EMPLOYMENT TRIBUNALS

Claimant: Mr G Aylott

Respondent: Royal Mail Group Limited

Heard at: Manchester **On:** 12 and 13 December 2018
17 December 2018

Before: Employment Judge Batten
Mr H Flynn
Mrs C A Titherington

REPRESENTATION:

Claimant: Mr Monaghan, Counsel
Respondent: Mr C Baker, Solicitor

JUDGMENT having been sent to the parties on 11 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant claimed disability discrimination, specifically direct discrimination, indirect discrimination, discrimination because of something arising from disability and a failure to make reasonable adjustments. There was also a pleaded claim of harassment which was not pursued at the hearing.

2. The hearing of the evidence took place over two days, 12 and 13 November 2018. On 17 December 2018, the Tribunal deliberated and the parties attended at 2.00pm for oral judgment.

3. The Tribunal was provided with an agreed bundle of documents for use at the hearing, and witness statements: from the claimant and, for the respondent,

Mr M Aspden, Plant Manager at Preston Mail Centre and the claimant's third line manager; Mr S Sumner, the late shift manager and the claimant's line manager; and Mr D Vaja, the Deputy Manager at Preston Mail Centre. Each witness tendered their statement as evidence in chief and was subject to cross-examination. References to page numbers in these Reasons are references to the page numbers in the agreed hearing bundle.

4. The parties had also agreed a chronology and had cooperated to agree a List of Issues, which was amended slightly following discussion with the Tribunal on the morning of the first day of the hearing.

The issues

5. The parties had drawn up a list of issues which was discussed with the Tribunal at the start of the hearing and amended by consent. The issues which the Tribunal had to determine were agreed to be as follows.

Jurisdiction

6. Has the claimant presented his claim in time pursuant to section 123 of the Equality Act 2010?

7. If not, is it just and equitable in all the circumstances to extend the time limit?

Direct discrimination

8. Has the respondent treated the claimant less favourably than it has treated or would treat others because of disability pursuant to s13(1) EqA?

It was confirmed that the claimant here relied upon:

8.1 The respondent's failure to follow the recommendations from Occupational Health;

8.2 The respondent's failure to follow other recommendations in respect of the claimant;

8.3 The respondent's failure to make reasonable adjustments;

8.4 Mark Aspden asking Occupational Health to consider ill-health early retirement;

8.5 Scott Sumner accusing the claimant of only pursuing a grievance 'for money' and saying 'should stage 3 of the process be triggered the business could dismiss him as enough reasonable adjustments had been demonstrated';

8.6 The respondent's application of the attendance policy and the manner in which it was pursued.

9. Has the claimant identified a real or hypothetical comparator whose circumstances are not materially different to his own? The claimant confirmed that he relied upon the hypothetical comparator.

Discrimination arising from disability

10. Has the respondent treated the claimant unfavourably because of something arising in consequence of his disability pursuant to s15(1) EqA?

10.1 The claimant averred that his sickness absences arose as a consequence of and were related to his disability and that the application of the attendance policy amounted to unfavourable treatment. The claimant submitted that the respondent's attendance policy worked to the disadvantage of this particular disabled employee. As a disabled person, the claimant averred that he was at greater risk of sanction under the attendance policy.

11. If so, can the respondent show that such treatment was a proportionate means of achieving a legitimate aim?

11.1 The legitimate aim which the respondent contended for is the achievement of the Universal Service Obligation ("USO"). The respondent relied on the fact that it is the designated provider of the USO, a statutory duty which outlines the minimum standards of customer service and delivery/collection specifications which the respondent must adhere to. The USO can only be amended with agreement from Parliament and the respondent is subject to independent, external auditing of the USO by Ofcom and held to account for any failings. If the respondent fails to achieve the USO it can ultimately have its licence as a postal provider withdrawn.

11.2 The respondent averred that through the application of the attendance policy, which has been agreed with a recognised trade union, the Communication Workers Union ("CWU"), the respondent is able to provide an efficient and reliable service by ensuring that employees regularly attend for work. The attendance policy establishes national minimum standards of attendance which are designed to encourage a high standard of attendance so that an effective and reliable staffing base can be maintained ensuring that the respondent's obligations under the USO can be met and the risk of any failings under the USO is minimised.

Indirect discrimination

12. Has the respondent applied a provision, criterion or practice ("PCP")?

12.1 The PCP relied upon is the respondent's attendance policy

13. Is the PCP applied to persons who do not share the claimant's disability?

13.1 The respondent contended that the attendance policy is applied to all of the respondent's employees.

14. Does the PCP place those with the claimant's disabilities at a particular disadvantage when compared to other persons?

14.1 The claimant averred that those with the same disabilities as him are likely to experience absence more often and longer/more frequent absences than those without disabilities, and therefore more likely to trigger the attendance reviews under the policy.

14.2 The claimant also averred that those with disabilities will only incur disability-related absences which are counted under the attendance policy, thereby placing them at a disadvantage.

15. Does the PCP place the claimant at that particular disadvantage?

15.1 The claimant asserted that he has a progressive disability and multiple disabilities and so is more likely to be disadvantaged than a single disability comparator.

15.2 The claimant pointed to the fact that he was issued with an Attendance Review 1 ("AR1") in November 2017.

16. Is the PCP a proportionate means of achieving a legitimate aim?

16.1 The legitimate aim which the respondent contended for is the achievement of the Universal Service Obligation ("USO"). The respondent relied on the fact that it is the designated provider of the USO, a statutory duty which outlines the minimum standards of customer service and delivery/collection specifications which the respondent must adhere to. The USO can only be amended with agreement from Parliament and the respondent is subject to independent, external auditing of the USO by Ofcom and held to account for any failings. If the respondent fails to achieve the USO it can ultimately have its licence as a postal provider withdrawn.

16.2 The respondent averred that through the application of the attendance policy, which has been agreed with a recognised trade union, the CWU, the respondent is able to provide an efficient and reliable service by ensuring that employees regularly attend for work. The attendance policy establishes national minimum standards of attendance which are designed to encourage a high standard of attendance so that an effective and reliable staffing base can be maintained ensuring that the respondent's obligations under the USO can be met and the risk of any failings under the USO is minimised.

16.3 The claimant contended that counting disability-related absences is not a proportionate means of achieving a legitimate aim.

<u>Duty to make reasonable adjustments</u>

17. Has the respondent applied a PCP?

    17.1 The claimant relied on the respondent's attendance policy.

    17.2 The claimant contended that he was absent from work because of his disability and as a result his ability to regularly attend for work was reduced and that the respondent's attendance procedure which monitors employees' attendance at work penalises absence.

    17.3 The respondent contended that the correct PCP was the requirement for employees to regularly attend for work and relied on the case of Griffiths v Secretary of State for Work and Pensions UKEAT/0372/13.

18. Did the operation of the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

    18.1 The claimant contended that his disability significantly impacts his ability to attend for work and accordingly his disability leads to a level of absence which a non-disabled employee is unlikely to have. The claimant therefore averred that the attendance policy puts him at a substantial disadvantage.

19. If so, has the respondent taken such steps as it is reasonable to take to avoid the disadvantage?

    19.1 The claimant averred that he would benefit from lighter and/or seated duties on shift, e.g. in the resource area, quality checks or any administrative work that would give him a break from being on his feet. Extended triggers under the absence procedure would assist in his circumstances as would discounting all disability-related absences. The claimant contended that these adjustments would better enable him to return or remain in work.

    19.2 The respondent's attendance policy provides that absences relating to disability will 'normally' be discounted but that in some circumstances 'where it is justifiable to do so' the disability-related absence may be counted.

    19.3 The respondent's position was that the absence policy has an inbuilt adjustment of discounting disability-related absence. However where an absence level reaches the stage where it is no longer sustainable and the adjustment of discounting disability –related absence is no longer reasonable the respondent will count disability-related absences on the basis that it is justifiable to do so.

20. Could the respondent reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled?

20.1 The claimant submitted that as the respondent admits he was disabled, it recognises it is likely that he would be placed at a substantial disadvantage under the attendance policy as operated.

Findings of fact

21. The Tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of the witnesses and the consistency of their evidence with surrounding facts.

22. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal has not simply considered each particular allegation, but has also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

23. The findings of fact relevant to the issues which have been determined are as follows:

24. The claimant commenced working for the respondent on 19 February 1996 via a Job Centre programme to support disabled people to gain employment. The claimant originally worked at Doncaster Mail Centre and, when that closed in 2010, he moved to the Sheffield Mail Centre. In 2015, the claimant requested a transfer to Preston Mail Centre for personal reasons. The claimant remains an employee of the respondent.

25. The claimant is disabled by reason of Crohn's Disease which he has suffered since he was 14 years old and for which he has had significant and substantial surgery. He has also been diagnosed with rheumatoid arthritis, fibromyalgia (diagnosed approximately 4 years ago) and he also suffers from depression and anaemia. The respondent accepts that the claimant is disabled within the meaning of section 6 and schedule 1 of the Equality Act 2010.

26. The respondent has an attendance procedure which was included in the hearing bundle at pages 54-62. The objective of the attendance procedure is to achieve and maintain consistently good levels of absence.

27. In the bundle at page 56 the procedure provides that absence arising from disability will normally be discounted when deciding whether the respondent's attendance standards are met. However, in circumstances where it is justifiable, management may count the absence when considering an employee's attendance. There follows (in the bundle at page 63 onwards) guidance for employees about how managers will manage employees who are disabled and who have absence. Pages 65-66 provide that managers should seek advice from HR and review any Occupational Health reports and

that, in circumstance where it is justified to do so, managers should advise the employee in writing that any future absences may be counted as opposed to discounted. The example given in the policy is where an employee's disability-related absence reaches an unacceptable level.

28. The policy provides for 3 levels of warning. Firstly, an AR1 which is an 'Attendance Review 1', where a meeting about the AR1 is triggered, when 4 absences or 14 days of absence occur in a 12 month period. If the employee thereafter maintains standards over the next 12 months, the AR1 is removed and the employee is removed from the procedure. Next there is an AR2, which is triggered after a further 2 absences after the AR1 or 10 days in any six months. If there is less than one absence of a maximum of 4 days, the employee is removed from the procedure altogether. The third stage is a 'COD' which stands for Consideration of Dismissal, which takes place after a further 2 absences or a further 10 days or more, in a six month period.

29. When the claimant moved to Preston Mail Centre in 2015, he was placed on the night shift because that was where there was a vacancy. Within a matter of weeks, the claimant requested a move to "lates" or to an administrative or support role.

30. In late 2015, the claimant was referred to Occupational Health. The report appears in the bundle at page 230, and recommended a phased return to work after a period of sickness absence and access to toilet facilities. The report also said:

> *"You may wish to take into consideration a permanent change to day shifts to help reduce the risk of future flare-ups."*

31. On 15 December 2015, a further Occupational Health report was obtained. This concluded that the claimant was fit for the tasks of his role although it strongly recommended restricting him from working between the hours of 10.00pm and 6.00am, which the Occupational Health physician said would be the detriment of the claimant's Crohn's disease. The report stated that there was a reasonable chance that the claimant's condition would settle down if he was restricted from night working.

32. In the bundle at page 260 is a letter from the respondent to the claimant about a formal absence review meeting, because he had then fallen below the respondent's attendance standards - at that stage the claimant's absences amounted to 130 days in 12 months.

33. On 20 January 2016, following a meeting to review the claimant's attendance, the respondent wrote to the claimant to say that it would not, at that stage, issue him with an AR1 warning but that, should the level and frequency of his absences, which had been identified as being due to illnesses related to his disability, continue then the respondent warned that it "may no longer continue to discount any future disability-related absences that you may incur and subsequently those absences may be included in any future attendance warnings received".

34. On 26 January 2016, the claimant was moved to the late shift, so he was working at the Preston Mail Centre between the hours of 2.00pm and 10.00pm.

35. On 1 February 2016, the respondent referred the claimant to Occupational Health for an assessment for ill-health early retirement. However, that assessment was not proceeded with because the claimant attended the appointment and told the assessor that he was back on full duties and therefore he believed that he did not qualify for ill-health retirement.

36. From 4 August to 2 September 2016, the claimant was off sick.

37. On 13 September 2016, the claimant was invited to a formal attendance review meeting to consider his absences. As a result of that meeting, on 19 September 2016, an AR1 was issued to the claimant by Mr Vaja on the basis of the absences the claimant had sustained in August 2016.

38. Following the AR1, the claimant was absent for one day in December 2016 and 3 or 4 days in February 2017.

39. The claimant was referred to the respondent's Occupational Health physician. On 2 March 2017, the Occupational Health report which resulted stated that the claimant was fit for his role and also commented that management may wish to consider increasing the attendance triggers.

40. On 2 March 2017, as a result of receiving that report, Scott Sumner, who was the claimant's line manager, asked for HR guidance about what amount of absence increase would be considered reasonable. The HR reply was to consider discounting absences for disability, and said that should be done "if absences become excessive and the claimant's attendance falls below acceptable levels…." In effect, therefore, HR were merely quoting from the policy wording and not actually providing the advice which Mr Sumner sought.

41. In May 2017, the claimant was absent for 3 days, and in August 2017 he was absent for one day and a subsequent 3 days. The claimant was then absent from 30 October to 15 November 2017.

42. On 14 November 2017, the respondent invited the claimant to an absence review meeting. The claimant returned to work the following day, 15 November 2017.

43. On 20 November 2017, the respondent wrote to the claimant by letter, inviting him to an attendance review meeting because his absence was considered to be a cause for concern. The meeting took place on 24 November 2017, and resulted in the issue of a further AR1, by Mr Vaja, for a period of four absences of 27 days in total.

44. On 7 December 2017, the claimant submitted a grievance about the issue by Mr Vaja of an AR1. The claimant was aggrieved that the respondent had failed to take account of his disability when making decisions under the

Attendance Procedure and the claimant wrote that he believed it would be a reasonable adjustment to discount his disability related absence.

45. The respondent considered and rejected the claimant's grievance in December 2017.

46. The Claimant was absent from work sick in January 2018 and, on 19 January 2018, the claimant applied to ACAS for Early Conciliation and issued his Employment Tribunal claim, on 15 March 2018.

The Law

47. A concise statement of the applicable law is as follows.

48. The law is set out in the Equality Act 2010 ("EqA")and briefly the following sections provide for the applicable law in this case:

Jurisdiction

49. The time limit for complaints brought under EqA is found in section 123 as follows:-

"(1) Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three 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."

(2) ....

(3) For the purposes of this section –

(a) conduct extending over a period of time is to be treated as done at the end of that period;

(b) ....

50. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

General

51. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

52. EqA provides for a shifting burden of proof. Section 136 so far as is material provides as follows:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

53. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

54. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

55. Direct discrimination is defined in section 13(1) of the EqA as follows:

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

56. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) EqA applies:

"*On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*"

57. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities.

58. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed [2009] IRLR 884*, that in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or

subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Indirect discrimination

59. Section 19 EqA provides as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Discrimination arising from disability

60. Section 15 of the EqA provides as follows:-

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

61. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of *Pnaiser v NHS England and Coventry City Council EAT /0137/15* as follows:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) …..

(h) Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so."

62. In *City of York Council v Grosset [2018] WLR(D) 296* the Court of Appeal confirmed the point made in paragraph (h) in the above extract from Pnaiser: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

63. The Equality and Human Rights Commission Code of Practice on Employment ("the Code") contains some provisions of relevance to the justification defence. In paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

- is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

64. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

65. The application of section 15 to long term sickness absence was considered by the Court of Appeal in *O'Brien v Bolton St Catherine's Academy [2017] ICR 737*. Although the test for the fairness of a dismissal differs from the test of justification under section 15(1)(b), in practice the two standards are broadly equivalent: see Underhill LJ in paragraph 53. Frequently the factors which have to be weighed in the balance are the same.

Reasonable Adjustments

66. Section 39(5) of EqA provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in EqA Section 20, Section 21 and Schedule 8. This case turned on the first requirement in Section 20(3):

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

67. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in *Environment Agency –v- Rowan [2008] IRLR 20*.

68. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Code paragraph 6.10 says the phrase is not defined by EqA but

> "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions*".

69. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) EqA defines substantial as being "*more than minor or trivial*".

70. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

71. The Code deals with sickness and absence from work from paragraph 17.16 onwards. Paragraph 17.20 confirms that employers are not automatically obliged to disregard all disability related sickness absences. Paragraphs 17.21 and 17.22 read as follows:

> "*17.21 Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so.*
>
> *17.22 However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make.*

72. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP. In *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664* the EAT held that a failure to consult an employee about adjustments did not in itself amount to a failure to make a reasonable adjustment. Nor was the extension of a rehabilitation programme which offered no prospect of restoring the claimant to full duties: *Romec Ltd v Rudham EAT 0069/07*.

73. In the course of submissions, the Tribunal was referred to a number of cases by the respondent, as follows:

- Royal Mail Group Limited v Mr Hunkin UKEAT0507/08
- Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT 0397/14

- Williams v The Trustees of Swansea University Pension and Assurance Scheme and Swansea University [2017] EWCA 1008 (Civil)
- Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15.
- Hensman v Ministry of Defence UKEAT 0067/14
- Coppull Castings v Hinton EAT 0903/04
- Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265
- General Dynamics Information Technology Limited v Carranza [2015] IRLR 43
- Salford NHS Primary Care Trust v Smith UKEAT 0507/10
- Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Application of law to facts

74. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

75. Firstly the Tribunal was asked to determine jurisdiction, and noted that the claimant went to ACAS on 19 January 2018. On the face of it, therefore, any act before 20 October 2017 would be out of time.

76. The Tribunal found that the AR1, which is an important event in the time line for these proceedings, was issued on 24 November 2017 and therefore is in time. Further, the Tribunal considered that the respondent's application of its attendance policy constituted a continuing act over time, therefore bringing other acts prior to 20 October 2017 in time for the purposes of the claimant's claim. The Tribunal therefore decided that it had jurisdiction to hear the claimant's claims.

77. On the issue of direct discrimination, it was confirmed that the claimant here relied upon the following acts and omissions:

77.1 The respondent's failure to follow the recommendations from Occupational Health;

77.2 The respondent's failure to follow other recommendations in respect of the claimant;

77.3 The respondent's failure to make reasonable adjustments;

77.4 Mark Aspden asking Occupational Health to consider ill-health early retirement;

77.5 Scott Sumner accusing the claimant of only pursuing a grievance 'for money' and saying 'should stage 3 of the process be triggered the business could dismiss him as enough reasonable adjustments had been demonstrated';

77.6 The respondent's application of the attendance policy and the manner in which it was pursued.

78. First, the Tribunal did not find that the respondent had failed to follow the recommendations from Occupational Health and, further, did not consider that the respondent would necessarily have followed any of the recommendations for an able-bodied employee or any other employees, in comparison to the claimant - there was no evidence to support a contention of less favourable treatment on this aspect nor that any such treatment was because of the claimant's disability. The respondent had considered, certain aspects of the application of its policy when asked to by Occupational Health and the respondent had sometimes, but not always, decided to follow what Occupational Health had suggested. For example, the respondent transferred the claimant onto the late shift as soon as it was able to do so, in order that the claimant avoided working from 10.00pm to 6.00am (the night shift) as advised by Occupational Health. However, a recommendation to consider extending the sickness procedure triggers was not followed. Mr Sumner had sought advice from the respondent's HR department on that matter, albeit that HR misunderstood what he was asking and merely repeated the policy wording back to him, which was of little use to Mr Sumner. It did not answer his question as it could have done nor did it provide meaningful guidance that he sought. Nevertheless, the Tribunal did not consider that a failure to extend the triggers, in the circumstances, constituted an act of direct discrimination.

79. On the issue of the respondent's failure to follow "other recommendations" in respect of the claimant, the Tribunal asked the claimant's Counsel,, at the beginning of the hearing, to clarify what other recommendations were contended for. Counsel referred the Tribunal to the claimant's further and better particulars which appear in the bundle at page 33 (particulars (a) and (c)) and the Tribunal have considered those as follows: the claimant was transferred to the late shift in January 2016 and was given access to the toilets. It was not a recommendation that he be transferred to days, as such. There was a specific recommendation to avoid working shifts between 10.00pm to 6.00am, and the respondent met that recommendation by transferring the claimant from the night shift onto lates, on 26 January 2016, and the respondent also restricted the weights that the claimant should lift or handle. There was no recommendation from Occupational Health to look at the suitability of other aspects of the respondent's working areas, but in any event, the Tribunal noted that the claimant's evidence was that he did not want to work in the 'letters area' because he said that was a dying area of the business. In fact, other areas were looked into by the respondent's management but jobs were either being withdrawn or there was no scope to move the claimant as no vacancies arose. The respondent's evidence, which the Tribunal accepted, was that they struggled to recruit workers for the night shift whilst, in contrast, other shifts were over-staffed, particularly the day

shifts, where the respondent was looking to reduce staffing and not to recruit or transfer in more people. A 'shift manager support' role was identified at one point but that role was subsequently withdrawn from the respondent's business on a national basis, so no vacancy arose and the role was never advertised. The Tribunal therefore did not consider that the respondent, or its managers, discriminated against the claimant by failing to put him into a shift manager support role. In addition, the Tribunal took account of the fact that the Occupational Health reports consistently said that the claimant could meet the tasks of his job, and therefore the rationale for moving somebody to another role, namely because they could not meet the requirements of their existing role, did not arise.

80. Thirdly, it was contended for the claimant that the respondent's failure to make reasonable adjustments was a form of less favourable treatment. The Tribunal struggled to understand that suggestion in light of the fact that the claimant contended for discounting disability-related absence and then had conceded in submissions that the respondent actually did this. The Tribunal's Judgment deals with the allegation of a failure to make reasonable adjustments later and did not find any less favourable treatment in that regard.

81. The Tribunal then looked at the fact that Mr Aspden had asked Occupational Health to consider ill-health early retirement, which he did in February 2016. The Tribunal considered that any employee with the level of absence that the claimant had sustained at that time would likely have been referred by the respondent for consideration of ill-health early retirement. In all the circumstances, the Tribunal did not find that Mr Aspden's referral amounted to less favourable treatment of the claimant.

82. The Tribunal examined carefully the evidence surrounding the claimant's allegation that Mr Sumner accused the claimant of only pursuing a grievance 'for money' and saying 'should stage 3 of the process be triggered, the business could dismiss him as enough reasonable adjustments had been demonstrated'. Mr Sumner denied that matter in his witness statement, and he was not challenged about it. Accordingly, the Tribunal accepted the unchallenged denial by Mr Sumner on the point.

83. The Tribunal also considered the respondent's application of the attendance policy to the claimant. This allegation was clarified at the beginning of the hearing in that the Tribunal were told that the claimant's complaint was about the manner in which the policy was pursued. However, the claimant adduced no evidence that the respondent had applied the policy, or would have done so, in a different manner to non-disabled employees, albeit that there is provision in the policy for addressing disability-related absences, which is dealt with later in this Judgment. In light of any evidence to the contrary, the Tribunal did not consider that the respondent had applied the attendance policy to the claimant in a manner amounting to less favourable treatment.

84. The Tribunal then went on to consider the section 15 EqA claim of discrimination arising from disability. The claimant confirmed that the

"something arising" from his disability was his sickness absence(s) which arose as a consequence of and were related to his disability.

85. The claimant's case was that, by the application of the attendance policy to him, the respondent had subjected him to unfavourable treatment. The claimant contended that the respondent's attendance policy worked to the disadvantage of disabled employees and him in particular because, as a disabled person, the claimant averred that he was at greater risk of sanction under the attendance policy. Counsel for the claimant clarified this aspect in submissions as being that the application of the attendance policy placed hurdles in front of the claimant. The Tribunal understood this to be a reference to the AR1s when those were applied to the claimant and considered that such may amount to unfavourable treatment. In the claimant's case, the AR1s were issued in response to sickness levels that included incidents of disability-related sickness absence.

86. The respondent defended its actions on the basis that the attendance policy and its application was a proportionate means of achieving a legitimate aim. The Tribunal here noted that Counsel for the claimant accepted that the respondent had a legitimate aim to meet its USO, which is a statutory obligation, and also accepted that the attendance policy seeks to achieve regular and consistent attendance as part of the respondent's aim of meeting the USO. The Tribunal accepted the respondent's evidence about its obligations under the USO and the importance to the business of meeting the USO. The Tribunal also took account of the fact that the attendance policy has been agreed with the recognised union at the respondent, that it sets national minimum standards of attendance and has a default position on disability-related absences in any event. In those circumstances, the Tribunal concluded that the attendance policy was appropriate and necessary as a mechanism to ensure the regular and consistent attendance of the respondent's employees which contributed to the achievement of the USO. The attendance policy, and its application, was therefore justified by the respondent as a proportionate means of achieving a legitimate aim and the justification defence was made out.

87. As to <u>indirect discrimination</u>, the Tribunal considered that the respondent's attendance policy is a PCP and noted that it was applied to all employees of the respondent. In addition, the Tribunal accepted that disabled employees and the claimant were more likely to experience sickness absence due to the nature of their/his disability. However, the Tribunal also considered, on the basis of the written provisions of the attendance policy, that the attendance policy is, in fact, more favourable to employees who experience sickness absence which is disability-related. The default position under the policy is that, ordinarily, disability-related absences are discounted when computing the absence level, and such a discount was applied to the claimant's absences until 2016. The attendance policy comes into play for disabled employees only when the level of disability-related absence reaches what is described as an "unacceptable level", and even then the attendance policy is not automatically applied adversely to a disabled employee. What happens first, at that point, is that the respondent sends a letter of notification to the

employee, to the effect that the respondent gives notice or warning that it might, in future, count all absences including disability-related absences, when managing the employee's attendance under the policy. In the claimant's case, there were either 130 or 116 absences in a 12 month period, which the respondent viewed as an unacceptable level of absence. The Tribunal considered that the respondent's view was not unreasonable because the claimant's absence level was approaching half of the working year. The Tribunal accepted the respondent's view that this level of absence constituted an unacceptable level. In response to such a level of absence, and having served notice, the respondent was then entitled to invoke the attendance management policy for all absences and to issue an AR1 as it did. In all the circumstances, and as explained before, the Tribunal considered that the respondent's attendance policy is a proportionate means of achieving a legitimate aim, namely the achievement of the USO and so the claim of indirect discrimination is not well-founded.

88. In respect of the claim of a failure to make reasonable adjustments, Counsel for the claimant conceded, in the course of submissions, that on the evidence before the Tribunal, reasonable adjustments had been made. Counsel described this as "not the claimant's strongest claim" and stated that he was not pursuing it vigorously, save to submit that the claimant took the view that reasonable adjustments had not been pursued sufficiently or timeously by the respondent. The Tribunal asked Counsel for the claimant which reasonable adjustments he was referring to and he said the Occupational Health recommendations of working on permanent days. The Tribunal has already found there was a suggestion that a move to days should be considered but this was not a recommendation. In any event, the respondent transferred the claimant to the late shift in January 2016 - there was not a day shift as such but rather an early shift (from 6.00am to 2.00pm) and the late shift (from 2.00pm to 10.00pm). Occupational Health had suggested the claimant should be moved to day work, which was then defined as being work that does not fall between the hours of 10.00pm and 6.00am.

89. The Tribunal found that alternative roles were explored for the claimant, and the Tribunal rejected the submission, by Counsel for the claimant, that these were not explored vigorously enough. On the evidence, the Tribunal considered that alternative roles were explored sufficiently by the respondent, taking account of the national reduction in the postal service and the reduction in the requirement for employees to do postal work in the light of the changing nature of the communications sector in the UK.

90. The Tribunal did not accept that the respondent's attendance policy put the claimant at a substantial disadvantage because, as explained above, there is a reasonable adjustment embedded in the attendance policy to the effect that an acceptable level of disability-related absence will be subject to discounting. The discounting of disability-related absence is a reasonable step to take to avoid the disadvantage which disabled employees can face under attendance management, and particularly for those disabled employees whose disability makes them more susceptible to ill-health absence, such as the claimant, to avoid the disadvantage that those particular disabled employees might face.

91. The Tribunal takes note of the decision in the case of *Griffiths v DWP [2015] EWCA Civ 1265,* that the Court of Appeal has said that a modification of an attendance policy is not necessarily a reasonable adjustment, in circumstances where periods of potentially lengthy absence are likely. It can be reasonable not to disregard employees' sickness, the Court of Appeal said, particularly where further absence is likely, and where the reasonable adjustment arguably will not alleviate or remove the disadvantage. The Tribunal took guidance from the ratio in *Griffiths* as applicable in this case.

92. The Tribunal also looked at the reasonable adjustment of extending the absence triggers. Mr Sumner sought advice on this very matter, in an effort to understand and consider what might be done to assist the claimant. Unfortunately, the HR advice provided was woefully inadequate in that regard. Nevertheless, Mr Sumner did consider what he could do - the respondent's evidence could have been challenged on that point but it was not.

93. Lastly, the Tribunal were concerned that the claimant's case had largely been pursued because of a belief that the attendance policy should not be applied to him, because he was a disabled employee. At the start of the hearing, he resiled from this position and accepted that it would be a step too far to say that the policy should not apply at all. In any event, the Tribunal has found that the respondent's policy was not applied in a discriminatory manner and that the policy includes a reasonable adjustment, negotiated and agreed with the union, to alleviate the disadvantage that employees like the claimant might encounter with attendance management.

94. In light of all the above matters, the Tribunal concluded that the claimant's claim of disability discrimination are not well-founded and will be dismissed.

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Employment Judge Batten
Dated: 7 March 2019

REASONS SENT TO THE PARTIES ON

16 March 2019

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FOR THE TRIBUNAL OFFICE

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