EMPLOYMENT TRIBUNALS

Claimant:	**Mrs S Whitham**		
Respondent:	**Tesco Stores Limited**		
Heard at:	**Sheffield**	**On:**	**17, 18 and 19 June 2019**

Before: **Employment Judge Little**
Mr D Fell
Mr K Smith

Representation

Claimant: Mrs C Fowler, Solicitor (Howells LLP)
Respondent: Mr H Zovidavi of Counsel (instructed by Pinsent Masons LLP)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. None of the complaints are time barred and so the Tribunal has jurisdiction.
2. The complaint of discrimination by failure to make reasonable adjustments succeeds.
3. The complaint of indirect discrimination succeeds.
4. The complaint of discrimination arising from disability succeeds in part.
5. The complaint of unfair dismissal succeeds.
6. The Tribunal will determine remedy at a hearing on a date to be fixed.

REASONS

1. **The complaints**

   In a claim presented on 4 October 2018 Mrs Whitham brought the following complaints:-

   - Disability discrimination – alleged failure to make reasonable adjustments.
   - Indirect disability discrimination.
   - Discrimination arising from disability.
   - Unfair dismissal.

2. **The issues**

   The issues for determination by the Tribunal were agreed at a preliminary hearing for case management held on 13 February 2019 and were documented in the Tribunal's order issued following that hearing.

3. **Evidence**

   The claimant has given evidence but called no other witnesses. The respondent's evidence has been given by Mr Luke Jarvis, twilight grocery team manager and at the material time the claimant's line manager; Mr Lewis King, store manager Sheffield Infirmary and dismissing officer and Mr Carl Foster, store manager Abbeydale Road and appeal officer.

4. **Documents**

   We have had the benefit of an agreed bundle running to 384 pages. On day two of the hearing the Tribunal made enquiries of the respondent as to policies or procedures of the respondent which we felt were likely to be in existence and also likely to be relevant to the circumstances of this case. These were a capability policy or procedure and a document entitled "Supporting Colleagues with Disabilities". The latter was referred to in the only policy which was within the bundle – the respondent's equal opportunities and diversity policy. At the beginning of the afternoon session on day two we were provided with copies of the Supporting Colleagues with Disabilities document (although in a November 2018 version which post-dated the material time) and also a document entitled "Inspiring Great Performance Every Day". Mr Jarvis told us that he was unaware of the supporting colleagues with disabilities guidance during the time that he was dealing with the claimant's capability issues. Mr King told us that he was familiar with the guide. Mr Foster also said that he was aware of the guide but he did not have it before him at the time and had not re-read it prior to conducting the appeal against dismissal.

   The respondent's witnesses confirmed that the claimant's capability issues had been dealt with by reference to the inspiring great performance every day guidance and no other document. However we doubt that this could be the case. The guidance that we have seen could be described as a motivational

tool rather than one intended to give guidance in circumstances where an employee's performance is impeded by health or disability issues. Moreover, various references are made in the respondent's evidence to the claimant being provided with a support plan which would normally be a six week programme but which could be extended to a maximum of 12 weeks. It appears to the Tribunal that that arrangement would apply to an employee who, for instance, was making a phased return to work after a period of long-term sickness absence rather than a disabled employee who, in the claimant's case, had never been absent from work and whose condition was unfortunately only likely to deteriorate.

We have also noted that unfortunately the respondent persists in using the term "disciplinary" in respect of situations which are in fact health related and/or disability related capability cases.

There is also a lacunae as to the status of the appeal process in the claimant's case. We have not seen any "disciplinary policy" or any other policy which would apply to a case where an employee dismissed because of ill health/disability related performance issues then appeals against that decision.

5. **Facts**

The Tribunal find the following primary facts:

5.1. The claimant's employment commenced on 21 August 2004. That was employment as a customer assistant. Initially the claimant worked at the respondent's Abbeydale store in Sheffield but in December 2004 she moved to the then recently opened Infirmary Road store. The terms and conditions of employment which applied during the latter part of the claimant's employment are set out in the document at page 191 in the bundle. The claimant's job title is given as customer assistant – replenishment.

5.2. For approximately the first 10 years of the claimant's employment her role was essentially working on a check out till. However in or about February 2013 the claimant had an absence from work because of shoulder pain. That absence was approximately five weeks.

5.3. By July 2014 the claimant was also experiencing pain in her fingers. The claimant's GP issued a fit note which advised that the claimant might be fit for work on amended duties. The amended duties were described as ' No heavy lifting no check out duties'. The diagnosis given was ' Finger pain under investigation, Shoulder pain'. A copy of that fit note is at page 67. The claimant was finding it particularly difficult to handle cash because she could not grip and pick up small coins. Tapping the till screen also aggravated the claimant's condition. In the light of this fit note the respondent removed the claimant from check outs and gave her a job replenishing the health and beauty aisle.

5.4. Subsequently the claimant was moved to what is described as a back door job, splitting cages. When stock arrived at the store it was in cages. The claimant's role was to ensure that those cages contained the right products for each of the 13 aisles in the store. Some of the cages would need splitting so that stock would be moved from one

cage to another. The claimant would also check for any damage to stock and take the appropriate action with it.

5.5. The respondent was provided with a letter from Miss R D Harper, consultant plastic and hand surgeon at Northern General Hospital in July 2015. A copy of that letter is at page 84. The claimant is described as having severe arthritic change in the joint of her left index finger and that was making it very difficult for her to do her job on the check out. The claimant had asked Miss Harper to write the letter because she felt that she struggled when working on the check outs due to the arthritic change.

5.6. On 6 November 2015 an informal meeting was conducted with the claimant by her then manager Leanne Wilson. Under the respondent's terminology this was described as a 'Right hours, right place' meeting. The note of that meeting is at page 86. Miss Wilson spoke to the claimant about her condition and how her work affected it. By this stage in addition to the split work the claimant was helping with trolley work -moving empty trollies from satellite trolley bays in the car park back to the central bay. The claimant is recorded as saying that she was happy helping out with trollies but would not want to do it permanently due to the cold affecting her arthritis. It was felt that that would make her condition worse.

5.7. In May 2016 the claimant was asked to change her hours of work and she agreed. The record of a meeting about this page 89. Reference is made to a concern the claimant had about wishing to attend football matches in the evenings and the manager who conducted that meeting, Kay Jenkins, said that the respondent would accommodate that where possible. Although the note does not suggest that there was any discussion about the claimant's arthritis, reference is made to alternative roles which the claimant would do and there is a reference to plant bread. There is also a reference to stores in which the claimant 'would' (that is 'could') work and reference is made to Saville Street, another Tesco store within Sheffield.

5.8. By Autumn 2016 a decision had been taken that the Infirmary Road store would no longer open 24 hours per day. As a result the claimant's back door/split role would come to an end. On 12 October 2016 a health investigation meeting was conducted with the claimant. The manager involved was Mr Jarvis and he was assisted by Andrew Hall, one of the respondent's "people managers" (HR). The health investigation form concerning that meeting is at pages 94 to 95. There was an analysis of the types of work which the claimant could or could not do and it was noted that she had arthritis in her fingers and thumbs. As a result of this meeting the claimant was moved to a role described as 'price integrity', which involved checking and if necessary changing the prices displayed on the shelves. However the claimant found that this was as she put it a fiddly job, involving labels and a PDA device. As an alternative the claimant was to be given a trial in a replenishment role on the grocery aisle.

5.9. There was a further review conducted on 19 October 2016, this time by the manager Kay Jenkins. A note of that meeting is on page 96. It

may be that Mr Hall was also present at that meeting. There is a reference to him indicating that there was now a need to contact occupational health. It was noted that the claimant had said that she would not be able to work in any departments other than bread and cakes and trolleys. However it was noted that there were no vacancies for these positions at Infirmary Road. There is a reference to the managers having emailed the Saville Street and Abbeydale Road branches to see if they had any vacancies.

5.10. There was a follow up informal meeting with the claimant on 9 November 2016. Notes of that meeting are at pages 97 to 100. The claimant expressed the concern that as there were jobs she believed she could do, plant bread or trollies, she should not be "taken to" occupational health. She feared that that was a way of getting rid of her. Mr Hall explained that there were no vacancies on trollies or plant bread but said that if they became available the claimant could be fitted in or slotted in. However the respondent could not remove other employees from their jobs so as to do this. Mr Hall suggested that the claimant could undertake replenishment work on the home bake aisle (aisle 11) because that was lighter work. We were told that the majority of the stock on this aisle came shrink wrapped or 'plastic' as it was described. This made it easier for the claimant to unpack. Her condition made it difficult for her to open cardboard boxes in which other stock would be contained. The claimant was provided with a tool known as a Mobi knife to assist with the opening of boxes. Mr Hall explained that Mr Jarvis, who was to be the claimant's manager, would mix and match aisles to see what the claimant could do but she needed to do at least 70% of the job. We should add that we have not seen any policy or procedure which refers to any percentage of a job which an employee can do, or what the ramifications of such a percentage might be.

5.11. In the event the claimant was not referred to occupational health at that stage.

5.12. On 9 December 2016 Mr Jarvis, accompanied by Mr Andrew Hall held a meeting with the claimant. The notes of that meeting are at pages 101 to 105. The claimant felt that she had been 'OK' in the new role. Mr Hall informed her that grocery was the only place where the respondent had vacancies. Although they had talked about plant bread (bread received into the store on trays) there were no vacancies in that department. The claimant pointed out that she could not work Saturdays because she went out on those days from midday until 10pm. She also said that she could not work until midnight because she had to care for her disabled husband. Mr Hall explained that the respondent was limited in the vacancies which they could provide and they could not make a role or vacancy for the claimant. Mr Hall explained that he was happy to meet the claimant halfway, but she needed to do something to help the business and decide whether 'Tuesday and Saturday' (presumably a reference to the claimant wanting to attend football matches on those days) was more important.

5.13. The parties were able to agree revised working hours following this meeting as recorded on page 106. The claimant was contracted to

work 15 hours per week and those hours were spread over three days. The new arrangement was that the claimant would now work Tuesday, Thursday and Friday for five hours on each day, still on the twilight shift, working till 10pm or on Fridays 11pm.

5.14. The respondent has a computer system referred to as a replenishment scheduler which calculates how long it would take an average colleague to complete a certain replenishment task. That is, calculated by an algorithm. At the beginning of the replenishment teams shifts their manager would have prepared information on a white board explaining who was allocated to which aisle or aisles and, by use of the replenishment scheduler programme, how long was allowed for those tasks. In his witness statement Mr Jarvis describes the replenishment schedule as a system which allows the respondent to properly manage stock levels and to support and manage colleagues' performance.

5.15. On 20 January 2017 there was an informal conversation (described as Let's Talk) instigated by Mr Jarvis and his co-manager, Ms Jenkins. A note of that appears at page 107. The reason for this meeting was the manager's concern as to the amount of work which the claimant was undertaking that is, her performance. It was explained that there would be some "shoulder to shoulder" coaching which involved the managers working for a period of time with the claimant.

5.16. There was a further Let's Talk conversation on 1 June 2017 and the note of that is at page 110. It was noted that the claimant was "not performing to full potential". The claimant indicated that she was having problems opening boxes on the biscuit aisle and opening boxes in general because of finger and thumb problems. It was agreed that Mr Jarvis would work with the claimant to observe her method of working and to provide coaching for her to work more efficiently. In addition to the amount of stock which the claimant was able to put on the shelves, the managers were also concerned about presentation of that stock in that it was not being "faced" properly.

5.17. There was a further Let's Talk informal conversation on 18 July 2017 and a note of that is at page 112. It appears that the claimant had been given a longer period than the replenishment scheduler would otherwise have provided to undertake her work on the day which was being discussed, 14 July. The claimant had been allocated 4.5 hours to fill the crisps shelves. However Mr Jarvis on conducting a spot check was concerned that not all the boxes of crisps which could have unpacked and put on the shelves had been. It was noted that the claimant needed to ensure that she filled the shelves thoroughly and faced up as she was filling. Mr Jarvis decided that it would be necessary to have weekly catch ups every Friday night thereafter.

5.18. There was a meeting between Mr Jarvis and the claimant on 21 July 2017 and a note appears at page 119. Mr Jarvis was again concerned that not all the stock that could have been put out had been. On that day the claimant's task had been to complete cereals and biscuits for which the replenishment scheduler allowed three hours 55 minutes. The claimant had been allowed four hours and 40 minutes but the task

had not been completed. The claimant's concerns were expressed as that she could not work any faster due to not being able to open boxes and that was because of the arthritis in her fingers and thumbs.

5.19. At the catch up meeting conducted on 2 August 2017 (page 139) Mr Jarvis conducted a comprehensive review of the aisles in the store in discussion with the claimant. This analysed which aisles the claimant could or could not work on, in her view. She was ok with cereals although had a problem with big boxes and with crisps but again some issues with big boxes. Contrary to the Tribunal's understanding aisle 11, home bake, was described as something which the claimant had never done previously and it was noted that she would be trialled on it.

5.20. There was a further review meeting on 8 August 2017 (see page 140). The claimant told Mr Jarvis that she was fully capable of completing aisle 11. The note records that whilst the replenishment scheduler would give her two hours and 50 minutes for that task, Mr Jarvis was allowing the claimant three hours and 20 minutes. In the remaining one hour 40 of the claimant's shift it was noted that she would support other areas of the shop. However Mr Jarvis was concerned that the reality had been that the claimant had not been able to complete the task within the whole of her five hour shift. There were also concerns about the standard of filling. Mr Jarvis also noted that the claimant was not using the methods which he had suggested to her as being more efficient at the 2 August review, such as using a filling trolley. In his evidence to us Mr Jarvis explained that the claimant was not following his advice that she should use a table and that she should arrange her work so as to minimise the need to walk back and forth along the aisle.

5.21. At a further review meeting on 11 August 2017 it was noted that the aisles looked better but there had been no real improvement on filling time. There was a discussion of "the problems Sandra has".

5.22. There was a further meeting on 15 September 2017 (page 150). Mr Jarvis noted that the claimant was inconsistent in her performance and had again failed to complete her aisle to the standard which was expected. Mr Jarvis felt that the claimant had shown a slight but insufficient improvement on speed. He noted that his concern was that they were showing the claimant how to work more efficiently but the claimant was not helping herself. He believed that it was "will not skill". It was noted that the claimant needed to show the respondent that she wanted to improve and should show more will and enthusiasm at work.

5.23. A further meeting was conducted with the claimant on an unknown date but probably at some time in September 2017. That meeting was conducted by a different team manager, Angela Sleight and Mr Hall was also present. The note is on page 156. It was recorded that there had been a discussion about time allocations for completing aisle 11 work. It was also noted that in the past few months the claimant had tried many different aisles and had been challenged for not completing her job. Ms Sleight explained that other colleagues were expected to complete their aisles in the allocated time and also work a check out. It was noted that the claimant was already exempted from check out

duties. The note goes on to refer to there being no vacancies on bread or trollies, those being areas where the claimant said she could work. It was recorded that new colleagues had been placed in those areas but their contracts were only 7.5 hours per week. We were told that many of the part-time workers at the Infirmary Road store were university students and contracts with that amount of hours were primarily intended for them. Ms Sleight also recorded that she had asked the claimant to ask her team manager for any support she needed but also to obtain some medical advice about her condition. It had been two years since she had seen the doctors about this. That was "so we can continue to support Sandra in the best way whilst also ensuring that her health does not get any worse through doing her job she is currently doing".

5.24. The claimant duly attended at her GP and a fit note was issued on 29 September 2017 (page 157). The diagnosis given was arthritis of the hands, especially left index finger and thumbs. It was noted that the claimant struggled with gripping packs and opening boxes. The advice was that the claimant may be fit for work if there were amended duties. There was no description of what those amended duties might be.

5.25. A meeting was then conducted on 5 October 2017 with the claimant by Mr Jarvis, who by now was in possession of this fit note. A note of that meeting is at page 158. The claimant is recorded as explaining that it was not a question of whether she could or could not do any particular aisle. Instead the problem was not being able to open boxes fast enough to meet the times set by the replenishment scheduler. The claimant went on to explain that it was not as if she had broken a bone which in six weeks would be better. Because of her arthritis she would be like that forever. She did not know how the respondent could help unless there could be a job that involved filling the shelf straight from the cage without having to open packaging or boxes. On the same date a document entitled Support Plan was initiated. Having regard to our earlier comments about the possible absence of some of the respondent's procedures or policies, we are unsure of the genesis of this document. It appears on page 159 and it describes the claimant's amended duties as being to complete toilet rolls and sections of the brand outlet together with crisps.

5.26. At a further one to one meeting with Mr Jarvis on 12 October 2017 it was noted that the claimant had been working on toilet rolls, freeform and brand outlet. The claimant had been focusing on doing the products which were in 'plastic'. The claimant had been completing those duties in three and a half hours and had then proceeded to support colleagues on the shop floor with facing and anything else that was in plastic that she was able to fill. It was noted that the next step would be for the claimant to focus on hitting replenishment times of three hours for this work.

5.27. The evidence of Mr Jarvis (paragraph 14 of his witness statement) was that in October 2017 he formed the view that within the small replenishment team (of seven) it was not possible to accommodate the adjustments which had been made for the claimant on a long-term

basis. He expressed the concern that colleagues were having to perform additional duties, picking up the work which the claimant could not complete. If colleagues assisted the claimant they might not complete their own work and failures in replenishment would jeopardise the service which the store offered to its customers. We should add that although during the course of cross-examination Mr Jarvis alluded to customers making complaints about items not being on shelves, no such complaints were documented. There was no evidence before us that any of the claimant's colleagues had complained about having to assist the claimant. Further it is to be noted that in the 'supporting colleagues with disabilities' guidance some of the examples of adjustments which might be made include "allocating some of the colleagues' duties to another person" and "allowing the colleague extra time where appropriate to carry out certain tasks".

5.28. Nevertheless Mr Jarvis decided that it was now necessary to begin a formal process and so on 24 October 2017 there was a formal capability meeting. For the reasons given earlier, we remain unsure precisely under which procedure this was being commenced. The notes of that meeting begin at page 167. Mr Jarvis conducted the meeting and the claimant declined to have a companion with her. She was not in the union. The note taker was Angela Sleight, check-out manager. Mr Jarvis began the meeting by explaining that it was a formal meeting about the claimant's limitations and the support needed with her capabilities. There was a review of the various tasks that the claimant had previously undertaken. The claimant said that she had been ok on bread but Mr Jarvis said there was no vacancy and in any event bread or morning goods included items that were in boxes. The claimant's view was that most of the bread came in trays rather than boxes. Mr Jarvis pointed out that the scheduler gave targets to complete tasks and he asked the claimant whether she felt she could work to that. She said that she couldn't because the times were based upon the store being shut. Mr Jarvis denied that that was the case. Mr Jarvis went on to ask the claimant if she was given further support, could she achieve the required times (see page 175). Her response was that she had no idea and Mr Jarvis knew that she struggled opening boxes. Mr Jarvis said that he could support the claimant for up to eight weeks or possibly twelve but what would change after that time? The claimant said 'nothing due to her condition as it was not going to be cured'. The claimant was asked whether she thought that her filling time would improve and she said that she thought that it would not. Mr Jarvis explained that the business was changing - "we need to be more efficient, my concern is after support is over how can you keep up" (page 179). Mr Jarvis acknowledged that the claimant 'came in great' sometimes and did a great job when there was a light delivery. However they were only allowed a certain amount of hours and the claimant had been re-trained. There had been a bit of progression and the claimant was asked whether she thought she would get quicker. She said probably not. Cereals in themselves were not a job role. Reference was made to the need for the claimant to complete 70% of her job role. Mr Jarvis went on to say that he was

going to be honest. They had done a review and the claimant said that her fingers weren't going to get any better and he asked the claimant whether she considered that she was capable of doing her role. The claimant replied "no, probably not to the level you want" (Page 181). The claimant believed that she could do approximately 50% of her job role. The claimant agreed that there was not an aisle that she could fully complete. Towards the end of the meeting it was agreed that the claimant would be referred to occupational health.

5.29. That referral is at pages 186 to 190 in the bundle. It appears to be Mr Hall who actually made the referral. The referral explained that the claimant struggled to open any sort of product that was in a box and that 85% of the delivery received on grocery was in boxes. That meant that the claimant was often put on products that were not in boxes such as toilet rolls or kitchen rolls, but there was not enough of that type of work to cover her shift.

5.30. Whilst the occupational health report was awaited Mr Jarvis conducted a further meeting with the claimant as a one to one on 10 January 2018 (page 192). It was noted that the claimant had been "on support for 14 weeks". That was on light duties. It was agreed to extend the support from eight weeks to twelve weeks.

5.31. The assessment by occupational health (Nuffield Health) was by the means of a telephonic assessment conducted on 17 January 2018. The fairly brief report that was provided to the respondent a result is at pages 196 to 197. The author of that report is Melinda Griffiths. She does not give her title or qualifications but we have assumed that she is not an occupational health physician. The report says that the claimant informed Ms Griffiths that she had a diagnosis of rheumatoid arthritis and that her main concern at work was opening boxes and she also found handling money difficult. The report goes on to deal with the questions set out in the referral (which did not include whether or not occupational health considered the claimant to be a person with a disability). Ms Griffiths explained that arthritis was a long-term health condition. In answer to the question which had been posed "Will the colleague be fit to undertake their full duties within the next eight weeks?" Ms Griffiths replied that that was unlikely because the claimant was symptomatic and that was unlikely to change within that period. In answer to the question "What, if any, reasonable adjustments would the colleague require to support them to remain in work?" Ms Griffiths replied:

"I understand Sandra is currently working adjusted duties where she refrains from opening any boxes, but she is able to open plastic packaging. Please continue with this workplace adjustment until further review".

Under the heading 'Recommendations' Ms Griffiths wrote:

"In my opinion, Sandra is fit to work with adjustments, as above. To aid her further, with her consent I will write to Virosafe so that a workplace assessment can be made and specific equipment ordered as recommended by the assessor. Re-deployment to "bread and cakes" would be preferable if the business can accommodate it.

Sandra informs me that she could fill most of the role aside from opening cake boxes *(it is the Tribunal's understanding that the claimant could open boxes it was just that it took her longer than it would take a person without arthritis in the hands)* if an adaption could be required to open boxes, Sandra is likely to be able to fulfil her usual role. I have not planned a review appointment for now but will do so if required. If you are not satisfied following Virosafe recommendations, please refer back to us and I will gladly re-visit this case".

5.32. In the event, whilst a report from Virosafe was obtained, (see below) the respondent did not seek any other occupational health advice prior to dismissing the claimant.

5.33. A Mr John Keough of Virosafe conducted a workstation assessment with the claimant on 31 January 2018. His report is at pages 199 to 201 in the bundle. The report notes that the claimant had told Mr Keough that her condition had deteriorated over the last four years. The report is directed simply at the claimant's then current role of stock replenishment, specifically working on aisle 11. It was noted that the claimant's condition meant that she was unable to grip between her thumb and fingers and so struggled to open smaller cardboard packaging and display casing and that because of this she had, since October 2017, been working in the main with stock that was shrink wrapped in plastic. It was noted that if she was working with a colleague, that colleague would re-stock the items which were in cardboard packaging and the claimant would re-stock the items that were wrapped in plastic. It was also noted that due to arthritis in the hip the claimant struggled to put stock out on the lower shelves and it took her longer to stand back up again from those kneeling positions. She could also struggle to lift boxes of stock, especially the bulkier or heavier items. Mr Keough's recommendations were in these terms:

"There are no standard items of equipment readily available that are robust enough to assist Sandra in opening the cardboard packaging, therefore we would have to try and modify her existing equipment to give her better grip or try alternative types of tools to give her additional leverage for opening the cardboard packaging.

In terms of moving the cages it would be possible to make some equipment so that she can pull them easier with both hands, however this will not alleviate the problem she has with her hip when completing this task".

We should add that some of the advice (coaching) which Mr Jarvis had given to the claimant was driven by his view that the claimant was making life difficult for herself by trying to "punch out" the cardboard boxes. There was an easier approach which was to turn the box over and with the Mobi knife cut some Sellotape or other tape thereby gaining access to the box. He also explained that whilst some of the packaging could be used as display, as shown by photographs in the bundle, he would have been content in the claimant's case for her simply to take the product and put it neatly directly on to the shelf.

5.34. Mr King's evidence was that before making the decision to dismiss he had a telephone conversation with Mr Keough at Virosafe when, according to paragraph 19 of Mr King's witness statement:

"He told me that there were no reasonable tools able to be provided as Sandra struggled with removing stock from boxes with her condition. He stated that the best tool to get into the box was already in use". Unfortunately Mr King made no note of this telephone conversation. Accordingly the recollection he sets out in paragraph 19 is given at least a year after that telephone conversation.

5.35. Although the workstation assessment report is dated 31 January 2018 and was probably sent to occupational health shortly thereafter, it did not come into Mr King's possession until around May 2018. In paragraph 17 of his witness statement he explains that the delay was caused by "structural changes taking place in large stores across the business at the time impacting on people and compliance managers who would ordinarily support in dealing with capability issues and facilitating the shared information between managers and occupational health or other specialists like Virosafe".

5.36. In the meantime there was a further meeting with the claimant which took place on 13 February 2018. The note is at page 203 to 211. The meeting was conducted by Danielle Barrett, the fruit and vegetable manager. That was because Mr Jarvis was on holiday at that time. Ms Barrett said that having looked back through the notes the claimant had been told that the process could lead to her dismissal. Reference was made to the various roles that the claimant had undertaken since coming off the tills. The claimant was asked about the telephone conversation she had had with occupational health on 17 January. Ms Barrett told the claimant that she had been supported throughout the process but no vacancies had arisen that the claimant could do or which were suitable hours. As a company the respondent could not create vacancies. Although the claimant had been asked what was said at the occupational health assessment, it is clear that Ms Barrett had a copy of the occupational health report before her because it is referred to in the meeting notes. When concluding the meeting Ms Barrett said that looking back to when Mr Jarvis had started to manage the claimant's performance it had soon come to light that because of the claimant's health issues with her fingers and thumbs it limited what she could do. The note goes on to record that Ms Barrett said:

"Based on them facts (sic) there is no other options other than sending this to Lewis (Mr King) to make a decision around your employment with the company. This could lead to dismissal due to incapability of doing your role."

5.37. On the same date Ms Barrett wrote to the claimant and a copy is at page 212. The title of the letter is "Outcome of summary meeting from OH report". The letter went on to invite the claimant to a "disciplinary meeting" that was to be before Mr King on 16 February 2018. The claimant was warned that the meeting could "lead to any ting (sic) up to and including your dismissal from the company".

5.38. That meeting duly took place. Mr King was accompanied by Mr Hall who took notes. Within the bundle is a disciplinary check list (pages 213 to 224). That appears to be partially a script or aid memoire for the manager conducting the "disciplinary hearing" but it also includes some notes of what was said at the meeting and Mr King's handwritten notes as to his rationale at page 220, although part of that note is missing.

5.39. The Tribunal have a residual concern that an organisation the size of Tesco's with the concomitant resources nevertheless uses documentation clearly designed for a disciplinary process in a case which is one of capability. Whilst the respondent's counsel has sought to distance the respondent from the terminology which is used in these standard documents, some documents are not standard, they are letters presumably crafted by HR professionals. Whilst there is no suggestion that the claimant was actually dismissed on the basis that the matter was disciplinary, we noted that throughout the evidence of Mr Foster, the appeal officer, he referred to matters as being in relation to a disciplinary hearing. The Tribunal have the concern that if this terminology is used the danger is that the mindset of the individuals dealing with dismissals and appeals may have the wrong focus.

5.40. The notes taken by Mr Hall of this meeting are at pages 225 to 237. Mr King's opening statement as recorded by Mr Hall is:

"This is a disciplinary meeting around your capability and also due to your health".

The claimant declined the offer of a representative (we assume companion). The claimant said that she had told occupational health that she believed that the respondent was trying to get rid of her. The claimant felt that she had not got the support or help that she needed. She went on to explain that there were three jobs that she felt she could do. These were bread and cakes replenishment; assisting customers at self-service or the trollies. Mr King asked the claimant if she had ever applied for those jobs. She said that she had only applied in respect of the bakery but that included Saturdays and she could not do Saturdays. That was because of football and ice hockey where she had season tickets. The claimant explained that she had had some support in that people had worked with her for 45 minutes to an hour. Mr King asked her if she felt that that was like someone doing her job. The claimant said no not really. Mr King asked the claimant if she could see the impact on the business when "we pay you and have to put someone else to help" (page 231). Mr King thought that vacancies for the claimant would be limited as she could not work the whole of a Saturday.

5.41. Mr King decided to adjourn the meeting to await receipt of the Virosafe report so that he could "see what is out there, I am then able to make a decision and if the tools will make you fill the aisle and complete your job". Mr King went on to reiterate that he had concerns that both the claimant's speed and quality of fill needed to improve. It took her longer to fill toilet rolls than others. The claimant did not currently meet the fill times for the job she did.

5.42. As we have mentioned, Mr King told us that he was familiar with the guidance contained in the 'supporting colleagues with disabilities' document. At paragraph 11 of that guidance under the heading "What does the legislation mean by reasonable", the following passage appears:

"Due to the size and nature of our business it may be difficult not to accommodate adjustments, even if there is a substantial cost implication. However, we do have the option to refuse, where it is something that we simply cannot accommodate or it has a significant operational impact. If we are unable to make an adjustment we should ensure that we have considered all/any alternatives and fully discuss these with the colleague. Ultimately we should try, where possible, to reach an agreement with the colleague that enables them to stay in employment".

5.43. For the reasons we have explained above, there was a substantial delay before the "disciplinary" meeting could be reconvened. This was not until 12 May 2018. In the meantime the claimant continued to undertake her amended duties on the shrink wrapped and lighter work. Mr Jarvis remained the claimant's line manager during that period. He explains in paragraph 22 of his witness statement his understanding about the February 2018 meeting and the delay in Mr King meeting the claimant again in May 2018. He does not in his witness statement make any reference to concerns expressed by the claimant's colleagues during this period of time, nor any concerns he had about the claimant's performance, nor about any customer complaints directed at the work undertaken by the claimant. However when he was asked about this in cross-examination he accepted that there had been no 'one to ones' which documented the concerns he referred to during cross-examination. He denied that he was simply making an assumption. He had been able to see for himself how the shelves/aisles looked. Mr King did not inform the claimant that, subsequent to receiving the Virosafe report, he had had a telephone conversation with Mr Keough.

5.44. The notes for the 12 May 2018 meeting are at pages 239 to 245. The notes were taken by Mr Edwards, a lead trade manager. By this stage Mr Hall had left the business. The claimant explained that she was now coping better with the work that Mr Jarvis was giving her. Mr King replied that this was not a role that could be sustained in the store and that was what they were there today to sort out. The claimant said that in the past she had been told that any job that came up she would be put into but now she was being told that she had to apply. Mr King replied that the respondent had to advertise jobs to be fair to all and the limiting factor was that the claimant could not work on Saturdays. The claimant said that she had not applied for any jobs in store, although she had looked at the bakery and maybe other stores where she could be a dot com picker. The claimant was asked whether that would affect her hip but she said she did not think so. The claimant reiterated that she felt that she was capable of working in self-service, bread and trollies. After an adjournment the meeting resumed and the claimant was informed that she would be "contractually dismissed". Mr

King felt that the claimant could not continue in the job she was currently in. He said that she had not been able to fulfil the tasks in the job role. He went on to say that the Virosafe report backed that up because there was no tool that would make the job easier. Mr King felt that dismissal was the best solution because the claimant was in pain but also "getting full pay for not doing a full job is not fair on the company". The claimant had not applied for any jobs. There were no vacancies in the store but if any roles came up in those areas she could apply. Mr King said that ultimately the claimant could not complete the job role she was in because she could not fill an aisle in the time required.

5.45. Mr King wrote to the claimant the same day confirming the dismissal (page 246). The letter is headed "Disciplinary outcome – contractual dismissal". The letter stated that the claimant was being dismissed "for your performance". That was because of incapability due to ill health. The claimant was advised that she had a right of appeal.

5.46. The claimant duly exercised that right when she sent an email to Jane Wooton, a people partner, on 25 May 2018 (page 247). The claimant set out various grounds for her appeal. She felt she had received inadequate support; the occupational health report recommendation had not been followed; due account had not been given for her lengthy period of employment and that since her diagnosis approximately four years earlier the respondent had always found jobs for her to do around the store. She contended that she had latterly been working without problems in the home baking aisle unwrapping shrink wrapped products; there were three other jobs that she could have undertaken and an earlier offer to slot her into a vacancy had not been honoured.

5.47. The appeal hearing took place on 19 June 2018 before Carl Foster, who at that time was the manager of the respondent's Abbeydale Road store. The notes of that meeting are at pages 257 to 275. On this occasion the claimant was accompanied by a Mr John Joyce, a colleague or former colleague from the Infirmary Road store. The notes were taken by Ms Wooton. On the issue of support, Mr Foster noted that there appeared to have been 14 occasions when there had been one to ones and training. Mr Foster expressed the view that Mr King's decision had been because there was no job that did not involve opening packaging. Mr Foster queried whether colleagues could help the claimant indefinitely. The claimant felt that they should if you were disabled. The claimant felt that that should be longer than six to eight weeks. Mr Foster explained that the respondent had a programme and a policy and it was about fulfilling your role and the claimant's illness had had an impact. The claimant pointed out that it was not a question of being unable to open boxes, it just took her longer. The claimant was asked if she could see how the need to support her impacted on other colleagues.

5.48. There was then a discussion of the three roles which the claimant believed she could undertake. The claimant referred to trolley roles being given to two new starters a year or a year and a half previously. The claimant said that she was willing to work part of Saturdays but

Mr Foster indicated that there was a need to work in the afternoon as well. The claimant reiterated what she had said at the May meeting- that she felt she could have a job as a picker for online sales (see page 268). The claimant also suggested that Mr Hall was going to look at a plant bread job at the Saville Street store and the claimant pointed out that that was nearer to her home than Infirmary Road. In the context of working on trollies and self-service Mr Foster asked whether the claimant could also work on check outs. The claimant said that she could not because of the coins. With reference apparently to the 7.5 hour contracts given to the new starters sometime previously, the claimant explained that she had wanted 12 hours. (We were told that the claimant could not work more than 15 hours per week because it affected her benefits). Having adjourned for 30 minutes the appeal meeting reconvened. Mr Foster explained that he was upholding the decision. There had been sufficient support including the 14 one to one meetings. The claimant was not fulfilling her role and other colleagues were doing it for her. Mr Foster did not think that Plant Bread was an appropriate role because it involved cakes in boxes. The self-service work would include other roles. The claimant had not applied for the trolley vacancies. It was pointed out that the claimant could not work on Saturdays. The claimant said that she thought that she could do 80% of the role.

5.49. We might add that all the notes of these important meetings, the disciplinary meetings and appeal meeting, are in long hand. With the exception of the notes taken by Mr Edwards, much of the handwriting in the other notes is difficult to decipher. Also the notes, obviously taken in haste, often do not read particularly well and in some cases just do not make sense. The respondent unfortunately did not take the step of having those rough handwritten notes put into typewritten form.

5.50. The appeal outcome letter dated 22 June 2018 is at page 277 to 278 in the bundle. Mr Foster reiterated that the claimant had been "contractual" (sic) dismissed for ill health "because you cannot complete 100% of the job role".

5.51. Whilst Mr Foster was giving evidence the Tribunal asked him whether he had given consideration to any vacancies which might be available in his own store, Abbeydale that the claimant might have been able to undertake. Further had he given any consideration to the claimant's suggestion that she might be able to dot com picking. His reply was that he felt that his role was simply to review the decision which Mr King had reached and it was not for him, Mr Foster, to raise issues which the claimant herself had not raised. However the claimant had of course raised the dot com picker possibility at both the disciplinary hearing and before Mr Foster.

6. The parties' submissions

6.1. <u>The claimant's submissions</u>

Mrs Fowler had prepared written submissions. In respect of any parts of the claim might appear to be out of time the claimant contended that there were continuing acts or failing that it would be just and equitable to extend time.

Kingston-Upon-Hull CC v Matuszowicz [2009] EWCA Civ 22 was authority for the proposition that the Tribunal should be generous when considering its power to extend time on the just and equitable basis where the discrimination amounted to omissions.

With regard to the *reasonable adjustments complaint*, the claimant contended that the PCP did exist.

We were directed towards the guidance set out in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 for the correct approach to the comparator and disadvantage questions in a reasonable adjustments complaint.

We were also directed towards Equality and Human Rights Commissions Code of Practice on Employment, Chapter 6.

In connection with the proposed adjustment of relaxing the requirement for the number of boxes/cages to be opened, after October 2017 the claimant had been relieved of the task of opening cardboard boxes and was only required to open shrink wrapped items. In the period from October 2017 until the claimant's dismissal, what was viewed as a temporary measure rather than a reasonable adjustment had not been properly assessed by the respondent in terms of effectiveness. The six or seven months this arrangement had been in place was long enough to demonstrate that the claimant could work in that way without serious adverse effects or disruption to her colleagues, customers or the business. Whilst the Tribunal had heard evidence from the respondents that the arrangement was not sustainable, there was no direct evidence of complaints by customers or colleagues.

Increasing the time the claimant was given to complete her work was a further adjustment that would have prevented the substantial disadvantage and which was reasonable.

Other reasonable adjustments would have been to allocate a different role to the claimant such as trollies, self service check outs and plant bread or as a dot.com picker. Such roles could have been considered in other stores such as Saville Street.

The written submissions go on to deal briefly with *indirect disability discriminatio*n. The same PCP was relied upon. That was likely to disadvantage disabled people whose disabilities affected manual dexterity or mobility when compared with non-disabled employees. The PCP put the claimant at a disadvantage. In terms of justification the claimant relied upon the submissions which follow in the written submissions under the heading of *discrimination arising from disability* complaint.

In relation to that complaint, the speed at which she could undertake and complete her tasks was slowed down and that was because of her arthritis.

We were referred to the guidance given by the EAT in **Pnaiser v NHS England** [2016] IRLR 170.

In respect of the alleged unfavourable treatment, the respondent now accepted that the allegation that there had been failure to provide her

with adequate support with opening the packaging was no longer part of her section 15 complaint. It was solely relevant to the reasonable adjustment complaint.

In terms of justification, the claimant accepted that the need to ensure that colleagues were performing their role in order to deliver a good service to customers and permit the business to run efficiently and profitably whilst balancing the respondent's and claimant's needs could be a legitimate aim. However dismissing the claimant had not been a proportionate means of achieving that aim. Essentially that was because it was alleged that reasonable adjustments had not been made.

In terms of *unfair dismissal* it was submitted that if any of the discrimination complaints about the dismissal succeeded then the dismissal must have been outside the band of reasonable responses. However even if the discrimination complaint did not succeed the dismissal was unfair for the reasons summarised in the list of issues.

Mrs Fowler in her oral submissions made various comments about the respondent's written submissions.

6.2. <u>The respondent's submissions</u>

Mr Zovidavi had prepared written submissions.

The respondent denied that it had a PCP to the extent that the replenishment scheduler provided guide times. However if the Tribunal found that there was a PCP which caused substantial disadvantage, the respondent's case was that it did so as a proportionate means of achieving a legitimate aim. That aim was ensuring that colleagues were able to perform their roles and deliver an efficient service to customers; to run an efficient and profitable operation; and to balance the needs of the respondent's business alongside the claimant's needs for adjustment.

With regard to the reasonable adjustments which the claimant proposed, it would not be reasonable to expect the respondent to employ somebody to support the claimant in her role (although we did not understand that to be an adjustment the claimant was seeking).

Alternatively if the adjustment would involve colleagues assisting the claimant, if the claimant could only perform 50% of her role then that would mean the other 50% being performed by another employee in addition to their own role.

The claimant had not performed the alternative roles of home bake and toilet roll replenishment (where box opening was not required) to a reasonable standard either. That was because of the time which the claimant had taken to undertake those tasks in contrast to the guideline time given by the replenishment schedule. In any event the respondent did not have a role which was devoted exclusively to the replenishment of toilet rolls and so there would not be enough work to cover the claimant's shift.

In terms of alternative roles, there was no specific role of self-service check out support and so the claimant was in effect seeking that a new role be created for her. That would not be a reasonable adjustment.

With regard to plant bread, there had been no vacancies and in any event some box opening was involved. The evidence also showed that the claimant would not be able to complete the required tasks in the available time. In relation to trollies, again there was no available vacancy but in any event this would not have been a suitable job for the claimant having regard to her impairments.

Mr Jarvis had made strenuous efforts to assist the claimant prior to the formal stage.

In so far as the claimant complained about the alleged failure to slot her into a plant bread role in June 2017, that claim was time barred.

In terms of unfair dismissal, the decision to dismiss had been reasonable. There were no further reasonable adjustments that could be made. There had been customer complaints about the state of the aisles even though those had not been documented. The claimant's inability to perform her role had impacted on the respondent's business.

7. The Tribunal's conclusions

7.1. <u>The time issues</u>

As we understand the respondent's case, the only time issue is in relation to the alleged failure to slot the claimant into the plant bread role when vacancies arose in or about June 2017. That is a feature of the reasonable adjustments complaint and the section 15 complaint.

In terms of the reasonable adjustments complaint, the Equality Act 2010 at section 123(4) provides:

"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) When P does an act inconsistent with doing it …"

On the evidence before us, we find that the claimant was simply overlooked when these vacancies arose. Accordingly whilst allocating those vacancies to others is on one level, inconsistent with considering the claimant for that vacancy, in circumstances where there was no consideration at all because the "promise" previously made to the claimant about being slotted in had been forgotten; there was no conscious decision made. Accordingly we find that there is contrary evidence and so this deeming position does not apply to the circumstances of the claimant's case.

We find that this aspect of the reasonable adjustments complaint, in the context of our jurisdiction, is in the same category as the other aspect of this complaint namely an alleged ongoing failure – conduct extending over a period with which we understand the respondent to take no issue.

In the context of the section 15 complaint, the claimant contends that it would be just and equitable to extend time because, as per the claimant's written submissions "up until her dismissal C was hoping R would make or confirm adjustments and/or find an alternative solution such as re-deployment to keep her in work and the process of considering this was ongoing". We also take into account the guidance in **Matuszowicz**. We also accept the claimant's submission that there has been no prejudice to the respondent. It has been able to deal with the issue evidentially.

In these circumstances we conclude that the Tribunal does have jurisdiction to consider all aspects of the disability discrimination complaints.

7.2. The reasonable adjustments complaint

7.2.1. The PCP

The PCP which is contended for by the claimant is that staff were required to unpack and shelve stock from a particular number of boxes or cages during the shift (ie perform to a required level of speed) and complete their aisles to an expected standard within an expected time frame.

The respondent acknowledges that its replenishment scheduler computer system provides a guide as to how long it should take an average colleague to complete a certain task. The respondent denies that the scheduler provided guide times. However the evidence of Mr Jarvis was that at the beginning of each shift he would set out on a white board the deliveries that were expected that evening, where employees would be working and what the anticipated time scales were for them to complete their tasks. We find that clearly there was the practice which the claimant contends for. That was not the replenishment schedule in isolation although that informed the particular practice in the store as described above.

7.2.2. Did that practice put the claimant at a disadvantage compared to non-disabled colleagues because of her disability?

Clearly it did. The claimant's reduced manual dexterity and mobility meant that she could not complete the unadjusted work that was provided for her within the allocated time. Sensibly Mr Jarvis realised that and made an adjustment in the claimant's case of allowing her more time.

In these circumstances the Tribunal is satisfied that the duty to make reasonable adjustments arose.

7.2.3. Did the respondent discharge its duty to take such steps as it is reasonable to have to take to avoid the disadvantage?

The EHRC Code of Practice on Employment explains that there is no onus on the disabled worker to suggest what adjustments

should be made, although it is good practice for employers to ask. (Paragraph 6.24).

Ultimately the test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case (see paragraph 6.29).

Paragraph 6.28 of the Code sets out some of the factors which may be taken into account when deciding what is a reasonable step for an employer to take. These are:-

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicability of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employer's financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- The type and size of the employer.

We have noted that in the respondent's supporting colleagues with disabilities guidance the following appears in paragraph 11.

"Due to the size and nature of our business it may be difficult not to accommodate adjustments, even if there is a substantial cost implication. However, we do have the option to refuse, where it is something that we simply cannot accommodate or it has a significant operational impact."

Would the trollies role have been a reasonable adjustment?

We conclude that it would not. This would have been an unsuitable job for the claimant having regard to the physical requirements of the job. Whilst the claimant, to her credit, expressed the view this was a job she could take on, she had not undertaken it on a long-term basis. In fact there seems only to have been a three day trial. That had been some years prior when her condition would not have been so severe. The claimant suggested that as she was able to go to football matches in all weather conditions accompanied by her husband who is a wheelchair user, working on the trollies would not be a problem. We do not think that that equates to the rigour of a five hour shift moving somewhat unwieldly combinations of shopping trolleys over a relatively large area which included a gradient. In addition, we accept that there were no vacancies at the material time within the Infirmary Road store (although see below with regard to the adjustment of roles in other stores).

Plant bread

The respondent's case is that at the material time there was no vacancy in this department and that just replenishing bread would not be a job role in itself. Also the other part of the role, cakes would still involve the opening of boxes to a certain extent. The claimant's evidence (paragraph 15 of her witness statement) is that she had worked on that role a few times covering holidays and found that it suited her because the products were already in trays rather than being boxed up. The claimant's evidence in cross-examination was that only 10% of the work involved boxes. However, Mr Jarvis' evidence was that 50% of the bread and cakes role involved boxes, with perhaps even more boxes at the weekend. He accepted that the claimant had done a trial on bread and cakes in 2016 but at the material time there was no vacancy.

We conclude that the bread element of this role would have been a reasonable adjustment supplemented by the claimant assisting other colleagues on an ad hoc basis if there was insufficient bread work. We note that the claimant had in effect been doing this assisting role during the latter part of her employment whilst her substantive role was home bake (shrink wrap).

<u>The home bake (shrink wrap)</u>

This was the role, on aisle 11, which the claimant undertook from October 2017 until her dismissal in May 2018. We understand that this also included replenishment of toilet roll stock and on the basis of Mr Jarvis' evidence, tidying up for other colleagues. Mr Jarvis does not in his witness statement deal with these seven months whilst the capability procedure slowly proceeded. We note that during his cross-examination Mr Jarvis said that plastic wrap should not take a full shift "even if that's what the claimant did". However he subsequently denied that he was just making assumptions about this because he was able to see what the aisles looked like. When questioned by a member of the Tribunal as to whether there had been any customer complaints, Mr Jarvis said that there had been comments about stock not being on shelves and that it looked as if though the store was closing down. He accepted however that there was no documentation of any such complaints. We should add that we heard no evidence that any of the claimant's colleagues complained about assistance they may have had to provide to her. We think it is significant that Mr Jarvis' evidence in chief does not indicate any problems with the seven month aisle 11 role and that reservations about this have only come before us in the way described above.

We conclude that it would have been a reasonable adjustment for the claimant to continue with the aisle 11/toilet roll replenishment duties.

<u>Self-service tills</u>

We accept the respondent's evidence that this was not a role in itself. However clearly it was a task which the claimant could undertake.

Whilst the respondent's case is that they were not obliged to create a new role for the claimant, we find that in the past that is what the respondent had in effect done in respect of the "back door job" which the claimant was given in 2016 when it was realised that she can no longer work on the tills. Moreover our understanding is that the duty to make reasonable adjustments can include the creation of a new post dependent upon the facts of the case (see **Southampton City College v Randell 2006**IRLR 18. However in the claimant's case the adjustment sought is not accurately described as a new role, if the claimant was to continue as a customer assistant – replenishment. Instead it was just a question of what replenishment she could do within that role. Further we consider that factors which can legitimately influence the reasonableness of adjustments is an employee's length of service – here some 13 years – and the fact that despite significant health issues the claimant had had very little sickness absence. Her attendance at work was therefore dependable. She soldiered on. We find that those factors should have provided the respondent with some comfort.

The dot.com picker role

We appreciate that this has not featured heavily in the claimant's case although it was raised at the dismissal and appeal stages. We take the view that from October 2017 the respondent showed little enthusiasm for considering any further adjustments. That is in contrast with the practical steps which Mr Jarvis had endeavoured to take prior to October 2017. We should perhaps add at this stage that we consider the claimant's criticism of Mr Jarvis' efforts to be rather unfair.

We have noted that Mr Foster conducted the appeal as a review. In those circumstances, he did not see the need to investigate with the claimant the picker role or to give consideration to whether there were any alternative roles in the store which he managed – Abbeydale, a very large store and the one where the claimant had begun her employment or at the Saville Street store which was nearer to the claimant's home than Infirmary Road. Because of the way in which the respondent has approached this aspect of the case we were not given any information as to the likely suitable vacancies at those two other stores. We consider that the respondent's approach - that it was primarily for the claimant to seek and apply for alternative roles - to be somewhat inimical to the duty which, by definition requires an employer to be proactive.

Our conclusion in respect of reasonable adjustments is therefore that there were various avenues which could have been pursued which would have permitted the claimant to

continue working without the disadvantage which the PCP caused.

8. **The discrimination arising from disability complaint**

8.1. Something arising in consequence of the claimant's disability

We understand it to be common ground that the "something" which is contended for was present – the claimant had difficulty opening packaging, specifically boxes - and that was because of her limited dexterity which in turn was due to her disability.

8.2. Unfavourable treatment – not moving the claimant to modified work

We have found that in the latter part of her employment the claimant was undertaking modified or amended duties where her physical limitations were accommodated. Whilst it could be said that not permitting that to continue was unfavourable treatment, that is really part of the unfavourable treatment by dismissal which we deal with below. Whilst we have found that there was a breach of the duty to make reasonable adjustments because the amended duties were not allowed to continue, we do not accept that the state of affairs prevailing at the material time resulted in the claimant being treated unfavourably.

8.3. Unfavourable treatment – not deploying the claimant to bread and cakes

Here again, as we find that at the material time the claimant was content with her aisle 11 work, and whilst the claimant has succeeded in her reasonable adjustments complaint on this point we do not think that the section 15 complaint is made out.

8.4. Unfavourable treatment – dismissal

It is not disputed that the claimant was dismissed because she was considered to be incapable of carrying out her work due to ill health. Dismissal is clearly unfavourable treatment and the incapability arose from the disability.

8.5. Was dismissal a proportionate means of achieving the legitimate aim?

It is not in dispute that the respondent had a legitimate aim. However in circumstances where they were in breach of the duty to make reasonable adjustments, dismissal cannot be regarded as a proportionate means of achieving that aim. Accordingly we find that the section 15 complaint succeeds in relation to dismissal.

9. **Indirect discrimination**

In terms of the provision criterion or practice, the claimant relies upon the same PCP which we have already found to have existed.

The claimant was disadvantaged because her inability to comply with the PCP led to her dismissal.

Dismissing the claimant was not a proportionate means of achieving the legitimate aim. There had been a failure to make reasonable adjustments

and the Tribunal's reasoning in relation to lack of justification for the section 15 discrimination applies equally here.

10. **Unfair dismissal**

10.1. Has the respondent shown a potentially fair reason?

The given reason for dismissal is the claimant's capability and that is one of the potentially fair reasons set out in the Employment Rights Act 1996 section 98(2).

10.2. Was that reason actually fair by reference to the Employment Rights Act 1996 section 98(4)

Medical evidence

Before dismissing for ill health capability a reasonable employer will ensure that it has reasonable medical opinion before it to inform its decision. We note that the respondent only had one occupational health report before it – the report by Melinda Griffiths on 17 January 2018. The Tribunal take the view that a reasonable employer would have obtained fresh medical evidence when, some five months later it was considering dismissal. Further a reasonable employer would have ensured that that new medical evidence resulted from an in person consultation with an occupational health physician rather than a telephone consultation with an individual whose title and qualifications are unknown. Other relevant factors here are that the claimant had a relatively lengthy period of employment. It is also to be noted that the occupational health report is fairly optimistic and yet this is the medical evidence on which the claimant was dismissed.

Alternatives to dismissal

We have discussed these at length when considering the reasonable adjustments complaint. All possible alternatives to dismissal had not been properly explored.

In all these circumstances we find that the decision to dismiss was outside the band of decisions open to a reasonable employer. Accordingly the unfair dismissal complaint succeeds.

Employment Judge Little

Date 26th July 2019