 32 days. On her return to work on 19 December 2016 a warehouse team leader, Gosia Ziolkowska, wrote to her inviting her to an investigation meeting to discuss her *"failure to maintain a satisfactory record of attendance"* (page 105). We have no evidence of what happened because of this.

58 In May 2017 the Claimant was off work with eye pain for 6 days. On her return to work Mr Puwlaski wrote to her inviting her to an investigatory meeting fixed for 17 May 2017 (page 109). Notes of this meeting are at pages 110 – 117. Mr Puwlaski chaired the meeting and it took place in a combination of English and Polish. The Claimant was accompanied by her husband who acted as interpreter for her. The note-taker, however, was an English-speaker only. It is common ground that the meeting did not go well. The Claimant felt that she was prevented from setting out her condition at the beginning of the meeting and from explaining why it had affected her absence level. Mr Puwlaski says that he simply wanted to set out the scope and purpose of the meeting and agree facts before turning to the Claimant's explanation. The minutes are consistent with Mr Puwlaski's evidence and were signed by the Claimant at the time. While she is not a proficient English-speaker, she had her husband's assistance with this. We find, therefore, that the minutes are a broadly accurate account of what happened.

59 The following exchange took place between Mr Zubowicz and Mr Puwlaski during the meeting:

> *"PZ: Despite the fact that managers and T/L know her condition since 2012 nobody cares about her, and one year ago we had this meeting and Artur Puwlaski has not done anything. He promised to speak to N Gibs* [sic] *because she is cronicly* [sic] *ill, and she needs to go sick without the consequences.*
>
> *AP: Ok, I do appreciate what you have said and I admit that all this* [sic] *meetings have not happened as often as they should."*

Mr Puwlaski was referring to the regular four-weekly meetings with the Claimant directed by Mr Fry in late 2015. He told us in evidence that these had only happened on a few occasions.

60 The Claimant commenced a further period of sickness absence on 29 May 2017. This absence, which was said to be for work-related pressure, lasted 54 days ending on 21 July 2017.

61 On 30 May 2017, the day after going off sick, the Claimant submitted another grievance to Mr Fry and Mr Radley (pages 118 – 119). She complained that Mr Puwlaski had not allowed her to say what she wanted about her health issues at the recent meeting

and that this was not reflected in the meeting notes. She also complained that the four-weekly meetings promised by Mr Fry in 2015 had not taken place regularly and that Mr Puwlaski either did not know the correct procedures or was deliberately lying about them which was affecting her mental health. She said that he had promised to take HR advice from Nadine Gibbs a year previously but had not done so.

62 Following receipt of this grievance the Respondent arranged a welfare meeting at the Claimant's home. We note that by this stage the Claimant had been in touch with ACAS to initiate early conciliation. In any event, the Claimant was accompanied by her husband at this meeting and the Respondent was represented by a manager, Andy Turnau, and Mrs Popiel. Mrs Popiel told us that she attended simply as a witness and that Mr Zubowicz acted as interpreter for his wife.

63 Mr Turnau made a number of proposals in this meeting which included raising the sickness review and waiting days trigger point under its sickness policy to 6 absences for the Claimant in a rolling 12-month period rather than three. Mr Turnau also suggested that the Claimant move to a new team under Mrs Popiel. The Claimant confirmed in evidence that these proposals were put into practice on her return to work but said that they have never been confirmed in writing.

64 The Claimant returned to work on 21 July 2017. She presented her claim to the Tribunal on 13 August 2017. She was absent from work at the time of this hearing because of illness.

Conclusions

65 In this section of our Reasons we set out our conclusions on the issues having regard to the legal principles and findings of fact described above.

66 We can deal with two aspects of the Claimant's claims relatively swiftly. We start with the allegation against Mr Radley based on events on 9 January 2016. We are not satisfied on the evidence that Mr Radley said the words attributed to him by the Claimant, bearing in mind that the conversation was through an interpreter. We think it more probable that he was making the point that there was only one person assigned to ambient receiving that day, a Saturday, and the Claimant could not do the whole of this job rather than suggesting that she was *"only 50% productive"*. In our judgment, therefore, the factual basis for this claim is not established as there was no unfavourable treatment.

67 Furthermore, this claim has been presented substantially out of time and we do not find it just and equitable to extend time for it. It is clear from the Claimant's grievances that she was aware of the rights and obligations under the Equality Act 2010 at that time when those events arose (see her letter of 21 February 2016 at page 90). Despite this she did not present a claim. We bear in mind that the Claimant suffers from depression, which may affect a person's ability to act promptly, and have weighed this in the balance but cannot find that justice or equity demands that this lengthy delay be ignored. The Claimant provided not evidence on a just and equitable extension of time in any event. Accordingly, we find that we do not have had jurisdiction for this claim in any event.

68 We also reject the Claimant's claim of failure to make reasonable adjustments based on a requirement to undertake the full duties of a warehouse operative for lack of jurisdiction. The evidence shows that since January 2016 at the latest the Claimant has been working on amended duties in ambient receiving; these are the duties the Claimant continues to do and which she confirmed in evidence are within her abilities. Accordingly, she has not been required to undertake the full duties of a warehouse operative an adjustment having been made in this respect for well over a year before the presentation of this claim. In these circumstances we have found it unnecessary to analyse whether the duty to make this adjustment arose (although it appears likely that it did) as a claim based on any failure to adjust is substantially out of time. We do not find it just and equitable to extend time for this potential claim for the same reasons as we gave about the claim concerning Mr Radley.

The remaining issues

69 Two issues remain: an allegation of discrimination arising from disability contrary to Section 15 of the Equality Act 2010 by commencing the sickness absence review procedure; and an alleged failure to make a reasonable adjustment to a requirement to *"maintain consistent and satisfactory attendance"* contrary to Section 20 of the Equality Act 2010.

70 The Respondent has instigated it sickness review procedure a number of times because of the Claimant's absences from work. The most recent occasion was on the 15 May 2017 (page 109). This event occurred within three months of the presentation of this claim to the Tribunal and therefore any unlawful treatment connected with it arising under the Equality Act would be within the Tribunal's jurisdiction without more.

The section 15 claim

71 The letter of 15 May 2017 invited the Claimant to an investigatory meeting because of her level of sickness. We find that the meeting was arranged because the Claimant had crossed the three-absence trigger contained in the Respondent's sickness absence policy. The first question for us is whether requiring the Claimant to attend such a meeting was unfavourable treatment? In our judgment, calling such a meeting was unfavourable treatment as it admitted of the possibility of a sanction, imposing three unpaid sick days, which was punitive having regard to the otherwise generous terms of the Respondent's sick pay provisions.

72 The next question is, what is the "something" which caused this meeting to be called? We find that the "something" was the number of absences the Claimant had had in the 12 months ending with her most recent one which had been for 6 days for eye pain between 9 and 14 May 2017 (see page 134). This was the Claimant's fifth absence in that period, two of which are recorded as being for eye symptoms (see page 134). She had already been called to two similar meetings during this 12-month period by letters dated 17 May 2016 and 19 December 2016, so it is not the case that the number of absences before the May 2017 meeting evidences an adjustment to the trigger-point.

73 The next question is whether the "something" arises in consequence of the Claimant's disability? The trigger for calling the meeting in May 2017 was absence for eye pain that month. There had been no absences recorded between December 2016 and

May 2017. Accordingly, we find that the number of absences, which triggered the meeting, arose in consequence of the Claimant's disability as eye symptoms were the cause of the most recent one.

74 Such treatment is not unlawful, however, if the Respondent establishes that it was a proportionate means of achieving a legitimate aim. We are satisfied by the Respondent's evidence that it had a legitimate aim, namely maintaining a healthy and stable workforce and efficient service delivery. We are not satisfied on the evidence, and judged objectively, that the Respondent's means of achieving this legitimate aim was proportionate. The Respondent applied an inflexible rule of three in the Claimant's case irrespective of the cause of her absence, or the length of an absence despite knowing that she had particular problems related to her eyes and to depression making absence more likely. Good evidence that the approach in May 2017 was disproportionate are the comments made by Mr Fry in his grievance decision in November 2015 and the adjustment made in July 2017 to double the Claimant's trigger point to six.

75 It follows that we find that the Claimant's treatment on 15 May 2017 was discrimination arising from disability. Furthermore, we are satisfied on the evidence that it was part of a course of conduct linked with earlier occasions on 19 December 2016 (page 105) and 7 July 2016 (page 102), when team leaders took the same inflexible approach despite one or more of the relevant absences being plainly disability-related. We note that the decision in July 2016 was also that of Mr Puwlaski; we have had regard to the fact that the decision maker in December 2016 was different in assessing whether there was an act extending over a period but have concluded that Gosia Ziolkowska was simply working to the same formula as Mr Puwlaski.

76 For these reasons the claim of discrimination arising from disability by commencing the sickness absence review procedure succeeds.

The section 20 claim

77 We turn then to the final element of this claim, failure to make a reasonable adjustment based on an alleged PCP expressed as *"the requirement to maintain consistent and satisfactory performance"*. Ms Anderson appeared to acknowledge that this formulation did not quite capture the Claimant's case when she recast the PCP in the following terms in her closing submissions:

> *"Did the Respondent breach sections 20 and 21 of the Equality Act 2010 by failing to disregard the Claimant's disability related absence?"*

78 We find that this PCP is more accurately described in the following terms:

> *"The requirement for an employee to maintain a certain level of attendance at work not to be subject to investigation and the possibility of the sanction of three day waiting."*

79 We are satisfied on the evidence that there was a provision criterion or practice ("PCP") in the terms we have described. The first question in respect of this part of the claim is whether the PCP put the Claimant at a substantial disadvantage compared with

non-disabled workers? In our judgment the PCP did do so in that the Claimant was more likely to be subject to investigation and possible sanction because of absence than the norm due to disability-related absences. The Respondent's trigger point of three in 12 months reflects a reasonable estimate of a normal level of sickness absence and the facts show that the Claimant was regularly called to investigations for exceeding this. There is no evidence about the treatment of potential comparators but we do not find that such evidence is necessary in this case to infer that the Claimant's level of absence was higher than non-disabled employees.

80 We are satisfied on the evidence that the disadvantage to the Claimant was substantial. The Respondent knew that the Claimant was disabled and knew of the effect on her of the investigation process because she complained about it repeatedly through the grievance process.

81 Judged objectively, a reasonable adjustment was the one that made in July 2017 to increase the trigger point to 6. An alternative may have been to disregard disability-related absences but that does not make the adjustment which was made unreasonable.

82 The reasonable adjustment was implemented when the Claimant returned to work on 21 July 2017, so before the presentation of this claim. A failure to make a reasonable adjustment is an omission done at the time when it was decided upon or, failing that, when the adjustment ought to have been made (*Kingston upon Hull CC v Matuszowicz supra*). In this case there was such an occasion falling within the limitation period, namely 15 May 2017 when, rather than making the adjustment, Mr Puwlaski stuck to the strict letter of the Respondent's sickness absence management process by requiring the Claimant to attend an investigatory meeting. The claim of failure to make reasonable adjustments succeeds to that extent.

83 The remedy to which the Claimant is entitled will be decided at a hearing on 14 May 2018.

Employment Judge Foxwell

7 March 2018