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EMPLOYMENT TRIBUNALS

Claimant: **Mr L Saouromou**

Respondents: **1. Co-Operative Group Ltd**
2. ISS Facilities Services Ltd

Heard at: **East London Hearing Centre**

On: **10-13 & 16-19 October 2018**

Before: **Employment Judge Ross**
Members: **Mr T Burrows**
Dr J Ukemenam

Representation

Claimant: In person

Respondents: Mr P Gorasia (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The complaints of race discrimination, disability discrimination and unfair dismissal are not upheld.**

2. **The Claim is dismissed.**

3. **The provisional remedy hearing on 11 February 2019 is vacated.**

REASONS

1 The Claimant was continuously employed by the First Respondent from June 2014 until 14 January 2018, when there was a transfer to the Second Respondent of the part of the business to which he was assigned. The

Respondents' case was that this was a transfer within the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regs"), which was challenged by the Claimant.

The Hearing

2 Mr. Gorasia represented both Respondents, producing a chronology and, on the first day, gave a running order of witnesses.

3 At the commencement of the hearing, the interpreter was sworn. The Claimant was reminded to give his answers or ask questions through the interpreter, because, during the case management stage of this hearing, he tended to use English in his responses. We noted that the Claimant had a fairly good grasp of English; he explained that he was concerned that more technical or legal language would be used in Court, which is why he needed the interpreter.

4 During an early part of his cross-examination, the interpreter, Ms. Durrant, explained that there was some delay in interpretation because sometimes she had to ask the Claimant to repeat answers. This was because she was a French (African) to English interpreter and he was a French (European) speaker. The Claimant said that he was happy to give the answer in English, to promote understanding.

5 After a break to consider this issue, the Tribunal decided that the Claimant should use the interpreter as the default position, but could give an answer in English, if he wanted to ensure his evidence was understood. This was because the Tribunal were concerned that the Claimant should have a fair hearing and be able to tell his account of events as he wished.

6 The parties were happy with this arrangement, which worked well. Generally, the Claimant answered in French, which was interpreted; from time to time, he answered in English. The quality of his evidence was not affected by this; in fact, the Tribunal found this promoted his ability to put his case.

7 When it came to the Respondents' case, the Claimant generally asked questions in English, often from a list he had prepared. Occasionally, he asked the interpreter to interpret a particular point whether in a question to the witness, or to the Tribunal.

Complaints and Issues

8 After periods of Early Conciliation, the Claimant presented three Claims, by which he brought complaints of race discrimination, disability discrimination, victimisation, and unfair dismissal.

9 In the third of these claims, a single ET3 was filed on behalf of both Respondents, alleging that the Claimant had objected to the TUPE transfer, had refused to transfer, and therefore his employment had terminated by operation of law.

10 These claims were case managed at a series of Preliminary Hearings. The last of these hearings, on 1 June 2018, produced a list of issues.

11 At the outset of the hearing, it became clear that the parties had not been sent the summary or case management order arising from this Preliminary Hearing (despite promulgation in August 2018).

12 Counsel had prepared a draft list of issues, following the discussion at that hearing, which was similar to the list drawn by Employment Judge Tobin. Having heard the parties and read the Claimant's witness statement, we determined that the Claimant's case on the issue of requests for training which were not met was expressed in more detail in the draft list prepared by Mr. Gorasia.

13 The list of issues set out in the case management summary of Employment Judge Tobin was amended by the Tribunal to a limited extent, so as to include this point, to correct some type errors and to set out the issues on the unfair dismissal complaint in more detail, to assist the parties and the Tribunal.

14 The parties were given a copy of the revised list on 16 October 2018. Counsel for the Respondents objected to issue 9 (whether there was a relevant transfer for the purposes of the TUPE Regulations). For reasons given at the time, we agreed with the Claimant that this was indeed in issue, as evidenced by the Preliminary Hearing Summary of Employment Judge Foxwell (p.61e) and the Respondents' own draft list of issues. We decided that it would further the overriding objective to allow the Respondent to adduce further documentary and oral evidence on this issue.

15 For ease of reference, we have included the final list of issues at the Appendix to this set of Reasons. This was agreed by the Respondents on 17 October 2018, and by the Claimant on the morning of 18 October 2018.

16 Orally, Counsel explained that it was not disputed that the Claimant had a physical impairment which had a substantial effect on his abilities, but it was disputed that the substantial effect was long-term.

17 In the course of the hearing, the Claimant attempted to raise other complaints, such as a complaint that he had accrued but unpaid holiday pay. We reminded ourselves that the scope of the complaints was defined by the three claim forms and that the issues had been identified during the Preliminary Hearings referred to above. It may be that a large retailer of this nature would examine a written request for holiday pay if one were made now, but this is not a matter for our determination.

The Evidence

18 There was a bundle of documents (two files) prepared by the Respondents. The Claimant produced further documents, not realising that most of these had been included in the bundles.

19 Pages in this set of Reasons refer to pages in this main bundle.

20 After discussion between the parties, a small further bundle of documents was prepared, which we labelled "C1". The last document in this was Appendix 10, a Training and Development Policy. The Claimant confirmed that he was happy to proceed and that all relevant documents were before the Tribunal.

21 After our determination that the question of whether there was a TUPE transfer was an issue in the case, we permitted the Respondent to adduce documentary and oral evidence in respect of this issue, in the form of relevant pages of the copy of the contract between the Respondents, with a schedule of employees proposed to be within scope to transfer, which was suitably redacted. We decided that this approach furthered the overriding objective. These documents were added to the bundle.

22 We explained to the parties that we would not read documents unless asked to do so or unless directed to them.

23 We read witness statements from, and heard the oral evidence of, the following witnesses:

For the Claimant:

23.1 The Claimant, former Warehouse Operative;
23.2 Richard Akpata, Warehouse Operative (statement at p.238);
23.3 Tomas Bladja, USDAW representative;
23.4 Lubos Oles, USDAW representative;

For the Respondent:

23.5 Pawel Gorny, Shift Manager;
23.6 Russell McAleese, Shift Manager;
23.7 Nicholas Wooton, Team Manager;
23.8 David Gardiner, Team Manager;
23.9 John Ramsden, Team Manager;
23.10 Pawel Zabik, Team Manager;
23.11 Janet John, Operations Manager;
23.12 Nadine Gibbs, Human Resources Adviser.

24 The Respondents indicated that they did not seek to cross-examine the remaining witnesses for the Claimant, who had all provided statements. Accordingly, we took those statements as read, but they were of marginal, if any, relevance. These witnesses were:

24.1 Piotr Zubowicz (p.241);
24.2 Lukaz Sabovik (p.242);
24.3 Przemyslaw Duk (p251).

25 On the first day of the hearing, which the Tribunal used for case management and reading, the procedure was explained to the Claimant, in detail, by the Tribunal. The interpreter translated this for him.

26 In his evidence-in-chief, the Claimant began by verifying his witness statement and impact statement, and by providing a reading list. We adjourned so the documents on this list could be read.

27 Subsequently, in cross-examination, the Claimant produced two further documents. One was a further version of p.71 (inserted as 71A) and a referral to Occupational Health ("OH"), inserted at 203a.

28 Later, towards the end of his evidence, the Claimant produced further documents, being extracts from the depot rota. These were considered; those from May 2018 were added to the bundle with those extracts already there.

29 On the afternoon of Friday 12 October, the Claimant closed his case, with the Tribunal confirming with him that he did not seek to call any further evidence. It was explained to him that it would probably assist him to write out his questions for cross-examination, and that any further documents should not be produced at the hearing, but must be given to the Respondents in advance of the next day of the hearing, Tuesday 16 October.

30 After the Claimant had closed his case, he arrived on Tuesday 16 October with a memory stick, alleged to contain a recording of a meeting with Mr. Gorny. This had not been disclosed and no transcript had been made. The Claimant's application to re-open his evidence and to adduce this evidence was refused, for reasons given at the time. He had no good explanation for not making any reference to this recording at any earlier point, stating that he had forgotten it.

31 Despite the wealth of oral and documentary evidence, there were relatively few disputes of fact. We found that the Respondents' witnesses generally gave reliable evidence.

32 We found that the Claimant genuinely believed that the evidence he gave was accurate. But the Tribunal found that his very strong sense of grievance clouded his ability to recall events accurately and caused him to misinterpret certain events. For example, in oral evidence (although not in his pleaded case) the Claimant alleged, as one example of being singled out by a refusal of training, that he had applied for a position under the "Warehouse to Wheels" scheme. He was told that he had the same score as the person who was ultimately appointed; but the other applicant was appointed because he had longer service. The Claimant did not deny in evidence that a number of persons of different ethnicities and backgrounds had also applied for the role. We did not find this failure to appoint was an act of victimisation (the Claimant alleged that it was due to him presenting a grievance against a manager, Sean Byrne, who is not mentioned in the List of Issues), given the reason for the appointment and given the absence of any complaint about this matter before the evidence. He could not point to any evidence other than this grievance as evidence of

victimisation; and he did not deny the operative appointed had longer service nor that the Respondent prioritised longer service in allocating these positions.

33 As a further example, the Claimant denied that he was offered training to be a loader. The Tribunal found that he was offered loader training, as shown by various pieces of documentary and oral evidence.

34 On the conflicts of fact generally, we preferred the evidence of the Respondents' witnesses.

Findings of Fact: Disability

35 The Claimant's case was that he was a person with a disability due to a physical impairment, relating to his back, or a mental impairment, relating to a stress-related condition.

36 The First Respondent's case was that the Claimant may have had a back impairment, but that it was not, at the material times, long-term.

37 Moreover, the First Respondent argued that, although the Claimant may have had a stress-related condition, the stress-related condition was irrelevant given the chronology and the complaints.

Back Impairment

38 The Claimant's Impact statement is from p.63aa. His case was that he had pain during daily activities which started early 2017; and that in July 2017: the condition re-occurred, painkillers stopped working, and that "*Since then, every time I feel pain when sitting down and standing up".*

39 There is no issue over whether the Claimant had a back impairment which had an effect on daily activities at material times. We focussed on whether the effect alleged was substantial and long-term.

Long-term adverse effect

40 We did not accept the Claimant's recollection to be accurate on the issue of when the impairment commenced nor on the issue of its long-term effect.

41 We found that the Claimant experienced pain during daily activities which started around April - May 2017. This is supported by the GP records (p.66). These make no mention of a back impairment, despite the Claimant's visits to the GP in January to February 2017, until 10 July 2017. The records for this date state:

"*Back pain without radiation NOS Lumbar back pain, worsening over past few weeks."*

42 Moreover, at the meeting of 9 October 2017, the Claimant states that he has had back pain for "*About 4 months*": see the minutes of the meeting (p.208),

which we find to be accurate if not verbatim. This indicates that the pain did not commence until May 2017.

43 We found that the substantial adverse effect of the back impairment did not last 12 months; and nor was there evidence at the material times that the substantial adverse effect was likely to recur. There was no medical evidence that the substantial adverse effect was likely to recur. The evidence that there was tended to point the other way. In particular, we relied on the following:

43.1 The GP records. For example, the entry for 18 September 2017 records: "*low back pain improving …now returned to work …keen for physio to improve strength in lower back to reduce risk of further episodes*" This leads to an inference that there is a complete recovery, and that the physiotherapy is being sought to reduce further risks.

43.2 The Fit notes at p.266-267. The note dated 18 August 2017 states: "*Please consider duties that avoid repeated bending and heavy lifting for another short period of time to enable full recovery*.". This leads to the inference that the back problem was a short-term problem, rather than a longer-term condition.

43.3 The GP records state for 29 September 2017 that a prescription of Naproxen for back pain "*as needed*" is made (56 tablets 2x per day). This prescription is not repeated, leading to the inference that the back pain (or, at least, the substantial adverse effect of the impairment) had disappeared at some point in October – November 2017.

43.4 The Occupational Health report (p205) dated 5 October 2017 does not support the Claimant's case on whether recurrence could well happen. This records that the Claimant reported a gradual onset of symptoms since the beginning of the year, with none prior to this episode. (The Claimant agrees with the findings of the OH report at the meeting on 9 October 2017).

43.5 The GP records do not mention back pain again after September 2017. The Claimant said in cross-examination that he must have been to the GP but that this was not recorded; we found this to be unlikely to be accurate given the nature of GP records generally (which in the Tribunal's experience contained notes of any visits) and the GP notes that actually were made in this case.

Knowledge in respect of the back impairment

44 In respect of whether the relevant managers of the First Respondent had the necessary knowledge (that the back impairment had a substantial adverse effect on the Claimant's day-to-day activities and that such effect could well last 12 months or recur), we did not accept the Claimant's arguments.

45 The evidence demonstrated that the knowledge held by Mr. Ramsden and others was around the Claimant's impaired ability to carry out the heavier work

tasks, not about his ability to do normal day-to-day activities. The Fit notes provided to Mr. Ramsden, at p.266-267, do not provide the knowledge required by statute. For example, the note of 18 August 2017 states "*Still getting pains on heavy lifting and constant bending. Please consider duties that avoid repeated bending and heaving lifting…*".

46 Furthermore, the Occupational Health report (p.204-205), quite apart from stating that the Claimant is unlikely to be covered by the Equality Act 2010, provides an opinion that the Claimant "*is not yet fit for the full duties of this contractual role due to back pain*". The report does not suggest that his back pain has impaired his ability to carry out normal daily activities and indicates that he is keen to continue working with reduced duties.

47 The Claimant himself does not state to his employer that he has an impaired ability to perform day-to-day activities. The impression given is that it is the heavier manual work that he cannot manage. For example, in the meeting of 9 October 2017 (to discuss the OH report and the fit note which was not time limited), the Claimant explained to Mr. Gorny (at p.211):

> "*I am not confident to be doing 10 cages at this time. I can do 2-3 cages at this time. Whatever I feel comfortable I will do*."

48 Moreover, several of the points that we have made above in respect of the issue of whether the impairment had a long-term substantial adverse effect are relevant on this issue. On the evidence before Mr. Ramsden, Ms. John and other managers, they could not reasonably be expected to know that the Claimant had an impairment which had a long-term substantial adverse effect on his ability to carry out day-to-day activities.

49 In the light of the above, we have concluded that the First Respondent's managers lacked the necessary knowledge for the complaint of a failure to make a reasonable adjustment succeed.

Stress impairment

50 The inference from the GP records and the other evidence is that the Claimant's stress which arose in September 2017 was reactive stress, arising due to circumstances. The symptoms lasted a few months, and there was no evidence that the anxiety and depression caused by stress in 2017 was a recurrence of symptoms from a long-term impairment. This tended to show that this was not a mental impairment which could well (in the Equality Act 2010 meaning of those words) last more than 12 months.

51 For example, the GP records showed that in January 2009, the Claimant had anxiety with depression following stress over family matters. In 2017, his stress was a reaction to his situation at work, and the perceived causes of his grievances.

52 The entries in the GP records at 29 September, 13 October and 27 October 2017 tend to support our finding that the Claimant's stress was reactive in nature. For example, the entry on 13 October includes:

> "*Problems at work – ongoing stress with employer…..Stressed and not sleeping well… Pt requested long-term sick note for time off work – advised that a long-term sick note is not advisable, cannot avoid employers, needs to face them. Offered 2 week sick note to collect himself and he can have this reviewed* …"

53 Moreover, there was no evidence that the stress-related symptoms were long-term. The impact statement states that "*From 2017***"** the Claimant was constantly worried, anxious, feeling hopeless, has low mood, disturbed sleep patterns, loss of sex drive and loss of appetite. There was no evidence of when precisely this started, nor how long any substantial adverse effect could well have lasted at the material times, nor whether the substantial adverse effect of the stress could well recur.

54 In any event, we found there was no evidence that the stress-related condition complained of by the Claimant was linked to the treatment complained of. The complaints under the Equality Act 2010 are about a lack of reasonable adjustments in respect of his back impairment, and the incidents of harassment alleged arise in the context of his back impairment. For example, the Claimant contended that Mr. Ramsden refused to accept his fit note of September 2017; but this note related to the Claimant's back impairment and there was no mention of stress being relevant, whether by the Claimant or the First Respondent's witnesses.

Findings of fact: complaints

55 In March 2013, the Claimant commenced work as a Warehouse Operative at the First Respondent's depot at Oliver Road, West Thurrock, as an agency worker. He was trained as a picker. Picking involves repetitive bending and lifting. It was reasonably heavy manual work.

56 On 29 June 2014, the Claimant became an employee of the First Respondent, based at the depot. His probation period ended on about 22 January 2015.

57 About 80% of the work in the warehouse was picking items to go to Co-op stores, and about 10% of the work at the warehouse was loader work, loading those items onto lorries. The remaining 10% of the work was divided between various tasks, including lane marshalling, de-kitting (which was essentially the processing of waste off the lorries, to make them ready to load again), and reach truck driving.

Claimant's relationship with Mr. Wooton

58 On 28 July 2015, Mr. Wooton held a performance review meeting with the Claimant, referred to in the notes at p.283-286. This took place because Claimant had failed to meet the Key Performance targets ("KPI") for picking in

three successive weeks. We find that Mr. Wooton would have treated any operative in a comparable position in the same way, given his desire for his team to meet KPIs and to be the best.

59 The result of the meeting was that Mr. Wooton gave him a verbal warning. Contrary to the Claimant's case, we find that Mr. Wooton did not threaten him, but he did explain how the process of performance management works and that there was a risk of dismissal if his performance did not improve.

60 We find that the note of this meeting corroborates Mr. Wooton's evidence. Moreover, it provides evidence that, as at that date, the Claimant had turned down loader training and that the Claimant was not interested in training: see p.285.

61 On 19 August 2016, the Claimant was working as a picker in the Chill section. He had nearly finished a task (which we inferred was like an order) and he had only one item left to pick. At about 2153, the Claimant went to handover his things. Mr. Wooton was the team manager on the handover desk. Mr. Wooton refused to accept the handover, because the Claimant only had to pick one further item to finish the task. It was common ground that operatives were free to go at 2155.

62 Mr. Wooton admitted that he had taken other handovers from other operatives before he was approached by the Claimant, but these operatives had finished tasks or had several more items left to pick. Moreover, he gave "*a bit of leeway*" where there was a picker who was very productive during their shift. The Claimant was not so productive. We concluded that it was likely that he had been impolite in his request to the Claimant.

63 In the event, the Claimant just handed over and walked off shift.

64 No disciplinary action followed from this incident. But the Claimant's general performance and that incident caused Mr. Wooton to commence formal performance management. The Claimant was given an oral warning, for six months. The Claimant reacted angrily to this, refusing to accept the warning and saying "*This is a fake meeting*".

65 We found that the incident of 19 August 2016, together with the other incidents complained of by the Claimant (including 31 December 2016 and the incident on 15 November 2017), demonstrated that Mr. Wooton was a manager who enforced standards quite rigidly, because he wanted his team to be the best at the depot. He did not adopt a flexible or pragmatic approach in his management of people. We found that his approach was likely to lead to confrontation with operatives from time to time. But we found that he was likely to have treated any other operative in comparable circumstances in the same way as he treated the Claimant on these occasions. On 31 December 2016, he did in fact treat a warehouse operative who was not of Black African ethnicity in the same way as the Claimant.

66 We note that there is other evidence which leads to an inference that the Claimant was not being singled out generally by Mr. Wooton, but that his treatment of the Claimant was due to his under-performance. In particular:

66.1 On 20 January 2016, Mr. Wooton met the Claimant to discuss his performance, and praised him for his contribution over 2015 as a whole.

66.2 Mr. Wooton took the Claimant off performance management at some point around mid-2016.

66.3 The minutes recorded on ERCC (p291) demonstrate that Mr. Wooton put the Claimant back on performance management. The inference is that he is proceeding in line with the First Respondent's performance procedure and discussed this with HR. At a further meeting, he warned the Claimant of his need to perform and the purpose of the informal Action Plan.

67 On 18 November 2016, at a performance review, the Claimant was represented by Mr. Reimann, a union representative. Notes in respect of this meeting are recorded at p292, which we find to be accurate, although obviously not verbatim minutes of the meeting. The meeting was arranged because the Claimant had failed to meet depot agreed targets. During the course of the meeting, Mr. Wooton asked the Claimant if there was anything outside work which might be impacting on his performance, because he had received information that the Claimant had other work which he performed at night. Mr. Reimann joined the Claimant in laughing at the question. The Claimant did not challenge this evidence.

68 As a result of Mr. Reimann laughing, Mr. Wooton took him outside and warned him that his behaviour was not appropriate for a trade union representative. The Claimant refused to answer questions when Mr. Wooton returned. He was warned that if he continued, Mr. Wooton would make a decision on the evidence that he had.

69 Mr. Wooton decided to issue the Claimant with a First Stage Performance Improvement Notice. We find that he did this because of the Claimant's failure to co-operate at the meeting, which meant that he only had the Respondent's evidence (showing that the Claimant had not reached his targets) to work from.

Issue 1.1: Allegedly being singled out for picking and chiller work

70 The Claimant predominantly did picking work. But we found that this was not because the Claimant was singled out. We accepted the First Respondent's witnesses' explanation as to why this was. Generally, there was more picking work on the back shift, which was the shift worked by the Claimant, and picking accounted for 80% of the work at the warehouse.

71 The other evidence did not point to the Claimant being singled out. Mr. Wooton's evidence that he rotated him to lane marshalling and cage tramming, or recoup,

once per week, was not challenged. The Claimant had been trained as a lane marshall; otherwise, we could not understand how he could have performed the role (or been allowed to).

72 Moreover, we accepted Mr. Wooton's evidence that it was not in his interest, as team manager, to have members of his team who were unhappy with their roles. We concluded that he was likely to work to avoid upset in his team and not to have singled out the Claimant.

73 In addition, as we have explained above, we found that the Claimant was offered but turned down training as a loader. Picking and loading work formed the vast majority of the work at the warehouse (about 90%), so the Claimant's refusal of loader training and the medical restrictions of other warehouse operatives limited his options in terms of other work.

Issue 1.2

74 We accepted the evidence of Mr. Gorny on this issue.

75 Generally, the First Respondent would train employees who had passed their probation, rather than agency workers. This was why the Claimant did not have other training whilst an agency worker, nor during his probation period. It is important to record that the Claimant did not complete his probationary period until January 2015.

76 Agency workers were not generally trained on anything but picking, but this was subject to operational needs. More agency workers were required at peak times in the Summer.

77 At the material times up to the Claimant's termination of employment, when the volume of work was increasing, agency workers would be recruited and trained as loaders. This was because only three pickers could be trained at any one time; so it was easier for the First Respondent to take Warehouse Operatives performing other roles and put them on picking and to train the new agency workers as loaders.

78 It was regrettable that the First Respondent did not comply with its own Training and Development policy in any planned way. We found that it was a systemic failing that Personal Development Plans were not completed or updated. Had they been, this case (or, at least, several complaints within it) may never have arisen. But we did not draw any inference that the reason for this failure was a discriminatory one, nor that it was one designed to single out the Claimant. From the evidence that we heard, very many (if not all) of the operatives in the warehouse would have suffered the same detriment as the Claimant in this regard.

79 In any event, the Claimant was offered loader training, as we explain elsewhere in these Reasons.

Issue 1.3: Mr. Wooton not arranging training

80 The Claimant identified the following alleged comparators had training in the following areas:

- Robert Adamski: loading, milk tramming and cage tramming
- Masciej Papior: forklift, milk tramming and cage tramming
- Daniel Marchewka: goods in; gate house work
- Sebastien Frey – forklift training

The Claimant could not say when they were provided with this training, and gave no evidence to suggest that they had the same material circumstances as himself, in terms of length of service or the shift worked.

81 All of these comparators were not in Mr. Wooton's team. He had no control over what training they received.

82 It was a feature of Mr. Wooton's evidence that he did not deny that the Claimant had requested training on the dates alleged. His evidence led us to infer that these requests were probably not ignored, even if training was not arranged.

83 In December 2013 and July 2014, however, the Claimant was still an agency worker. From the evidence of the Respondent, this was the reason why training was not offered to him at those dates.

84 On 22 January 2015, the Claimant had only just finished his probation, which was the main reason why he had not been offered other training up to that point.

85 In July 2015, we find that the Claimant was offered loader training, but that he refused this. The oral evidence of Mr. Wooton and Mr. Gardner is corroborated by the email from Mr. Wooton to Janet John of 16 May 2017 (at p.158) which was prepared for her grievance investigation. In fact, Mr. Wooton's evidence, which we accepted, was that the Claimant had been offered loader training several times, because the nature of the work on his shift meant that operatives trained in loading were required.

86 Moreover, there were a number of operatives at the warehouse on adjusted duties. This meant that there was a reduced need for others to be trained in the roles that they were fulfilling. A list of workers on adjusted duties was provided in evidence.

87 In addition, it is a feature of the Claimant's grievance against Mr. Wooton, dated 19 November 2016 (p.87ff) that he does not allege that Mr. Wooton had failed to arrange training for him. This leads to the inference that, as at that date, the Claimant did not perceive that Mr. Wooton was treating him in any unfavourable way.

88 In the light of all the above points, we concluded that although Mr. Wooton did not arrange training for the Claimant, this was for a range of non-discriminatory

reasons on the dates alleged. These reasons were not related to his race or ethnicity.

89 Furthermore, as we have indicated and as Mr. Gorny explained, the Claimant must have had some training to perform the lane marshall role. This also tends to support the Respondents' case on this issue.

Issue 1.4: Pawel Gorny not arranging training

90 The Tribunal accepted Mr. Gorny's evidence that the first request for training made to him by the Claimant was on 9 October 2017, in the meeting at which the OH report was discussed.

91 We rejected the allegation that requests were made on 15 February or 13 March 2017. This was for several reasons.

92 First, the notes of the grievance meeting of 13 March 2017 do not corroborate the Claimant's allegation. The notes of that meeting show (at p.133) that the Claimant is asked: "*What kind of resolution are you looking for?*" The Claimant does not request training and does not refer back to any previous request for training that was not actioned; he merely states that he would be happy to change team.

93 Secondly, on 15 February 2017, the Claimant was absent sick, so he is likely to be mistaken about this date.

94 Thirdly, there is no request for training in the notes of the welfare meeting on 21 February 2017 (at p.112-114), which followed absence due to stress at work. The Tribunal would have expected the alleged failures to arrange training (both by Mr. Gorny and Mr. Wooton) to be mentioned at this meeting, if they both happened and the Claimant perceived them to be detrimental or hostile acts.

95 Turning to the request for training made to Mr. Gorny on 9 October 2017, this was made at a welfare meeting at which the OH report and recent Fit note were discussed. At that meeting, Mr. Gorny explained to the Claimant that the roles that he identified were already filled by operatives on adjusted duties due to their medical conditions. In short, we find that there were no vacancies in the roles sought by the Claimant, which is why he was not offered training to carry them out.

96 Moreover, at that meeting, Mr. Gorny did not refuse to arrange training. On the contrary, he stated that he will look at training opportunities and, when roles are available, this can be considered (see p.212).

97 Further, at that meeting, the Claimant explained that he cannot do loading work.

98 In addition, at that meeting, Mr. Gorny assured the Claimant that he will be paid in full for the period from 18 September 2017 onwards, when he attended work but was not provided with any work.

99 After this meeting, on 13 October 2017, the Claimant presented a further Fit note, stating "*stress at work*", extending until 26 October 2017. After this, Mr. Gorny was on holiday for about 7 to 10 days in November 2017. Following this, the Claimant was absent sick from 21 December until about 12 January 2018. The transfer to the Second Respondent was on 14 January 2018.

100 Given the chronology of events, and the facts above, we do not draw an inference that the reason that Mr. Gorny failed to arrange training was because of the Claimant's race or ethnicity, and neither was this failure related to his race or ethnicity. We find as a fact that he did not arrange training because there were no alternative roles available for the Claimant and, in any event, the Claimant and Mr. Gorny were collectively absent from the warehouse for around 7-8 weeks after this meeting out of the three months leading up to the transfer.

Issue 1.5: Mr. McAleese not arranging training

101 We accepted Mr. McAleese's evidence explaining why he did not arrange training for the Claimant. We also accepted that it was not unusual for an operative to be trained in only one role.

102 In respect of the alleged March 2017 request for training, we consider it likely, given the findings of fact made above, that the Claimant retracted his request for loader training.

103 In November 2017, Mr. McAleese, as one of the shift managers, carried out one-to-one consultation meetings with operatives who were deemed to be part of the de-kitting operation due to transfer to the Second Respondent.

104 Mr. McAleese had two meetings with the Claimant. The notes of these meetings, which are accurate but not verbatim, are at p.237 and 258. At the meetings, they discussed whether there were other roles that he could perform within the business to avoid being transferred. The minutes show that the Claimant's suggestions were not ignored; but it was explained to him that other workers were already filling roles that he suggested. This part of the facts is further explained below under issues 8.6 and 9.

Issue 1.6: Mr. Gardner not arranging training

105 From his cross-examination of Mr. Gardner, and from his submissions, we did not understand the Claimant to be contending that Mr. Gardner had harassed him at all. In any event, the Tribunal made the following findings of fact.

106 On 25 April 2017, after the Claimant had changed to Mr. Gardner's team, he had a one to one meeting with Mr. Gardner, which was to enable Mr. Gardner to introduce himself and set targets. After the meeting finished, the Claimant asked for loader training. Mr. Gardner agreed that he would push for him to get this training. Mr. Gardner asked Mr. Gorny about this, and the response was that this should not be a problem.

107 In early May 2017, the Claimant grabbed Mr. Gardner as he walked through the de-kit area, where the Claimant was working. He asked for training in "Goods in" as a releasing clerk. Mr. Gardener explained that this would not be possible as this work was now done by a support assistant role, and all those posts were filled. The Claimant was told he could apply if a vacancy arose. We heard no evidence that the Claimant ever applied for such a role.

108 Mr. Gardner went on holiday from 6-12 May 2017. On 16 May 2017, he began a period of compassionate leave that lasted until August 2017. On his return, he learned that the Claimant had been assigned adjusted duties.

109 We find that the reasons why Mr. Gardner did not do more to arrange loader training were for the reasons that he gave. His actions were not related to the Claimant's race in any way.

110 We infer from the evidence that the reason why no loader training was arranged after 25 April 2017 was most likely a combination of the following:

110.1 back pain felt after April 2017 by the Claimant when doing heavier manual work;
110.2 restrictions on the work that the Claimant could do imposed by his back pain.

111 This inference is supported by the notes of the meeting held by Mr. Gorny with the Claimant on 9 October 2017, at which no complaint is made about Mr. Gardner nor any alleged delay from 25 April 2017, and at which no complaint is made of a failure to arrange loader training. Further, there is no documented complaint at all about Mr. Gardner and his alleged failure to arrange training.

Issue 1.7: Claimant's grievance of 19 November 2016

112 This grievance was made against Mr. Wooton; a copy is at p.87-88. It related to alleged bullying, intimidation and race discrimination on 19 August 2016, at the 2015 performance review referred to above, and at the later performance review on 18 November 2016.

113 We found that the First Respondent's managers did not ignore the Claimant's grievance of 19 November 2016. We accepted the evidence of Mr. Gorny and Ms. John and found that the documentary evidence about steps taken to deal with the grievance were genuine records.

114 Mr. Gorny explained that there was a delay in holding the grievance, which was not the fault of the First Respondent. The chronology of these is set out in paragraph 9 of his witness statement, which he was not challenged about in cross examination and which we accepted.

115 Mr. Gorny investigated the grievance, by interviewing Mr. Wooton and the two witnesses who had accompanied the Claimant into the meetings, including Mr. Reimann. Mr. Gorny's interview notes with Mr. Wooton are at p.115 – 122.

In his interview with Mr. Reimann, the witness stated that he had not seen Mr. Wooton display any bullying or harassment to the Claimant, believing both had contributed to the problem, and his view was that the Claimant had not been given the chance to prove his performance.

116 On 13 March 2017, the Claimant attended a grievance meeting; the notes of this meeting are at p.129-134.

117 We found that this grievance was fairly investigated and impartially decided by Mr. Gorny. Any other Operative would probably have been treated the same in this respect.

118 The grievance was not upheld, in that no bullying, intimidation or race discrimination was found. But Mr. Gorny found that there had been a breakdown in communication, and that Mr. Wooton had probably asked the Claimant to finish his task in an impolite way and should try to adapt his management style so as to engage the Claimant. This decision was in an outcome letter given to the Claimant on 10 April 2017 (p136-138).

119 One result of the grievance outcome was that the Claimant was removed from Mr. Wooton's team, and placed in Mr. Gardner's team. Further, Mr. Gorny advised Mr. Wooton to be familiar with the Respect Policy of the First Respondent. These two events could not have occurred if the grievance had been ignored.

120 The Claimant appealed. He attended a grievance appeal meeting with Ms. John on 13 May 2017. Ms. John re-interviewed Mr. Wooton when conducting the grievance appeal: see the notes at p.155 – 157. Mr. Wooton was prepared to attend mediation and to apologise; but he thought the Claimant should apologise for alleging race discrimination. His evidence to Ms. John was that he had only begun to have problems with the Claimant when he had begun to performance manage him.

121 Mr. Gorny proposed mediation between the Claimant and Mr. Wooton on three separate occasions. The Claimant refused to take part.

122 We are satisfied having read and heard the relevant evidence that the grievance appeal was a genuine exercise. We note, in particular, that Ms. John did not rubber stamp Mr. Gorny's findings. She partially upheld the appeal, on two points.

123 We accepted Ms. John's evidence that she would have treated any other worker the same way in these circumstances. It is notable that the Claimant's own representative at the relevant meeting, Mr. Reimann, had admitted that the Claimant's behaviour did not help the situation.

124 The Claimant could not point to any documentary evidence which supported his case that his grievance was ignored nor to anything which suggested the records were fabricated in any way.

125 The Tribunal concluded there was no evidence that the manner in which this grievance was dealt with had as its purpose or effect of the creation of a hostile or intimidating environment; but if it had the proscribed effect on the Claimant, it was not reasonable for it to do so in the circumstances.

126 In his evidence before us, the Claimant also relied on an incident on 31 December 2016 to allege that he was treated less favourably than other operatives by Mr. Wooton. We preferred Mr. Wooton's account of this incident. He challenged the Claimant about arriving on the warehouse floor at 14.05, which is five minutes late on shift. We find, also, that he would have treated any other worker the same way; he did in fact challenge another worker (Mr. Marchel) at almost the same time for the same reason. In any event, we accepted that the challenge to the Claimant was based on his lateness, and had nothing to do with his race or ethnicity. No disciplinary or other action followed from this incident.

127 In support of his complaint of being singled out (see issue 1.1 below), and more generally in support of all the harassment and direct discrimination complaints, the Claimant relied on an incident on 15 November 2017. On that date, Mr. Wooton, who was then the Claimant's team manager, had seen the Claimant talking to Mr. Akpata. Mr. Akpata's evidence was that he had said to them: "*hey can you go back to work*". The Claimant described the incident as an "*aggressive intimidating verbal attack*" by Mr. Wooton, which illustrates the point that he was so emotionally involved in this case that his ability to recall events accurately was reduced. We accepted the evidence of Mr. Akpata that this incident happened; but we accepted Mr. Wooton's account of why it happened. Having seen him give evidence, and heard the evidence from his management colleagues, this was an example of his more direct management style and his desire for his team to perform better than others.

128 In any event, his choice of words, whilst not perhaps ideal in terms of good management, were not such as to lead to an inference that he was singling out the Claimant, nor that his approach and choice of words was related to, nor because of, the Claimant's colour or ethnicity. The words used were neither rude nor insulting; and, set in context, they were said during a shift in a busy warehouse by a junior manager trying to manage, in a situation where the use of words may not be carefully weighed. When all the facts are looked at, the Claimant was talking to Mr. Akpata, rather than picking.

Issues 3.1 and 8.1

129 The Claimant complains that Janet John had in effect terminated his grievance on 31 May 2017, failing to give him the further opportunity to appeal to which he was entitled under the relevant procedure. This was not put to her in cross-examination.

130 Ms John admitted that her grievance appeal outcome letter stated that the Claimant had no further right of appeal (p.167). At the time, she genuinely believed that this was the case.

131 We accepted Ms. John's explanation on this issue. Ms. John made a mistake, by relying on the Group grievance policy template letter. The grievance policy in the First Respondent's Logistics section allowed a further right of appeal and had a different template letter.

132 Ms. John had made the same mistake in an appeal outcome letter for a white European (Slovakian) Operative about two months before she sent the Claimant his outcome letter.

Issues 8.2 – 8.5

133 On 10 July 2017, the Claimant presented a "Fit note" from his GP, stating that he would be fit for amended duties to avoid straining his back and leg bending. This note was for 35 days (see p.266). The First Respondent adjusted his duties so that he was performing lighter duties in the form of de-kitting work, which is the work required to clear out the waste left in the First Respondent's delivery lorries, to make them ready for the next load.

134 On 18 August 2017, the Claimant presented a further Fit note. This stated: *"Suffering lower back pain still but getting help with exercises and therapy. Still getting pains on heavy lifting and constant bending. Please consider duties that avoid repeated bending and heaving lifting for another short period of time to enable full recovery."*

135 This note was for 28 days (p.267).

136 On 18 September 2017, the Claimant attended a return to work meeting with Mr. Ramsden, the designated manager for such meetings on that date. He presented a Fit note stating:

"*For amended duties as discussed with employer, to avoid duties involving recurrent bending*".

137 This note had no end date. Mr. Ramsden was not sure what to do, and referred the matter to Mr. Gorny.

138 Mr. Gorny believed that the Fit note was advising that the Claimant be re-deployed permanently into a role with lighter duties than picking. This note was not consistent with the previous note which proposed amended duties for "*another short period of time to enable full recovery*". In any event, the Claimant was the only worker to have produced such a Fit note with no end date.

139 Mr. Gorny discussed this with the management team and then took advice from the First Respondent's Employee Relations Service, by telephone. He was advised that the Fit note could not be accepted, because it had no end date. We infer that ERS thought the matter would be dealt with fairly quickly, with a review date being sought. There was no evidence that the ERS adviser knew of the Claimant's earlier protected acts.

140 Within the warehouse, a significant number of operatives had had to be re-deployed onto light duties due to medical advice. The effect of this was that operatives could not be rotated between tasks as often as management would have liked, so as to give workers a break from the heavier tasks. The knock-on effect of the redeployment of others to lighter work meant that training could not be justified for work that was not available to them. This caused the First Respondent to want to ensure that a long-term amendment of duties was only because of a good medical reason. Because of these factors, Mr. Gorny did not believe that the changes to the Claimant's role could be accommodated on a permanent basis. He decided the Claimant needed to go back to his GP to get an end date to the Fit note.

141 As a result, Mr. Gorny instructed John Ramsden to tell the Claimant that this Fit note could not be accepted and to go back to his GP to get a timescale for how long adjustments were needed. Mr. Ramsden did so, informing the Claimant that he should go home if he was not fit for his work. In evidence, the Claimant said that Mr. Ramsden and Mr. Gorny stick together because they have known each other a long time; he did not allege that Mr. Ramsden acted because of his protected acts.

142 The Claimant refused to leave, and continued to attend for work for about three weeks and sit in the canteen. He was advised to do so by his trade union representative.

143 There was another operative also in the canteen, Mr. Adamski. He had a Fit note with an end date on it. Management had refused to allocate him work. Mr. Adamski was white European ethnicity.

144 Mr. Gorny contacted HR again. He was advised that this was potentially misconduct because the Claimant was not following a management instruction. The Claimant was warned that it he did not go home, he may face a disciplinary investigation.

145 Pawel Zabik was selected to carry out the investigation. He did not know that the Claimant had brought an Employment Tribunal Claim nor of the protected acts relied upon (the earlier grievances). It was not his decision to send out the invitation letter to the investigation hearing. He gave the Claimant the letter, but he was simply following instructions and the normal procedure in such cases.

146 The investigation meeting went ahead on 25 September 2017. At the meeting, the Claimant admitted that he had been told to leave the premises on 19 September because he was sick; Mr. Zabik explained the business could not accommodate any more adjustments, to which the Claimant asked why, in that case, Mr. Gorny wanted an end date to his Fit note. Mr. Zabik concluded that the matter should proceed to a disciplinary hearing.

147 By an invitation letter of 29 September 2017 (p.194), the Claimant was invited to a disciplinary hearing. The letter was from Mr. McAleese. It contained a charge which followed from Mr. Zabik's investigation. It did not contain any sanction, nor was the Claimant suspended. It did, however, cause detriment to the

Claimant, who was feeling work-related stress at the time, and this letter increased his stress levels.

148 The proposed disciplinary hearing did not go ahead. Ms Gibbs was employed on site as the only HR adviser. She had a role involving broader HR matters, such as recruitment and planning, rather than day-to-day employee-related queries. When she returned from annual leave, during the first week of October 2017, she became aware of the Claimant's situation from the shift managers. She queried with the shift managers what the fundamental difference was between the Fit notes, apart from the latest one being open-ended. She advised the shift managers to take advice from the First Respondent's legal team. As a result of that advice, it was decided that it was inappropriate to deal with the matter as a disciplinary case.

149 The First Respondent referred the Claimant to OH. The report of OH (p205) confirmed the Claimant was not fit to return to his contractual duties.

150 On 9 October 2017, Mr. Gorny met with the Claimant and discussed the OH report. The notes of this meeting, which are accurate but not verbatim, are at p207-215. The light duties that the Claimant could perform were discussed. The Claimant stated that he had asked for training in the past on duties such as temperature checking, receiving, and battery bull. These duties were filled by other workers, who were on adjusted duties due to their medical conductions, and Mr. Gorny explained this.

151 At the time, there were no vacancies for a clerk or support assistant position. Mr. Gorny explained this.

152 The Claimant explained that he could carry out lane marshalling or de-kit duties, provided this did not involve pushing more than 2-3 cages; he was not confident he could push 10 cages at that time. His evidence was that he could not do any picking or loading.

153 The Claimant requested training and Mr. Gorny informed him that he would look at training opportunities when available. Contrary to the Claimant's evidence, Mr. Gorny did not state the Claimant would receive training; this is not recorded in the minutes and from the evidence we heard Mr. Gorny would not be in a position to make such a promise given the number of operatives already on adjusted roles. The outcome of the meeting was that a temporary work adjustment would be put in place (p.213) for the Claimant to do de-kit and lane marshal work. (In fact, as we explain, his work was almost wholly de-kit from this point).

154 Mr. Gorny apologised for the previous stance of not providing adjusted duties, and that at the time he thought they were following the correct process. He confirmed that the Claimant would be paid in full.

The Claimant's work in the de-kit operation

155 As we have noted, from about 10 July 2017, the Claimant's duties were adjusted. We find that after that date, he was to a large extent carrying out de-kit duties until October 2017.

156 Tomasz Blajda, USDAW representative at the TUPE consultation meeting on 20 December 2017, was called by the Claimant to give evidence. His evidence, which was not challenged and which we accepted, was that the Claimant was working on de-kit for 100% of his time. The Claimant confirmed in evidence that he was working 100% of his time in de-kit from October 2017 (after he returned from sickness absence) until his dismissal.

157 Mr. Gorny did not learn of the proposed TUPE transfer until October 2017. This did not have any effect on the placement of the Claimant in the de-kit operation, given that this had largely been the case since July 2017.

158 We are satisfied that the Claimant work in the de-kit section had nothing to do with the protected acts relied upon. It had occurred due to the Fit notes, which in turn lead to his duties being adjusted to lighter duties.

Issue 9: Was there a TUPE transfer of the de-kit operation from the First to the Second Respondent?

159 We accepted Ms. Gibbs' evidence about the nature of the transfer. Her evidence that the First Respondent had outsourced its Thurrock Tower De-kit operation to ISS Facility Services Limited with effect from 14 January 2018 was not challenged in cross-examination.

160 In addition, Ms. Gibbs' evidence that this was a relevant transfer within the TUPE Regulations was corroborated by the documentary evidence produced by the Respondent. This included a redacted copy of the key parts of the transfer contract (p.519ff), the "*Frequently Asked Questions for Colleagues*" (p.244a-f), and the Joint Consultative Committee Minutes (p.244h). The schedule of employees indicates that the Claimant was one of at least nine operatives who were proposed to transfer: see p.487-488.

161 As part of the consultation process ahead of the transfer, the Claimant had a series of consultation meetings with Russell McAleese. The very existence of these meetings pointed to there being a proposed TUPE transfer. At the first of the one-to-one meetings, on 22 November 2017, the Claimant was informed of the transfer. The Claimant did not challenge that the transfer was a genuine commercial exercise, nor suggest that it was being done to victimise him.

162 From all the evidence, including the above facts, we were satisfied that the transfer of the De-kit operation to the Second Respondent was a relevant transfer within the scope of the TUPE Regulations 2006.

Issue 8.6: Was the dismissal of the Claimant an act of victimisation?

163 Ms. Gibbs was responsible for co-ordinating the transfer. When the shift managers were asked which operatives worked on de-kit, they did not know why. They produced a list, which recorded that the Claimant worked on de-kit for 100% of his time.

164 The Claimant fell within the criteria applied by the First Respondent in assessing who worked in the undertaking or service to be transferred. The criteria for those who were in scope was those who had worked in the De-kit section for more than 80% of their time over the previous 6-8 weeks.

165 Although Ms. Gibbs knew of the Claimant's Tribunal claims, it did not have any effect on her decision to find that he was in scope for the transfer. On the facts we have found, the Claimant clearly was in scope.

166 The First Respondent had employees affected by the transfer who wished to opt of it. Where resources made it possible, the First Respondent would offer re-training, provided the employee could carry out the duties of the role.

167 Ms. Gibbs learned from Mr. McAleese that the Claimant was not happy about the proposed transfer and did not intend to work for the Second Respondent. But the First Respondent had no evidence that he could carry out a new role.

168 We accepted Mr. McAleese's evidence, including about the contents of the second and third one-to-one consultation meetings, which the Claimant did not challenge, and which was corroborated by the notes of the meetings.

169 In the second meeting, the Claimant requested training for reach-truck, PPT training, ambient receiving, frozen tramming, security cage, and cage tramming battery bull. Mr. McAleese informed him that there was no training available for these positions, because they were filled with workers on adjusted duties for medical reasons. The Claimant confirmed that he was not fit enough to do picking or loading work.

170 The Claimant also proposed doing a partial role, for example that he could drive a Low Level Order Picker in the frozen section, but would not be able to pick or remove cages. Operationally, this would not be workable and, in any event, would have been very unpopular with colleagues who were left to do the heavier manual work.

171 In addition, the Claimant asked to be trained for clerical duties, so he could work as a warehouse assistant. We accepted Mr. McAleese's evidence that all these roles were filled at the time.

172 Mr. McAleese did not provide security training for the Claimant, because such a post was only for 15 hours of work, and the Claimant wanted 37.5 hours.

173 On 20 December 2017, at the third one-to-one consultation meeting, the Claimant asked about positions in the Frozen section, but was informed that

they were filled, and that the Claimant had said he could not do these roles because of his back. The Claimant was informed that he would need to transfer to ISS and needed to have a one-to-one with them before he started. The Claimant refused. He complained of discrimination and lack of training.

174 On 21 December 2017, the Claimant commenced a period of sickness absence. He did not return to work until shortly before the date of the transfer, on 14 January 2018.

175 The Claimant informed the Second Respondent directly that he would not be transferring. By letter of 12 January 2018, Mr. Sharif, the First Respondent's Operations Manager, explained to him in writing what the consequence of opting out was, specifically that his employment would terminate on 14 January 2018.

176 By letter dated 13 January 2018 (p.263-264), to Mr. Sharif, the Claimant objected to transferring. He made various allegations in that letter, but we saw no evidence to support them.

177 The Claimant did not attend work for the Second Respondent. As a result, his employment with the First Respondent came to an end on or about 14 January 2018.

178 We found that the Claimant refused to transfer. Indeed, he admitted refusing to transfer. We found this proved that he objected to the transfer.

179 We found that some de-kit work continued to be performed at the depot after the transfer, but we accepted Ms. John's evidence on this issue. This de-kit work was not planned by the First Respondent, and it was not like the de-kit operation which transferred. It was the result of drivers turning up because they did not know the de-kit operation had moved to Thurrock Tower or they returned to the depot due to a delay in de-kitting by ISS. There were 200 drivers employed by the First Respondent, and about 100-150 agency drivers.

180 There is no de-kit operation and no de-kit area at the depot anymore. If vehicles and their cages are needed urgently, they will go to the depot; but they will then be sent back to Thurrock Tower for processing.

The Law

Jurisdiction: Time Limits

181 Section 123 EA 2010 provides so far as relevant that:

> "(1) proceedings on a complaint … 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 purposes 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 a person does an act inconsistent with doing it, or

(b) if a person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it."

182 A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

183 Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: *Hendricks v Commissioner of Police for Metropolis* [2003] ICR 530 at paragraph 54.

184 The principles to be applied in the application of section 123 EA 2010 are as follows:

184.1 The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640, paragraph 17.

184.2 Unlike section 33 Limitation Act 1980, section 123(1) EA 2010 does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble [1997] IRLR 336*), the Court of Appeal has made it clear that the

Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi [2003] EWCA Civ. 15; [2003] ICR 800* , paragraph 33.

184.3 There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

184.4 Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 19.

Disability Discrimination: Definition of Disability

185 Section 6(1) EA provides that a person has a disability if:

(1) P has a physical or mental impairment;

(2) the impairment adversely affects P's ability to carry out normal day to day activities;

(3) the adverse effect is substantial; and

(4) the adverse effect is long-term.

186 The Respondents' case on these issues was as follows:

186.1 The Claimant had a physical impairment at the material times;

186.2 Such impairment did not have an adverse effect on his ability to carry out normal day to day activities;

186.3 Even if there was such an effect, it was not long-term.

187 The Respondents' case was that, in the event that the Claimant was found to be disabled, it was denied that it knew or reasonably ought to have known that he was a disabled person.

188 The authorities show that a purposive interpretation must be given to the statutory test when deciding whether a person has a disability. But the burden of proof lies on the Claimant to show that he meets this definition.

189 In reaching its decision on the issue of whether a person is disabled under the Equality Act 2010, the Tribunal must take into account the *Guidance on Matters to be taken into account in determining questions relating to the definition of disability,* issued under section 6(5) EA 2010 (the "Guidance"). We have considered relevant passages within the Guidance.

Mental or Physical Impairment

190 The Respondent admitted that the Claimant had had a back impairment at material times, and that its effect on day to day activities had been substantial at some points. It denied that the effect was long-term. The Respondent denied that the stress-related condition was relevant, contending that the Claimant was not so impaired at material times.

Substantial

191 A substantial effect is one which is more than minor or trivial: see Guidance, Para B1 and s.212 EA 2010.

192 The fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not establish that disability is made out. The Act is concerned not with any adverse effect but rather with a more than minor or trivial adverse effect. Whether or not pain or difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it.

193 The Guidance makes the point that the ability of a person to modify his behaviour to cope with an impairment may be of relevance in deciding whether it is 'substantial'.

194 Crucially, the Act requires the Court to consider the "deduced effect" of the "measures" taken to treat or correct the impairment: Paragraph 5 of Schedule 1 EA 2010:

> *"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:*
>
> *(a) measures are being taken to treat or correct it, and*
>
> *(b) but for that, it would be likely to have that effect.*"

195 The Guidance states (at para C3) that *'likely should be interpreted as meaning that it could well happen, rather than it is more probable than not that it will happen'*.

Long Term

196 Schedule 1 para 2(1) of the EA 2010 provides a definition of "long term":

"The effect of an impairment is a long-term effect if:

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected."

197 An impairment which has had a substantial adverse effect, but where the effect has ceased, the substantial effect is treated as continuing if it is likely to recur: Sch 1, Para 2(2), EA 2010 and *Swift v Chief Constable of Wiltshire* [2004] IRLR 540. "Likely" in this context means "could well happen".

198 Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of long-term: see Guidance C4.

199 In determining whether the adverse effect of a person's impairment was "likely to recur", a Tribunal should not have regard to subsequent events, but determine the question on the basis of the evidence available at the time of the act alleged to constitute discrimination: *McDougall v Richmond Adult Community College* [2008] ICR 431, paragraph 24 (a case relied upon by the Respondent).

Requirement of knowledge

200 The requirement of actual or constructive knowledge in section 20 EA (or, rather, in the equivalent DDA 1995 provisions) was addressed in *Gallop v Newport CC* [2014] IRLR 211. The Court held, per Rimer LJ:

"*36 I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further*

agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position."

201 The legal principles emerging from *Gallop* and *Donelian v Liberata UK Ltd* [2018] IRLR 535 as to the application of the knowledge provisions within the EA 2010 are as follows:

201.1 Provided that the employer had actual or constructive knowledge of the facts constituting the employee's disability, it did not need to know that, as a matter of law, the consequences of such facts were that the employee was a "disabled person" as defined in the Act.

201.2 The tribunal must ascertain whether, at the material times, the local authority had actual or constructive knowledge of the s.6/Sch.1 facts constituting the claimant's disability.

201.3 The facts in *Gallop* illustrated the need for an employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee was a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability.

201.4 Where the opinion given was that the employee was not disabled, the employer must not forget that it was he who had to make the factual judgement; it should not simply rubber stamp the opinion that they were not. An example of a case where the employer had not rubber stamped the OH opinion was *Donelian*.

201.5 The standard is one of reasonableness, not a counsel of perfection.

Harassment

202 Section 26 provides, where relevant:

"*(1) A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

203 Paragraph 7.9 of the Code states that "related to" in section 26(1)(a) should be given "*a broad meaning in that the conduct does not have to be because of the protected characteristic*".

204 The Code continues that "related to" includes a situation where the conduct is related to the worker's own protected characteristic, or where there is any connection with a protected characteristic.

205 In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, we considered *Dhaliwal v Richmond Pharmacology* [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26. We find it helpful to set out the following extracts of the judgment of Underhill J(P):

> "*14 Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability - "purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so). It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).*
>
> *15 Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be* reasonable *that that consequence has occurred. …. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the*

victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. See also our observations at para 22 below.

22 On that basis we cannot accept Mr Majumdar's submission that Dr Lorch's remark could not reasonably have been perceived as a violation of the claimant's dignity. We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase..."

206 Paragraph 15 above is authority for the proposition that the criterion in section 26(4) EA were overall objective criterion. The Tribunal found that, applying *Dhaliwal* and the reasoning of Underhill J, this was a correct interpretation of the law.

207 The Tribunal considered Paragraph 22 of *Dhaliwal*, and Paragraph 13 of *Grant v HM Land Registry* [2011] IRLR 751.

208 We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

Burden of proof in discrimination cases

209 We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

210 In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Transfer of Undertakings (Protection of Employment) Regs 2006

211 Where an employee objects to a TUPE transfer, the contract of employment is terminated at the point of the transfer; it is not deemed to be a dismissal: see Reg 4(8) TUPE Regs.

212 The Tribunal has also taken into account Reg 4(9) and (11), but found these are not relevant in this case.

Submissions

213 Mr. Gorasia provided some helpful, brief, written submissions and provided the Claimant in advance with the authorities that he referred to. These were supplemented with oral submissions.

214 The Claimant made written and oral submissions too, which were helpful and proportionate.

215 The fact that we do not address each submission is not to be taken as evidence that each submission was not taken into account. We took all those submissions into account.

Conclusions

216 Applying the law set out above to our findings of fact, we have reached the following conclusions on the matters set out in the List of Issues. The Respondents accepted that the protected acts were as set out in issue 7.

Jurisdiction: Issues 13-14

217 The first Claim was presented on 8 September 2017, alleging direct race discrimination and direct disability discrimination.

218 The second Claim was presented on 8 November 2017, alleging disability discrimination.

219 We concluded that the complaints set out at issues 1.1 to 1.6 pointed to an allegation of a continuing act. These all relate to an allegation of a continuing

state of affairs, which was that the Claimant was being singled out, both for the heavier or less amenable work and to miss out on training. The last of these incidents is alleged to occur on 22 November 2017. Accordingly, these allegations are all in time.

220 The complaint at 1.7 consists of management ignoring the claimant's grievance of 19 November 2016, over a period of time. As argued by the Claimant, this is an allegation of a continuing state of affairs which continues until the conclusion of the grievance proceedings. Therefore, the last part of this allegation occurred on 31 May 2017 (appeal decision by Janet John). On the face of it, this allegation is made outside the primary time limit of three months.

221 In respect of the complaints at issues 3.1 and 8.1, we found that those complaints were on their face out of time.

222 In respect of the complaints at issues 5, these were all found to be in time. In respect of issue 6, the alleged failure to make a reasonable adjustment, it was alleged that this breach was a continuing state of affairs; but in any event, an individual breach would have crystallised approximately two weeks after the request for light work because the Respondent would have needed time to re-arrange the work in the warehouse given the number of workers on restricted duties, if this were possible.

223 In respect of those complaints that were, on their face, out of time, we concluded that it would be just and equitable to extend time so that these complaints could be heard. This was because:

223.1 There was no evidence that the Respondent had suffered any prejudice by the delay in presentation of these complaints.

223.2 The Respondent was able to call witnesses to deal with each complaint. There was documentary evidence for all the factual issues. There was no evidence that the delay had affected the availability or cogency of the evidence.

223.3 As we have indicated, several of the Claimant's complaints were in time. Those that were out of time covered the same factual territory, or were part of the same factual matrix, so that it made little sense to hear some complaints (such as the continuing act of being singled out) yet not to hear other complaints arising over the same or a similar period.

223.4 Further, discrimination cases may well turn on the inferences to be drawn from findings of primary fact. It would be unfair to the Claimant not to make findings of fact on the very factual disputes that he relied upon as demonstrating discrimination.

223.5 The extensions of time required were relatively short particularly in respect of issues 3.1 and 8.1.

Disability Discrimination

Issue 4: Disability

224 For the reasons set out in our findings of fact, especially paragraph 43 above, the Claimant was not a disabled person at the material times as a result of his back impairment. The substantial adverse effect of his back impairment was not long-term as defined in Schedule 1 EA 2010.

225 In respect of the stress-related condition, we concluded that the substantial adverse effect was a reaction to events and was not long-term, within Schedule 1 EA 2010.

226 Moreover, we found there was no evidence that the stress-related condition complained of by the Claimant was linked to the treatment complained of.

227 Accordingly, the Tribunal has no jurisdiction to consider the complaints of disability discrimination, and we do not need to decide issues 5 and 6.

228 If we are wrong about this, and the duty to make reasonable adjustments is engaged, we have found that the First Respondent's manager did not have actual or constructive knowledge that the Claimant was a disabled person at the material times. Our reasons for this are set out at paragraphs 44-49 above.

Issues 1 & 2: Race discrimination by harassment or direct discrimination

229 We have made positive findings of fact which demonstrate that the Claimant was not subject to harassment related to his race or colour and nor was he treated less favourably because of his race or colour.

Issue 1.1

230 We refer to the findings of fact above at paragraphs 58-79. These findings show that the Claimant was not singled out in terms of his duties. In any event, the treatment of the Claimant was not related to his race or colour; the treatment arose for non-discriminatory reasons.

231 In terms of this allegation as one of direct discrimination, the Claimant produced relatively little evidence to support his case that the named comparators in the List of Issues had training that he did not. Insofar as he identified the training of four comparators, which we list above, none of those were managed by Mr. Wooton, the Claimant's team manager (until after his grievance of 19 November 2016 had been determined) and an alleged perpetrator of the Claimant's complaints of race discrimination.

232 We did not hear evidence to prove that these four were statutory comparators. This is material in this case, because it was clear from the evidence that which shift was worked may affect the duties required. We took these four comparators to be evidential comparators in any event.

233 In asking ourselves how a hypothetical comparator would have been treated, we took into account all the facts set out above.

234 We concluded that a white European comparator, in the same material circumstances as the Claimant, would have been treated in exactly the same way. In particular:

234.1 Our finding demonstrate that the Claimant was rotated between duties that he was trained or able to perform by Mr. Wooton. He turned down loader training.

234.2 From July 2017, he could no longer perform picking due to medical restrictions. As a matter of fact, due to his duties being adjusted, he worked mainly in the De-kit operation after that time; and from October 2017, he worked in de-kit 100% of the time.

234.3 By November 2017, when TUPE related consultation was taking place, there was no opportunity for him to be trained in any other role, for several reasons including his medical restriction, the number of other workers working on adjusted duties (in the less physical roles), and the absence of any vacant administrative assistant roles.

234.4 The fact was that about 90% of the warehouse operative work at the depot was either as a loader or a picker, which the Claimant could not perform after July 2017.

Issue 1.2.

235 We did not uphold this complaint for the reasons set out in our findings of fact at paragraphs 74 to 79.

236 Agency workers were trained, sometimes, for duties that the Claimant did not have training for, such as loading. This depended on the operational needs of the business. In any event, there is cogent evidence that the

Issue 1.3

237 We did not uphold this complaint for the reasons set out in our findings of fact, and particularly the section at paragraphs 80 to 89. There is, however, an overlap between our findings in respect of issue 1.1 and this issue.

238 Although we found that Mr. Wooton had not arranged training for the Claimant, we have made positive findings of fact that this was for a range of reasons not related to his race or ethnicity.

239 In any event, the burden of proof did not shift. On the facts found, there was not the “something more” required, other than a difference in treatment between the Claimant and the four comparators identified in evidence.

240 If we are wrong about this, the First Respondent discharged the burden of proof, by the provision of a cogent explanation from Mr. Wooton corroborated by witness evidence and documentation, such as proof that the Claimant had been offered loader training and evidence that it was probably not unusual for warehouse operatives to be trained in only one task.

Issue 1.4

241 We found that the reasons that Mr. Gorny did not arrange training for the Claimant was nothing to do with his race or colour. The relevant findings of fact include those at paragraphs 90-100 above.

242 Although we have made positive findings of fact that Mr. Gorny did not act in a prohibited way towards the Claimant, we have considered the application of the burden of proof.

243 On the facts found, there was "something more", in that the Claimant had not been provided with adjusted duties when he returned with the open-ended fit note in September 2017, despite the fact that adjusted duties had been provided with the previous Fit notes. He had, in effect, been left sitting in the canteen.

244 The First Respondent discharged the burden of proof, by the provision of a cogent explanation from Mr. Gorny corroborated by witness evidence from Mr. Ramsden and Ms. Gibbs, and documentation, including the notes of the welfare meeting on 9 October 2017 which included an apology.

245 On the Fit note issue, Mr. Gorny had received advice from ERS, a centralised HR advice line, which was either poor advice or was misinterpreted poorly by Mr. Gorny. Error does not, by itself, transform attempted management into race discrimination.

246 Moreover, the first request for training to Mr. Gorny was not made until 9 October 2017, when medical restrictions were in place and when there were no alternative roles available. After that, either the Claimant or Mr. Gorny was absent from work during the next 7-8 weeks in any event.

Issue 1.5

247 We found that the reasons that Mr. McAleese did not arrange training for the Claimant was not related to his race or ethnicity. The relevant findings of fact are at paragraphs 101-104 and 163-180 above.

248 We concluded that a hypothetical white comparator of European ethnicity would have been treated in exactly the same way as the Claimant in the circumstances in which Mr. McAleese dealt with the Claimant. We heard no evidence that the comparators relied upon were in the same position as the Claimant in being part of the De-kit operation proposed to transfer. The inference was that they were not part of this operation, because they could carry out more physical tasks.

249 If we are wrong about this, and there was a difference in treatment, the First Respondent discharged the burden of proof, by the provision of a cogent explanation from Mr. McAleese corroborated by witness evidence and documentation.

Issue 1.6

250 The Claimant really had no complaint about Mr. Gardner. It was difficult to understand, both from what the Claimant submitted and from the evidence, how he had become the subject of a complaint.

251 From our findings of fact at paragraphs 105-111, it should be apparent that Mr. Gardner's treatment of the Claimant was not related to, and was not because of, his race or colour.

Issue 1.7

252 Our findings of fact at paragraphs 112 to 127 above lead to the conclusion that this complaint, whether of harassment or direct discrimination, must fail.

253 We concluded that there was no difference in treatment; a hypothetical comparator would have been treated the same by Mr. Gorny and Ms. John.

254 In respect of the complaint of harassment, the treatment of the Claimant by the two managers referred to was not related to his race or colour; there was no direct evidence that it was connected to this and there was no evidence from which we could draw such an inference.

255 Moreover, the manner in which the grievance was dealt did not have the purpose or effect of creating the environment proscribed by section 26 EA 2010.

Issues 3.1 and 8.1

256 The denial of a further right of appeal could be sufficient in many cases to amount to "something more" in the *Madarassy* sense, because on the face of the First Respondent's grievance procedure, a hypothetical comparator would have been afforded the additional appeal. In this case, however, we accepted Ms. John's evidence that she had misdirected herself as to the procedure which applied, and that she would have done this had she been dealing with a hypothetical comparator. This was evidenced by the fact that she had made the same mistake in respect of a white European Operative.

257 Consequently, we concluded that the burden of proof did not shift to the First Respondent.

258 However, if we are wrong about this, there was cogent evidence that Ms. John would, in these circumstances, have treated any Warehouse Operative in the same way. This mistake had nothing to do with race or ethnicity, nor was it caused in any way by the Claimant's protected acts.

Issue 8.2

259 Mr. Ramsden did not refuse to accept the Claimant's Fit note on 18 September 2017 due to the protected acts. We have made findings of fact at paragraphs 136 to 141 which explain why this complaint of victimisation is not upheld.

Issues 8.3 – 8.4

260 We have made findings of fact at paragraphs 144 to 148 which explain why these complaints of victimisation are not upheld.

261 In the first place, Mr. Zabik was selected to carry out the disciplinary investigation and had no role in deciding to send out the letter. Secondly, he had no knowledge of the protected acts when he served the Claimant with the invitation letter to the disciplinary investigation nor when he decided that there should be a charge of misconduct. Accordingly, there could be no causative link between the protected acts and the treatment alleged by Mr. Zabik.

262 We accepted Mr. McAleese's evidence. It followed from the conclusion of Mr. Zabik. It was not caused in any way by the Claimant's protected acts.

Issue 8.5

263 Using the findings of facts from paragraph 155 onwards, we have concluded that the Claimant was not assigned to the De-kit operation in order to make the Claimant part of the transfer to the Second Respondent.

264 The Claimant's work was largely in the De-kit operation from 10 July 2017, before Mr. Gorny or the shift managers knew of the transfer. He worked 100% of the time in de-kitting from about October 2017 due to the adjustments made because of the restrictions referred to in the Fit notes.

8.6 & Unfair Dismissal

265 The First Respondent nor the Second Respondent dismissed the Claimant on 14 January 2018 or at all. In the factual circumstances found in this case, the effect of regulation 4(8) TUPE Regulations is that the contract of employment terminates by operation of law at the point of transfer.

266 Accordingly, the termination of the Claimant's employment could be neither an act of victimisation nor an unfair dismissal.

Summary

267 For the reasons set out above, each complaint fails.

Employment Judge Ross

11 January 2019