THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lynn Fenwick**

Respondent: **Asda Stores Limited**

Heard at: **North Shields Hearing Centre** **On:** **9, 10 & 11 September 2019**
Deliberations: 21 October 2019

Before: **Employment Judge Arullendran**

Members: **Ms R Bell**
Mr S Hunter

Representation:

Claimant: **Mr D Robinson-Young (counsel)**
Respondent: **Mr R Ryan (counsel)**

JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1. The claimant's claim of unfair dismissal, pursuant to section 98 of the Employment Rights Act 1996, is not well-founded and is dismissed.

2. The claimant's claim for disability discrimination, pursuant to section 15 of the Equality Act 2010, is not well-founded and is dismissed.

3. The claimant's claim for disability discrimination, pursuant to sections 20 and 21 of the Equality Act 2010, is not well-founded and is dismissed.

REASONS

1. We heard witness evidence from the claimant, Michael Hopper (regional organiser for the GMB trade union), David Cammiss (warehouse operations manager), David Wilson (general manager), Paul Mackay (general manager), Louise Reardon (network people manager (North food)) and Gary Bishop (general manager). We were provided the joint bundle of documents consisting

of 427 pages. The claimant produced a chronology which had not been agreed with the respondent.

2. The issues to be determined by the Employment Tribunal were agreed between the parties and the Tribunal at the commencement of the hearing as follows:

    i. was the claimant treated unfavourably by the respondent by being refused a return to work in March 2018?

    ii. Was the claimant treated unfavourably by the respondent by being advised on her return to work on 19 April 2018 that the respondent was going down the route of dismissal by reason of capability without any previous warning?

    iii. What claimant treated unfavourably by the respondent by having the outcome of the capability proceedings delayed until 27 June 2018 thereby causing additional stress to the claimant?

    iv. Was the claimant treated unfavourably by the respondent by being dismissed on 27 June 2018?

    v. If so, was any of the treatment noted above because of something arising from the disability of the claimant? The “something” is said to be the disability related absence from work and the difficulties in carrying out certain duties of her role by reason of disability.

    vi. If so, in treating the claimant in that way what aim was the respondent seeking to achieve? The respondent asserts that the aim was to ensure staff were medically fit to undertake safety critical roles, to ensure staff were able to attend to their contractual duties on a regular basis and to manage long-term capability absences so as to save cost and management time and to allow the respondent to plan its workforce and operational needs with certainty.

    vii. Were any of those aims legitimate?

    viii. If so, was the treatment a proportionate means of achieving those aims or was there a less discriminatory way of achieving them?

    ix. Did the respondent apply a PCP to the claimant that she had to reach 100% productivity within six weeks from the date of her return to work?

    x. Did the respondent apply a PCP to the claimant that she had to have a certain level of fitness?

    xi. Did the respondent apply a PCP to the claimant in not permitting the type of role she was carrying out to be subject to any variations in terms of the duties to be undertaken?

xii. If so, did the PCP place claimant at a substantial disadvantage when compared with nondisabled employees?

xiii. Did the respondent fail to make reasonable adjustments to such PCP(s)? The claimant asserts that the respondent should have provided her with lighter duties and offered a suitable alternative role within the workplace and/or followed its own policy?

xiv. Did the respondent know or, if not, could it reasonably be expected to know that the PCP alleged by the claimant had the substantial disadvantage?

xv. Was the claimant dismissal potentially fair reason pursuant to section 98(2)(B) of the Employment Rights Act 1996, namely capability or some other substantial reason?

xvi. Did the respondent act reasonably in treating the claimants lack of capability as a sufficient reason for the claimant? Did the respondent carry out as much investigation into the claimant's health as was reasonable before moving to dismiss the claimant? Did the respondent reasonably inform themselves about the medical situation of the claimant? Did the respondent reasonably considers suitable alternative roles for the claimant?

xvii. Was the dismissal of the claimant reasonable in the circumstances? In particular, was the dismissal within the band of reasonable responses available to the respondent?

xviii. If the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce any compensatory award?

Preliminary Issue

3. The respondent told the Employment Tribunal on day one of the hearing that the documents numbered 8, 9, 10 and 11 were the incorrect documents as they related to retail, office and salaried staff and the respondent provided the relevant documents for warehouse staff instead, which were placed at the front of the Tribunal bundle.

4. This matter was initially listed to be heard over a period of four days, however due to the availability of Tribunal resources, the hearing was reduced to 3 days which resulted in deliberations taking place at a later date and the production of a reserved judgement.

The Facts

5. These findings of fact are made on the balance of probabilities.

6. The claimant began her employment with the respondent on 1 September 2008 and was employed as a warehouse operative. The respondent organisation is a large national supermarket and the claimant was employed to work at the respondent's warehouse at Pattinson industrial estate in Washington, Tyne & Wear. It is common ground that the claimant's primary duty involved pick, sortation, international, penalties, legging and kit. The respondent accepts that the claimant was a disabled person within the meaning set out in the Equality Act 2010 at all relevant times.

7. The claimant underwent surgery on her right wrist on 23 May 2016 and was absent from work for six weeks and returned on a phased return and worked restricted or light duties. Following that surgery, the claimant was diagnosed with arthritis. The respondent obtained a report from occupational health on 9 June 2016 in respect of the claimant's arthritis and the effect this had on her ability to carry out her duties and a copy of this can be seen at page 142 of the bundle. The respondent obtained a further report from occupational health dated 4 August 2016, a copy of which can be seen at page 147 the bundle. It is common ground that the claimant reduced her hours of work in 2016 from 30 to 20 hours per week and, although this was done at the claimant's request, it was agreed by the respondent before being implemented.

8. It is common ground that the claimant commenced restricted duties again around mid-September 2017 and she underwent further surgery to her right wrist on 16 November 2017 and was absent from work until April 2018. It is also common ground that the respondent maintained contact with the claimant whilst she was absent on sick leave and carried out a number of welfare meetings with her throughout each sickness absence.

9. The respondent obtained occupational health report dated 6 December 2017, a copy of which can be seen at page 178 of the bundle. The report indicated that the claimant was not currently fit for work following her surgery as she was experiencing restricted movement, a lot of pain and restricted movement following the operation and it was estimated that the claimant would be able to return to work in 7-9 weeks if there were no complications arising from the surgery. The occupational health report recommended that the respondent should seek the opinion of the workplace physiotherapist in 6-7 weeks in order to obtain a more comprehensive assessment in terms of any adjustments needed prior to the claimant's return to work. The claimant's evidence is that she was already receiving physiotherapy from the NHS but a referral was made by the respondent to the workplace physiotherapist in accordance with the recommendations in the occupational health report. In answer to questions from the Tribunal, the claimant stated that this provision of physiotherapy was not a reasonable adjustment as the respondent provides this service to all its staff, when required.

10. The meetings carried out by the respondent prior to December 2017 in respect of the claimant's absence from work were conducted by her department manager, Tom Goldsmith, and it is common ground that the meetings were considered to be welfare meetings, the purpose of which was to find out how the claimant could

be helped with her disability in the workplace. The claimant attended a welfare meeting with the shift manager, Darren Orritt, on 12 December 2017. A copy of the outcome letter can be seen at page 181 of the bundle and it was agreed that a further meeting would be arranged to take place in four weeks. However, the claimant developed severe upper arm pain after completing her NHS physiotherapy towards the end of 2017. The letter from the claimant's specialist consultant, dated 4 January 2018 (page 182) records the level of pain as being 10:10 and recommended an urgent referral to the pain team for assessment. It is common ground that the claimant advised the respondent about the severe upper arm pain around this time and the respondent then began following the ill-health capability process, as set out at pages 109 to 111 of the bundle. The first step in that process was the letter from Mr Cammiss at page 183, dated 22 January 2018, which invited the claimant to attend ill-health capability review meeting to discuss her continued absence from work, the opinion from occupational health and the claimant's own medical evidence, alternative duties and adjustments, along with the impact of her continued absence on the business.

11. The claimant attended the ill-health capability review meeting on 29 January 2018 and the minutes of that meeting can be seen at pages 184 to 185. The claimant believed that this was a further welfare meeting rather than ill-health capability meeting and she takes issue with the fact that the minutes are not written on the respondent's headed paper. The minutes taker was not called as a witness and the respondent was not able to explain why the minutes were taken on non-headed paper. However, as the letter at page 183 to the claimant states that the meeting is an ill-health capability review and the claimant does not take issue with the actual contents of the minutes at pages 184 and 185, we preferred the evidence of the respondent that the meeting of 29 January 2018 was a formal capability review meeting and not a welfare meeting. The claimant had attended an appointment with the acute pain management review clinic on 22 January 2018 and a copy of the letter with details of that attendance can be seen at pages 186 to 187. The claimant reported to the nurse at that appointment that she was experiencing severe episodes of pain in her right upper arm and the claimant provided the respondent with this information at the meeting of 29 January 2018, as set out at page 184. It is also noted in the minutes that the claimant told the respondent that she could not carry shopping bags, that she was experiencing severe pain in her right arm and struggled to twist her wrist. The claimant was advised by her physiotherapist on 22 January 2018 that she had CRPS in her upper arm which was the cause of the severe pain.

12. The claimant attended a further ill-health capability review meeting with Mr Cammiss 28 February 2018 and copy of the minutes can be seen at pages 190 and 191 of the bundle. The claimant reported at that meeting that she was still experiencing pain in her arm although her wrist was 100% better than it had been four weeks previously. However, the claimant reported that she could still not carry shopping bags and she could not push open doors but she was receiving physiotherapy for both her wrist and her arm. The claimant indicated that she wanted to return to work within four weeks. The claimant's evidence is that she wanted to return to work on 5 March 2018 but the respondent refused and forced her to obtain a further four-week sick note. The respondent evidence is that it did

not make the claimant obtain a further sicknote, but the claimant had indicated at the meeting that she would obtain another fit note on 5 March and that she thought it would be for another four weeks. The letter from the respondent recording the outcome of the ill-health capability review meeting (page 192) records at the 6th bullet point 'you state that when the current fit note runs out on 5 March 2018, your doctor will issue a further four weeks and you feel at that point a RTW should be achieved on phase duties.' The next bullet point in the letter states 'we agreed that an OHN & physio appointment would be made for the middle of the four-week fit note.' Looking at all of the evidence in the round, we prefer the evidence of the respondent that the claimant wanted to return to work but that there was a discussion about the fact she could not lift shopping bags and open doors and that both sides agreed that the claimant should obtain a further fit note from her GP. We find that the claimant was not forced to obtain a further sicknote on 5 March 2019 and it is more probable than not that there was a discussion about the claimant's fitness to return to work which resulted in the agreement that the claimant would obtain a further sicknote, that a referral will be made to occupational health, that a physiotherapy appointment would be arranged during the period of the fit note and that the parties would meet again when the fit note expired, around the week commencing 2 April 2018, to discuss the claimant sickness absence, as set out in the letter at page 192. It is common ground the claimant did obtain a further fit note from her GP on the expiry of the fit note on 5 March 2018.

13. The respondent invited the claimants to a further ill-health capability meeting in a letter dated 10 April 2018, a copy of which can be seen at page 194. The purpose of the capability review meeting was set out in the letter and includes 'make a decision regarding your continued employment which may result in termination of your employment'. The ill-health capability review meeting took place on 19 April 2018. The respondent had the benefit of a report from the workplace physiotherapist, copies of which can be seen at pages 195 to 198. On 28 March 2018 the physiotherapist noted that the claimant was desperate to return to work and that her advice was that she was currently not fit to return because she was experiencing sharp pains in her right arm when lifting the arm. On 11 April 2018 the physiotherapist recorded that the claimant could return to work on lights duties for a period of 10 to 12 weeks due to the nature of the injury and the complications from the surgery. However, the physiotherapist recommended that her manager monitor the claimant's progress because she was concerned the claimant might be trying to do too much as she was desperately wanting to work. The physiotherapist estimated that the claimant would been able to return to the full duties within 3 to 4 months.

14. The claimant returned to work on lights duties on 19 April 2018. The claimant's manager, Mr Goldsmith, completed a rehabilitation plan with claimant on 19 April 2018, a copy of which can be seen at pages 199 to 201. It is noted in the rehabilitation plan that the claimant required amended duties and it was estimated it would be more than six weeks before the claimant could resume her normal duties. It was made clear that the claimant should not attempt to carry out anything in the workplace which could have an adverse effect on her recovery. A list of the lights duties the claimant could perform was set out at page 200 and these consist of rework, penalty, international scanning, building boxes, legging

one rail and hygiene. Mr Goldsmith indicated on the rehabilitation plan that he was unable to determine a date for the claimant's return to normal duties because the physiotherapist had only provided an estimate as a guideline.

15. The minutes from the ill-health capability review the which took place on 19 April 2018 can be seen at pages 202 to 206. The claimant was accompanied by her trade union representative at this meeting. The outcome of meetings is set out in the respondent's letters to the claimant dated 21 April 2018, which can be seen at pages 207 to 208. It was noted that the claimant had returned to work on 19 April 2018, which was earlier than the date recommended by the physiotherapist, and, as the claimant had been on lights duties for two months before her operation on 16 November 2017, the total amount of time the claimant was deemed to be non-productive, as defined by the respondent's internal procedures, was in the region of 12 months. The respondent indicated at the ill-health capability review meeting on 19 April 2018 that it was willing to look at alternative nonphysical roles within its business with the claimant, however the claimant stated that she did not want a different job and she was confident that she could return to her full duties in time. The respondent ended this meeting on the basis that Mr Cammiss would assess the impact of the claimant's sickness absence and non-productivity on the business.

16. A further ill-health capability review meeting was arranged to take place on 25 April 2018. In the meantime, Mr Cammiss investigated the impact of the claimant's absence and non-productive work in terms of the respondent's business, which included consideration of the information at page 211. This information indicates that 43% of the claimant's work was deemed to be productive and 40% was non-productive in 2016, 60% of the claimant's shifts were deemed to be productive and 27% were non-productive in 2017, 0% were productive and 51% were deemed to be non-productive in 2018. This document provided the respondent company with details of the cost of the claimant's absences and non-productive shifts. Mr Cammiss gave evidence to the Tribunal that he understood the requirement to consider the impact on the respondent's business to include the financial impact and this was the reason why he undertook his investigation and obtain the information set out at page 211 of the bundle.

17. The respondent's uncontested evidence is that, through the application of a worktime study, the respondent and the recognised trade union agreed which jobs within the warehouse would be deemed to be productive jobs (which could be measured) and which would be deemed to be unproductive jobs (which could not be measured). It is common ground that the non-productive jobs are deemed to be light duties and do not form part of a specific role within the warehouse, but rather are carried out by all the warehouse operatives and serve to provide light relief to what would otherwise be a very demanding job consisting of heavy lifting. These non-productive jobs are referred to by the parties as "the 21 jobs" as set out at pages 156 and 157, which is not a prescribed list but has come about and is considered on a case to case basis.

18. The claimant attended an ill-health capability review meeting with the respondent on 25 April 2018 and the minutes of the meeting can be seen at pages 213 to

216. Mr Cammiss told the claimant he would be making a decision about the claimant and the company policy required employees returning from ill health absence to be working at full capacity after six weeks of their return. The claimant told the respondent that her sickness absence was not her fault and that she wanted to return to work, however the respondent told the claimant that it had a duty of care to her and that the physiotherapist had indicated in her report that she had major concerns with the claimant's ability to return to work and the respondent company needed to make sure that the claimant was safe to return to work when they agreed to her return. The claimant's trade union representative told the respondent that the costs to the business was irrelevant, however Mr Cammiss stated that the cost was not irrelevant and the depot had been overspending on absences. Mr Cammiss also indicated that the company would consider making a reasonable adjustment to help the claimant and a copy of the respondent letter confirming the details of ill-health capability review meeting of 25 April 2018 can be seen at pages 220 to 221 of the bundle. In this letter Mr Cammiss sets out in detail the financial cost to the respondent business of the claimant's absence and confirmed that a final ill-health capability meeting would take place after reviewing the claimant's phased return to work over a period of six weeks and that a decision would be based on how capable the claimant would be of returning to her role as a warehouse operative. As a result of the outcome of the meeting of 25 April 2018, the claimant submitted a grievance to the respondent company, a copy of which is not included in the Tribunal bundle.

19. The claimant continued attending rehabilitation review sessions with her manager and regular sessions with the physiotherapist. The physiotherapist noted in her report on 2 May 2018, as can be seen at page 224, that the claimant had attempted to carry out the some of her substantive duties on the pick and had to stop and come back to light duties because she was struggling with pain in her right arm. The respondent wrote to the claimant on 16 May 2018, a copy of which can be seen at page 235, inviting the claimants to a further ill-health capability review meeting on 30 May 2018 and the letter states that a decision would be made about the claimant's continued employment which may result in the termination of her employment. The report from the physiotherapist dated 16 May 2018, which can be seen at page 234, states that the claimant had shown very minor improvement and was still struggling considerably. The physiotherapist states that the claimant 'is still definitely unable to complete a lifting task above shoulder height and any tasks involving items of heavyweight.' The rehabilitation plan for the claimant dated 17 May 2018, at pages 236 to 237, reflects that the claimant had been advised not to do any heavy lifting or any work above shoulder height.

20. The claimant attended a grievance hearing, which was chaired by Scott Newby, on 18 May 2018 and the minutes from this meeting can be seen at pages 241 to 257 of the bundle. Claimant was represented by her trade union at this meeting and the outcome of the meeting is reflected in the letter from the respondent dated 18 May 2018 and can be seen at pages 265 to 266 of the bundle. Mr Newby indicated that the points raised by the claimant were relevant to the capability process and, therefore, the claimant's complaints were not upheld. The claimant was advised by Mr Newby to raise her points with Mr Cammiss as part of the capability process as they related to the requirement to get back the full

duties after five weeks rather than the 3 to 4 months as suggested by the physiotherapist, the failure to make reasonable adjustments, being subjected to the ill-health capability process at all and the fact that she was awaiting an appointment with a consultant. The claimant appealed against the outcome of the grievance, as set out in her letter of appeal 22 May 2018. The claimant appealed on the basis that the well-being meeting were not part of the ill-health capability process, that reducing her hours of 30 to 20 had not been a reasonable adjustment, that the rehabilitation plan and physiotherapy treatment paid for by the respondent were not reasonable adjustments, that the reasonable adjustment policy had been ignored since 2016 and the claimant may request that Access to Work should visit the site to suggest reasonable adjustments. The claimant attended a grievance appeal hearing on 7 June 2018, which was chaired by Gary Bishop and a copy of the notes from that meeting can be seen at pages 289 to 293. The claimant was accompanied by Michael Hopper, the regional organiser for the GMB trade union. Mr Hopper argued that, as the claimant had reduced her hours from 30 to 20 at her own request and as that change can be made for any employee, this did not amount to a reasonable adjustment. He also argued that although the light duties the claimant had been undertaking were short-term, the reasonable adjustments forms, which form part of the respondent reasonable adjustments policy, should have been filled in. After some discussion, Mr Hopper suggested that as the capability process was ongoing and the matters raised by the claimant in the appeal related to that process, the grievance appeal should be adjourned so that the point could be dealt with during the capability process. This was agreed by everyone at the meeting and is reflected in Mr Bishop's letter dated 8 June 2018, and hr also advised the claimant that the reasonable adjustments form was completed for permanent agreed restrictions and not short-term adjustments, which the claimant was, at that point, undertaking.

21. The claimant attended a further ill-health capability review meeting on 30 May 2018, the minutes of which can be seen at pages 275 to 278 of the bundle. The claimant indicated that she had been seeing slight improvements in her arm each week and she had been continuing with her light or non-productive duties, however she had shooting pain when she tried to score the box and could not complete that duty. The claimant indicated that she was making slow progress with the pain in her right arm and that she was due to see her specialist on 11 June 2018. The respondent wrote to the claimant on 5 June 2018 with the outcome of the meeting of 30 May 2018, a copy of which can be seen at page 286 to 287 of the bundle.

22. The claimant was invited to attend a further capability meeting on 22 June 2018 to review the adjustments and consider any suggestions claimant might have or to make a decision regarding her continued employment with the respondent. The respondent also wrote to the claimant's specialist consultant on 5 June 2018, as can be seen at page 285 of the bundle, asking for his opinion on the short, medium and long-term recovery plans for the claimant. The claimant attended a physiotherapy appointment on 6 June 2018 and the report at page 288 indicates that the claimant was experiencing sharp pains from using her right arm although she was getting more movement in her shoulder. A further report from the physiotherapist dated 13 June 2018, which can be seen at page 301 of the bundle, states that the claimant was to be referred by her consultant back to

the pain management clinic and that they were waiting for a letter from the claimant's consultant to provide more information about whether the claimant could realistically return to work. The claimant's consultant replied to the respondent's letter on 15 June 2018, as set out at page 305 of the bundle. The consultant states:

'Mrs Fenwick has been my patient since 2017 and underwent an operation. Since then she has had persisting pain and weakness in her arm. In relation to your specific questions:

I do not expect any difference in the short term (next three months).

In the medium term I would expect the pain to improve as well as function but she is likely to persist with pain and functional limitation.

I do not expect her to regain full mobility, strength and function especially considering she has had 3 operations.

I do not think she is currently fit to do the duties as documented in your letter and she would benefit from light duties in an[d] administrative capacity.'

23. The claimant attended a final capability meeting with Mr Cammiss on 22 June 2018, where she was accompanied by her trade union representative. The minutes from the meeting can be seen at pages 306 to 311. Mr Cammiss discussed the contents of the letter he had received from the claimant's consultant dated 15 June 2018 and the claimant stated that the consultant had said she needed a steroid injection in her arm and attend a pain management clinic. Mr Cammiss stated that the claimant's consultant had recommended she obtain an alternative role in Administration and that he had contacted the local sites but that there were no vacancies available. The claimant's trade union representative asked that the claimant continue with her light duties and that the respondent's reasonable adjustment policy states that a review would take place at six months. However, Mr Cammiss told the claimant that the list of 24 non-productive duties are only available on short term basis and were intended for colleagues who would be reintroduced back into their substantive roles, which the claimant was incapable of returning to as outlined in her consultant's letter. The claimant's trade union representative asked if a referral could be made to Access to Work before a final decision and he accepted that the claimant would never be 100% but asked if she could continue on light duties. At this meeting the claimant also stated that the contents of her consultant letter did not "sink in at first".

24. On 27 June 2018 Mr Cammiss informed the claimant of the outcome of the capability meeting which was that her employment was to be terminated for reasons of capability. The claimant refused to sign the minutes of the meetings of 22 June and 27 June because she was disappointed with the outcome. In her evidence the claimant did not take issue with the accuracy of those minutes. The respondent wrote to the claimant on 28 June 2018 confirming that her employment had been terminated, providing her with comprehensive reasons for this and providing the claimant with the right to appeal. A copy of this letter can be seen at pages 315 to 317 of the bundle.

25. The claimant appealed against her dismissal on 3 July 2018, as set out at page 318, and the claimant attended the appeal hearing on 31 July 2018. The appeal was conducted by David Wilson and he made enquiries with Mr Cammiss about

the matters raised by the claimant in her appeal, as set out in the email at pages 327 to 329. In particular, Mr Cammiss provided details of 13 colleagues at the warehouse who were employed on permanent restrictions, which included the claimant, of which only two had reduced targets. Mr Cammiss also gave his reasons for not contacting Access to Work which were that the claimant was not capable of undertaking the duties of her job according to her consultant and her physiotherapist and therefore it was not reasonable to contact them. Mr Wilson asked Mr Cammiss why he had set out in his letter to the claimant the cost of her absence to the business and he explained that the respondent's ill health capability policy requires the manager to provide full details of the impact of the continued absence of the employee on the business and he thought this meant the financial impact, however Mr Cammiss stated that the cost did not contribute to his decision to dismiss and the main reason for the dismissal was the length of time claimant had not been able to carry out productive tasks and her prognosis. The outcome of the appeal was that the dismissal was upheld and is set out in the letter from the respondent at pages 330 to 331.

26. The claimant appealed against the appeal decision, as set out at page 332 of the bundle, on the grounds that Mr Wilson had failed to follow the respondent's policy, he had refused to allow Access to Work to review the reasonable adjustments, that he had taken the worst-case scenario from the consultant's letter, and the company failed to offer her healthcare leave to assist her in returning to full fitness. The second appeal was attended by the claimant on 10 September 2018, where she was accompanied by a trade union representative, Mick Popper. The second appeal was conducted by Paul Mackay and the minutes from the appeal are at pages 337 to 340 of the bundle. The outcome of the second appeal is set out in the letter from Mr Mackay and can be seen at pages 341 to 342. Mr Mackay found that the dismissing officer had considered what adjustments could be made to help the claimant and that the cost of her ongoing ill health, although a consideration, was not the reason for her dismissal and the claimant was also advised that as an ex-employee she could raise an ex-colleague grievance, however she failed to follow that procedure.

27. The claimant's evidence is that she did not want to work in an alternative role because she did not want to work on the shop floor in a store and she was not qualified to carry out an administrative role.

28. The claimant applied for and received personal independent payments from 21 February 2018 for her disability. In February 2018 the claimant was given 8 points for help with preparing food, eating and drinking, washing and bathing and dressing and undressing. In April 2019 the claimant was awarded 9 points for the same categories as the previous year, but with the addition of managing her treatment/medication.

29. The uncontested evidence from the respondent is that they have used the services of Access to Work in the past for other colleagues and, for muscular skeletal disabilities, they have not been able to provide and advice other than suggesting mass automation of the distribution centre, which is not possible.

30. Both counsel made closing submissions with reference to written skeleton arguments, the contents of which are not reproduced here but have been considered in their entirety.

The Law

31. Section 15 of the Equality Act 2010 provides:
    (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 it was 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.

32. Section 20 of the Equality Act 2010, regarding to the duty to make reasonable adjustments, provides the following:
    (3) … 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.

33. Section 98(4) of the Employment Rights Act 1996 provides:
    … The determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –
    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

34. We are referred to the case of Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43 in which it was noted that the duty to make reasonable adjustments and the prohibition from discrimination arising from disability may be closely related as it was held that "an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct."

35. The respondent refers us to the EHRC code of practice on employment and particularly the guidance at paragraph 6.27 which states "if making a particular adjustment would increase the risks to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment."

Conclusions

36. Applying the law to the facts we find that the claimant was not forced to obtain a further sick note in March 2018 and that she agreed with the respondent that, as

she was still having difficulties with many tasks, such as carrying shopping bags and opening doors, it would be advisable to obtain further advice from her GP and a further fit note, if that was recommended. We note that the GP could have advised the claimant to return to work on the fit note if he or she felt that the claimant was well enough to return, but that was not the case here and the claimant was issued a further fit note recommending that she refrain from work for a further 4 weeks. In the circumstances we find that the claimant was not treated unfavourably by being refused a return to work in March 2018 as the process carried out by the respondent was entirely reasonable and was for the benefit of the claimant in order to prevent any further injuries and in line with their duty of care towards the claimant and other staff.

37. We find that the claimant was confused about when the welfare meetings stopped and the capability process started. However, as we have found that the respondent did notify the claimant about the commencement of the capability process in January 2018, we must find that she was warned that she was being put through this process and that it could lead to dismissal, therefore her confusion was not objectively justified. In the circumstances, we find that the claimant was not treated unfavourably by being told by the respondent that it was "going down the route of dismissal". We note that there is no evidence that this phrase was used by the respondent, but even if it was, the letters from the respondent inviting the claimant to the capability review meetings from January onwards make it clear that one outcome of the process could potentially be dismissal.

38. The claimant made no submission about the alleged unfavourable treatment in delaying the outcome of the capability process until 27 June 2018 and we find that she was not treated unfavourably as the process was properly managed by the respondent. The evidence suggests that the delay in the process was due partly to the claimant raising a grievance and partly to implement the steps taken by the respondent to obtain medical evidence from the claimant's consultant and physiotherapist. In the circumstances, we find that this does not amount to unfavourable treatment.

39. We find that dismissal is potentially unfavourable treatment. However, we find that the dismissal was not for the claimant's sickness absence as the respondent did not take issue with the amount of sick leave the claimant had taken and there was no evidence that the attendance policy had been implemented by the respondent. This is not a case where the respondent dismissed the claimant for a reason relating to the number of sickness absence days the claimant had taken and we reject Mr Robinson-Young's submission on this point, particularly as we accept the evidence from several of the respondent's witnesses that, although cost was a factor to be considered, it did not form part of the reason for dismissal.

40. We find that the claimant was dismissed for reasons relating to her ability to carry out her full range of duties in that she was incapable of carrying any of her main duties at all and was still working on restricted duties. We find that this is "something" arising in consequence of her disability as the reason she was

unable to carry out any of her main functions was because of the pain and limitation of movement in her right arm.

41. We find that the respondent was seeking to achieve legitimate aims for the business to ensure staff were medically fit to undertake safety critical roles, to ensure staff were able to attend to their contractual duties on a regular basis and to manage long-term capability absences so as to save cost and management time and to allow the respondent to plan its workforce and operational needs with certainty. In light of the medical evidence from the claimant's consultant and the physiotherapist's reports that the claimant could return to her main duties at that time, we find that the respondent behaved in a proportionate manner in dismissing the claimant as there were no alternatives to the dismissal given that the claimant's evidence was that she did not want to work in any other role and did not want to be considered for another position, such as administration, and she restricted her work opportunities to work only in the warehouse, which consisted of manual labour. Further, we find that the respondent did consider whether Access to Work should be instructed and decided that it was not appropriate as there were no reasonable adjustments which the claimant had suggested or that they could potentially suggest as the respondent could not automate the distribution centre. In the circumstances, we find that this was a proportionate means of achieving a legitimate aim.

42. In terms of the respondent not approaching Access to Work, we note that the referral must be made by the employee, not the respondent, due to data protection reasons and the claimant was not prevented from contacting Access to Work by the respondent. In fact, the evidence from Mr Hopper to this Tribunal was that the trade union often helped its members to make an application to Access to Work, but he did not give any evidence as to why the union had not assisted the claimant to make this application, but sought to blame the respondent for failing to make the referral. In any event, the claimant did not adduce any evidence of what, if anything, Access to Work might have been able to suggest by way of a reasonable adjustment. Further, we find that contacting Access to Work would not, in itself, constitute a *step* which could have been taken to *avoid the disadvantage*, as required by the Equality Act 2010.

43. We find that the respondent did not fail to apply its own reasonable adjustments policy and that the reasonable adjustments form referred to by the claimant (which had not been completed by the respondent) only applies to permanent adjustments and there was no need to complete this form for temporary adjustments, as in the claimant's case. Further, the 6-month review only applies to permanent adjustments made by the respondent, which did not apply in the claimant's case as she was unable to carry out any of her main functions in the warehouse at all and the respondent was not in a position to make any permanent adjustments for her.

44. The respondent did not fail to follow its occupational health advice as the respondent was obliged to consider the medical evidence from the claimant's own consultant and the physiotherapist, as arranged by the respondent, in conjunction with the occupational health report. We find that the opinion expressed by the occupational health doctor was based upon the claimant

making progress with her arm, which in reality did not materialise, and it was reasonable, in all the circumstances, for the respondent to take a holistic view after gathering all the available medical evidence, which it did.

45. The respondent did require the claimant to have a certain level of fitness in order to carry out her substantive role as it involved lifting and carrying heavy objects, although this requirement was not to be 100% fit, as alleged by the claimant, but rather to be fit enough to carry out the duties safely. However, we find that the claimant was not subject to a PCP requiring her to carry out her role without any variation in terms of the duties being undertaken as she was allowed to carry out light duties and she had no targets to achieve. The uncontested evidence of the respondent is that they were willing and able to make permanent adjustments to the claimant's role, as they had with other employees, once she was capable of carrying out some of her duties. However, the claimant never reached the stage of being able to carry out any of her core functions. Further, the requirement to have a certain level of fitness was required as a matter of health and safety, given that the claimant was carrying out heavy lifting which could easily have resulted in further injury, but there is no evidence that the respondent would not make any variations to the terms under which the role could be carried out safely where the medical evidence supported such a variation.

46. We find that the requirement for the claimant to have a certain level of fitness places her at a substantial disadvantage when compared with non-disabled employees. However, we find that the respondent made reasonable adjustments for a period of at least 12 months as she was allowed to work on light duties or be non-productive/absent on sick leave and she was advised not to carry out any duties which aggravated her disability. The respondent also allowed the claimant to work on light duties outside the initial 6-week period after her return to work on 19 April 2018 and she was not dismissed within 6 weeks of that return (which would have been 31 May), as required by the respondent's own policy, as the respondent made a reasonable adjustment to its policy to accommodate the claimant's situation. In the circumstances, we find that there was no failure by the respondent to make reasonable adjustments in the manner in which the capability process was applied to the claimant.

47. In terms of the dismissal, we find that the respondent has not failed to make a reasonable adjustment in allowing the claimant to stay in employment on light duties for a period of time given that the claimant's own consultant and physiotherapist did not believe the claimant was capable of undertaking her substantive role with adjustments. Mr Robinson-Young's submissions are untenable in that he has failed to adduce any evidence about how long the claimant would have needed for her health to improve sufficiently to return to her substantive role. He states at paragraph 11 of his written skeleton argument that the respondent should have waited "a little longer before dismissing the claimant", but no evidence was adduced as to how long this should have been. The PIP documents submitted by the claimant show that the number of points she received on account of her disability increased from 8 in 2018 to 9 in 2019, which, on the face of it, suggests that the claimant's situation has got worse, not better. The claimant did not take any issue with the accuracy of her consultant's letter or the reports from the physiotherapist and, in the circumstances, we find

that there were no adjustments which could be considered to be reasonable and that could have been made to avoid the dismissal, particularly as the claimant did not wish to be considered for any alternative posts, as argued for by her trade union.

48. In all the circumstances, the claimant's claims of section 15 and section 21 of the Equality Act 2010 discrimination are not well-founded and are dismissed.

49. We find that capability is a potentially fair reason for the claimant's dismissal and, for the reasons set out above, we find that the respondent acted reasonably in treating this as a sufficient reason for dismissing the claimant in these circumstances. It is clear that the respondent carried out as much investigation into the claimant's circumstances as was reasonable and it had in its possession current medical evidence from the claimant's consultant and the treating physiotherapist at the time the decision was made to dismiss the claimant. The claimant had the benefit of representation of a trade union throughout the capability process and was able to raise all the arguments she wished. Further, the respondent considered suitable alternative roles, such as in administration and on the shop floor at the insistence of the trade union, even when the claimant herself said she did not want to work in an alternative role. In all the circumstances, we find that the respondent acted reasonably in dismissing the claimant and that the dismissal was within the range of reasonable responses available to the respondent in these circumstances.

50. For the reasons given above, we find that the claimant's claim for unfair dismissal is not well-founded and is dismissed.

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EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
..... 22 October 2019….....