EMPLOYMENT TRIBUNALS

Claimant: Mrs A Roberts

Respondent: Tesco Stores Ltd

Heard at: Cardiff **On:** 6, 7, 8, 9 and 10 January 2020

Chambers: 10 January 2020

4 February 2020

Before: Employment Judge Brace
Mrs M Walters
Ms C Williams

Appearances: Ms K Annand of Counsel
Ms T Burton of Counsel

JUDGMENT

1. The claims under s.20 and 21 Equality Act 2010 of failure to make a reasonable adjustment in relation to the sit-stand stool, flooring and the Wages role are well founded and succeed.

2. The claims under s.20 and 21 Equality Act 2010 of failure to make a reasonable adjustment in relation to heating is not well-founded and is dismissed.

3. The claim under s.15 Equality Act 2010 in relation to loss of income is not well-founded and is dismissed.

4. The claims under s.26 Equality Act 2010 of harassment are not well-founded and are dismissed.

RESERVED REASONS

Preliminary Matters

1. At the commencement of the hearing in the morning, the parties introduced an agreed Chronology, a Cast List and an Agreed List of Issues. The Tribunal agreed to a split hearing, dealing with just liability first.

2. An agreed bundle of documents, running to some 1366 pages over two lever-arch files of double-sided copied paper, was provided (the "Bundle(s)"). It was noted that some documents in the Bundles provided to the Tribunal were completely illegible (in particular, pages 376, 377 and 379,) but despite requests for further and better copies, none were able to be provided by either party. These documents could not and were not considered in reaching this decision.

3. Ms Burton, Counsel for the respondent, confirmed that disability had been conceded by the respondent and, in response to a question from the Employment Judge, confirmed that the respondent's date of knowledge of the claimant's disability commenced around February / March 2016.

4. It was noted that the s.13 and s.27 Equality Act 2010 ("EqA") claims brought by the claimant had already been withdrawn prior to the hearing, but that no judgment had been issued dismissing those claims on withdrawal by the claimant. It was confirmed that a separate judgment dismissing the claims would be issued.

5. We agreed some reading time and indicated that we would commence hearing evidence in the afternoon of the first day.

6. At the commencement of the hearing in the afternoon, the claimant withdrew one further element of her claim, her s.15 EqA claim relating to the Wages role (para 25-30 inclusive in the Agreed List of Issues) and it was confirmed that a separate judgment dismissing that claim also would be issued.

7. It was also agreed that the claimant would require regular breaks after each hour of cross examination and be permitted to stand periodically to ease the discomfort/pain that she suffered in her back. Counsel for the respondent had no objections, both adjustments were considered reasonable and as a result were put in place for the hearing.

The evidence

8. The Tribunal heard evidence from the claimant, Alison Roberts, and from the respondent's witnesses:

    a. Kirsty Cooze (Services Manager with management responsibility for the claimant 2017-December 2018);

b. Chris Halsey (at the relevant times, Lead Manager Tesco Retail); and
c. Jessica Fear (People Partner i.e. HR manager, with responsibility for the claimant's sickness absence since around January 2019).

9. All four witnesses relied upon witness statements, which were taken as read, and they were then subject to cross-examination, the Tribunal's questions and re-examination.

10. We were also provided with a statement from Lynette Davies (Store Manager of the Risca store in July 2016). Lynette Davies did not attend to give evidence, stating in her written statement that she was on long term sickness, recovering from a spinal operation and was too unwell to attend the hearing. A copy of a FIT note was also provided by the respondent during the hearing [1367/1368] dated 31 October 2019 for a period of 70 days.

11. Many of the respondent's managers, who dealt with the claimant prior to Kirsty Cooze, were not called to give evidence for the respondent as, we were informed, they had left the respondent's employment. We therefore did not hear evidence from the managers who had dealt with the claimant before Kirsty Cooze became managerially responsible for the claimant (at some point between June and August 2017,) or any of the HR Managers who had been responsible for claimant prior to January 2019 i.e. after the issue of these proceeding. We therefore had no evidence from Julie Thompson or Sarah Chislett, personnel managers who had primary responsibility for organising matters such as occupational health referrals [Kirsty Cooze statement paragraph 8].

12. Harry Danish (Lead Manager), who had been present during the discussion between Lynette Davies and the claimant on 18 July 2016, and Matthew Wannacott (Lead Trade Manager), who had been involved in the discussion with Kirsty Cooze and John Keogh (OH Adviser Virosafe Ltd,) on 26 March 2018, discussions which had been relied upon by the claimant on her s.26 harassment claims, were also not called to give evidence for the respondent.

Assessment of the evidence

13. The Tribunal was satisfied that all witnesses who attended and gave live evidence, gave their evidence honestly and to the best of their knowledge, information and belief. All witnesses were consistent and compelling, and their accounts were plausible.

14. The claimant was not cross-examined in detail on events prior to March 2016. As such, our findings in relation to the time period up to that date are formed from the claimant's witness statement and the contemporaneous documentation included in the Bundle, the veracity of which was not challenged by either party.

15. We placed little weight on Ms Davies' statement, not having the advantage of hearing and seeing her give oral testimony.

Findings

16. The claimant has been employed by the respondent since 8 November 2010 on terms and conditions provided [219] as a Customer Services Adviser at the respondent's Risca Store. She worked part time hours and, by September 2016, was working 18.75 hours per week [229].

17. The store is not open 24/7 but generally operates twilight hours closing around midnight each night, opening the following day around 6.00am. The role of Customer Services Adviser requires the employee to serve customers generally, dealing specifically with:

    a. requests for shopped items;
    b. tobacco;
    c. returns, and returning items to the shop floor;
    d. customer complaints;
    e. cleaning; and
    f. assisting customers to locate items in the store.

18. Over the last few years, lottery and scratch cards have also become part of the responsibilities of all Customer Service Advisers and is not just designated to specific advisers. This change took place over the summer of 2017.

19. The Customer Services desk is located at the right of the entrance to the Risca store and had, at the relevant times, four tills numbered 91, 92, 101 and 102, with tills 91 and 92 being the furthest away from store entrance. Cigarettes and tobacco are located behind tills 91 and 92, and a store cupboard is located behind the customer service desk and centrally located between the four tills. The store cupboard is accessed either through a gate, which is set in the desk and located centrally between the four tills, or via the rear of the till closest to the store entrance. The store cupboard holds electrical returns and cigarettes and tobacco. Cigarettes and tobacco are also stored during store opening hours in closed shelving behind the Customer Services desk goods, which is opened when a customer is served and removed each night from said shelving due to theft risk and stored in the store cupboard.

20. The area behind the Customer Services desk is an area that is restricted, certainly more than the general shopping aisles elsewhere in the store, as a result of the proximity of the customer service desk to the shelving for the tobacco located behind the tills areas. The area behind the customer service desk is approximately 1.7m x 10.5 m as set out in the Needs Assessment Report from 6 June 2017 [343/344].

21. With regard to the temperature at the Customer Services desk, whilst neither party had provided evidence within their written statements or documentary evidence regarding the temperature, in live evidence at the hearing there was a dispute as to whether the respondent's temperature test was found to be 'cold'.

22. On cross-examination the claimant asserted that it was found to be 'cold'. In examination in chief Ms Cooze asserted that it had been tested four times and the temperature was 'fine'. There was no support by way of comment from other employees to support the claimant's position whereas there were a number of comments within statements taken as part of the claimant's grievance and grievance appeal process which supported the

respondent's position (including the claimant's TU representative, Mr Sendell,) and we accepted the respondent's case that no other employees had complained about the cold temperature. We also noted that neither of the 2017 Access to Work Reports had made recommendations regarding the temperature.

23. There was a suggestion in submissions, in response to a question from the Employment Judge as to whether the issue of temperature was a seasonal or constant issue, that even in the summer the front of store could be cold due to air-conditioning, but we had heard no live evidence on this point. Furthermore, the focus on the claim from the claimant, and the documentation in the Bundle, was that the claimant felt cold due to the opening and closing of the front doors with no reference to air conditioning.

24. We did not find as a result that the temperature at the Customer Services desk was cold whether due to the opening and closing of the front doors or more generally.

25. In 2014/2015 the claimant suffered significant health problems related to a chest condition and, over a 26-week period, by August 2015, had an 88.47% absence rate [237-246 and 248]. In May 2015 the claimant's hours were reduced from 18.75 to 18.25 to suit the claimant's needs at that time, again related to her chest condition.

26. Disability is not disputed, and the claimant relies on plantar fasciitis and ankylosing spondylitis. The respondent admits that it had knowledge of her disability from February / March 2016. The claimant's impairments at this time included Plantar Fasciitis and pain in her back, knees and feet. The claimant was, around October 2016, diagnosed with Ankylosing Spondylitis and potentially secondary fibromyalgia.

27. In August 2015 the claimant and Nicola Williams, Services Manager, met to discuss the claimant's sickness absence [249]. There was an indication that management, including HR, were liaising regarding an occupational health referral for the claimant at that time and the claimant reduced her hours from 18.75 hours per week to 18.25 hours per week at this time [247].

28. In February 2016, the claimant had a period of absence (from 8 – 22 February 2016 [254]) due to bereavement and, on 21 February 2016, reduced her hours again, to 16.5 hours per week [226 and 255].

29. In the following month, on 24 March 2016, Julia Thompson (People Manager/Personnel Manager), on the claimant's behalf raised with the Regional Operational Risk Manager, Lee Orford, by way of email, the claimant's concerns that the hard floor was causing her foot pain and was also impacting on other illnesses [256]. The claimant requested that the respondent provide non-slip anti-fatigue mats behind the customer services desk to assist her with her current conditions. As a result of this request, Julia Thompson asked the Operational Risk Manager:

    a. whether the respondent would be able to provide such mats;
    b. whether a risk assessment would be required before purchasing the mats; and
    c. whether there were any health and safety implications if the mats were not provided.

30. A response was received from him on 29 March 2016 that:

    a. staff were provided with correct footwear to mitigate any negative health impact;
    b. that he was not aware if such mats existed within the respondent; and
    c. that if mats were to be purchased, they would need to be risk assessed mainly to assess trip hazard that they may cause.

31. He also confirmed that a trip hazard could be introduced by putting mats down. No advice about any specific matting or flooring was given. Mr Orford's referred to the fact that 'the issue' needed to be referred to Occupational Health.

32. It is not clear what the 'issue' relates to (not having heard from either Ms Thompson or Mr Orford,) but the claimant's representative has suggested that this presumably means the issue of the mats and whether they were needed for the claimant. On any reading of the emails, we agree with her presumption.

33. On 24 and 25 May 2016, the Claimant was absent from work and on 1 June 2016 a "Welcome Back Meeting" was held with claimant by the store's Grocery Manager [258]. We have not heard evidence from that manager, but the form completed during or after that meeting [258] confirms that the reason for the claimant's absence for two days was '*on-going severe back problems'.*

34. We found, as it was also recorded in that form which had been signed by both the manager and the claimant, that the claimant had made him aware that her back condition was made worse by standing on hard surfaces and in the cold [258]. She told him that she had been waiting to see Occupational Health since September 2015 and stated that anti-fatigue mats could help her condition but despite request nothing had been done.

35. On 18 July 2016, the Claimant went to see Lynette Davies (then Store manager) in Ms Davies' office. In her witness statement [para 17] the claimant states that Ms Davies '*seemed very annoyed and was stern'* and that Ms Davies told the claimant that Occupational Health were very busy "*dealing with very sick people with conditions like cancer*". No other evidence, or evidence as to the effect that this had on the claimant is included in her statement.

36. On cross examination, in response to a comment from Ms Burton that the claimant had brought a complaint of harassment as a result of Ms Davies' comments, the claimant responded: '*I don't believe I said harassment'*. On cross examination, the claimant also told us that that Ms Davies was angry but immediately altered her position to that Ms Davies was not angry, just '*put out'* that the claimant had asked her about the occupational health referral.

37. With regard to the effect on her, whilst the claimant stated on cross-examination that she was crying in the office at the time of her conversation with Ms Davies, she confirmed that she was not crying in response to Ms Davies' comment. She also

confirmed that she did not complain at the time as she went off work on sick leave the following day. The sick leave was also not as a result of any comments made by Ms Davies. The claimant did not complain about or raise this discussion in her correspondence of September 2016 [267 and 268]. She did not refer to this discussion until her grievance on 28 March 2018, some 20 months later.

38. Lynette Davies accepts in her witness statement [paragraph 11] that comments regarding other employees' cancer was made by her.

39. Taking into account the time that has lapsed since the discussion took place, we found that whilst a conversation did take place between the claimant and Ms Davies regarding the delay in the occupational health referral and that a reference was made to other employees awaiting a referral with conditions such as cancer, we were unable to conclude on balance of probabilities that the comment(s) made by Ms Davies, were exactly as stated by the claimant.

40. On 19 July 2016, the Claimant presented as unfit for work through 'Back pain' [262]. The condition causing the lack of fitness for work changed in the Fit notes provided in the Bundles from 12 October 2016 to ankylosing spondylitis [262-266]. The claimant remained off work until 13 February 2017 with these impairments.

41. Whilst off work on sick leave, the claimant met with Sarah Chislett, Personnel Manager on 3 August 2016 and 1 September 2016. Again, we have not heard evidence from this witness and draw our findings from the claimant's evidence and from the contemporaneous documentation [267 and 274].

42. In her letter of 1 September 2016 [267] the claimant:

    a. rejected advice which had been given of using steel toe cap boots;
    b. confirmed that her plantar fasciitis was exacerbated by standing on a hard surface;
    c. disagreed with the decision to refuse her request for anti-fatigue matting as it was a trip hazard as she considered that these were specialist mats in the workplace; and
    d. complained about the lack of reasonable adjustments and that she still had not seen Occupational Health;
    e. informed Ms Chislett that the pain her back becomes worse when she returned to work standing on a hard surface as this aggravated her condition
    f. that she had specialist insoles made by her podiatrist.

43. On 22 September 2016 the claimant again met with Ms Chislett as referred to in her letter of 3 October 2016 [274]. In that letter the claimant asked that to facilitate her return to work reasonable adjustments to the work area and a suitable floor or mat surface be installed. She also stated that she was on sick because of her condition and would like to return but that that the floor surface would aggravate her condition and make it worse.

44. The claimant and Ms Chislett exchanged emails in the subsequent weeks which included an email from the claimant confirming that she wished to return once reasonable adjustments had been made to help her to support her condition [278].

45. In an email, sent to Sarah Chislett on 14 November 2016 [281], it is recorded that she has been told by Sarah Chislett that Occupational Health had '*agreed to the floor'* [283]. No evidence was given by the claimant on this email, either within her statement or on cross examination. Ms Chislett has not given evidence for the respondents and we make no specific findings on what was agreed with the claimant at this time regarding the floor surfacing.

46. On 13 February 2017, the Claimant returned to work. A return to work meeting took place with Ms Chislett where amended shifts and duties were suggested by the claimant [296]. An 'Action Plan' document completed the same day reflected that agreed adjustments at that point were:

    a. amended hours (Monday to Wednesday 9am-2pm)
    b. work on customer service desk but to '*rumble'* front of store at quiet periods.

47. Neither the claimant gave, nor was Ms Chislett available to give, evidence regarding this document but the document was signed by the claimant and was stated to be a record of agreed actions which needed to be taken to assist with the claimant's attendance levels. No evidence was given by either the claimant nor indeed any respondent' witness on what '*rumble the store'* entailed and we make no finding in regard to this. No reference is made to the floor surfaces or any other adjustments in that documentation.

48. An 'Adjustment Passport' was also completed for the claimant that day by Ms Chislett and signed by the claimant [290]. Again, neither the claimant gave, nor was Ms Chislett available to give, evidence regarding this document, but the document was stated to be a record of adjustments agreed between the claimant and the manager to support her at work because of a health condition or disability. In that contemporaneous document it is reflected, and we found that the parties were still awaiting on occupational health and the publicly funded support programme, Access to Work and that the claimant confirmed that her condition impacted on her at work as follows:

    a. standing and sitting for long periods;
    b. cold weather;
    c. bending;
    d. heavy lifting; and
    e. tiredness.

49. In the weeks that followed that meeting, a serious of emails were exchanged between the claimant and Ms Chislett and included within the Bundle [298-301] which reflect that:

    a. Access to Work was at this point being progressed by the claimant;
    b. that she was telling Ms Chislett that she was struggling being on the customer service desk with standing/being on her feet and that the cold did not help and that her pain was intensifying as a result;

c. the claimant was reminding Ms Chislett of whether it would be worth contacting occupational health for advice.

50. In the period leading up to 3 April 2017, the claimant was absent from work for 49 days with pleurisy [304].

51. On 5 April 2017, a needs assessment was undertaken for the claimant at the respondent's store Access to Work.

52. Handwritten notes, written on 17 April 2017, onto both the 13 February Action Plan form [297] and 17 April 2017 absence log [315], noted that the Claimant was awaiting the results from the Access to Work assessment and that the claimant was to work Mon/Tues and to take Wednesdays unpaid leave for 4 weeks as support. As the Claimant was struggling with working 3 days a week, it was agreed that for 4 weeks, whilst waiting for the recommendations to be made by Access to Work, she could reduce her hours to Mondays and Tuesdays 9am to 2pm (10 hours per week), but that Wednesdays would then be unpaid.

53. On 9 May 2017, the Claimant has a meeting with Julia Thompson and Harry Danish [318]. By that point the April 2017 Access to Work Report had been received by the claimant [at pages 309, 310 and 314 but not 311 and 312 which relate to the later Access to Work report of June 2017 at 344].

54. The April 2017 Access to Work Report recommended that:

    a. Occupational Health should perform a formal redeployment for the claimant as her condition had become too poor to work at the front desk i.e. customer service desk; and
    b. that there would need to be a further assessment after redeployment to consider 'adaptions' to her workplace to make her more comfortable in her new workplace.

55. The claimant was not cross-examined on this meeting and we had no evidence from Julia Thompson, but we found from our review of the meeting notes that managers were focussing on:

    a. the fact that the customer services desk role suited the claimant's abilities,
    b. that the respondent told the claimant that they could not create a role for the claimant (which the claimant understood and agreed); and
    c. that the desk was now a combined role i.e. responsibility for lottery was shared amongst all Customer Services Advisers.

56. We also found that despite the April 2017 Access to Work Report recommending redeployment, the parties were still discussing whether adjustments could be made to the Customer Services Adviser Role and that Access to Work would need to return to review the adjustments to the Customer Services Adviser role [320/321].

57. Pending a further assessment and report from Access to Work, on 15 and 16 May 2017 the claimant tried an alternative role in the respondent's petrol filling station but considered this unsuitable for her. She could not sit due to the angle of the chair which caused instant pain and she was unable to walk around or move away from the till area

58. On 23 May 2017, the Claimant attended a meeting with Julia Thompson to check adjustments [330]. At that point Access to Work had been arranged to come in and do a second assessment to assess the claimant again on the Customer Service Desk.

59. Counsel for the claimant indicated that the claimant had expected at that time that there would be a discussion about moving her to an office role in light of the Access to Work report. We heard no evidence from the claimant on that point nor indeed on the content of that meeting and we make no finding that this was the claimant's expectation although we do conclude that it would have been reasonable for the claimant to have had this expectation**.**

60. From the handwritten note of that 23 May 2017 discussion, we found that the claimant wanted to terminate that meeting to have her representative with her because he had been told by Julia Thomson that she had agreed that her role was on the customer services desk as there was no other suitable role for the claimant. The claimant disagreed that there were no other suitable roles for the claimant within the store and the claimant felt that occupational health should be involved.

61. On 6 June 2016 the claimant wrote to Julia Thomson [346] and it is implicit from that letter and accepted that the claimant had asked for a split role in cash office / customer services desk but that this had been refused. At the time that the letter was sent, the claimant also believed that the respondent's position was that there was no other role for her. The claimant asked for a meeting with Julia Thompson on 12 June 2016.

62. On the same day, 6 June 2017, the second Access to Work assessment was undertaken.

63. The second June 2017 Access to Work report from this assessment [343, 344, 344a/311 and 344b/312] recommended:

    a. Bubblemat Anti fatigue Entrance standing non-slip safety mat, to cover 10.5 metres, which is the entire length of the Customer Service and Kiosk Desk.
    b. Muvman sit stand stool for the Customer Service Desk; and
    c. Muvman sit stand tool for the kiosk area.

64. The report also indicated that as the counter was situated near the main customer entrance, the claimant also felt cold due to the constant opening of the doors. No adjustments were recommended in respect of this.

65. We were unable to make any findings on when the June 2017 Access to Work Report was provided to the claimant save that we did find that the claimant had received a version of the report by 20 July 2017 [373]). Due to the lack of any clear evidence from the respondent's witnesses, we were unable to make any findings on when the report

was provided to the respondent but, from our review of the notes of the meeting between the claimant and Julia Thompson on 12 June 2017 [352-364 at 355, 357 and 360], we did find that the respondent was aware by that date i.e. 12 June 2017 that anti-fatigue matting and sit stand stools had been recommended by Access to Work.

66. The issue of whether the anti-fatigue matting was a health and safety risk was also discussed at that meeting, and Julia Thompson told the claimant that the risk assessment had indicated that mats could not be placed. The evidence as unclear as to whether any specific type of anti-fatigue matting was discussed with the claimant at this point. On balance, we concluded that it was more likely that flooring more generally was discussed, with Julia Thompson surmising that possibly carpeting was an option. Either way, no decision was made at this meeting that anti-fatigue matting would not be supplied by the respondent.

67. Footwear was also discussed, with the claimant confirming that insoles had been provided from her podiatrist, but they did not help. We make on no findings on what insoles were provided by the claimant's podiatrist (and/or whether they were the same insoles as those subsequently recommended by John Keogh in 2018, an issue we deal with later in this decision.

68. There was some limited discussion regarding the provision of a chair for the claimant at that meeting. The claimant had been making use of a chair behind customer services desk at that time, although this was being removed by colleagues as they considered it in their way when working. At this stage the claimant was unsure how the sit stand stools would help as the claimant considered that constant sit stand was 'bad' for her [355]

69. The steps that could be taken to address the effect of the cold that the claimant felt was also discussed, including the suggestion by Julia Thompson of a heatbelt, which the claimant rejected [356]. The claimant was asked for her views on what she did consider would assist her with the cold. She did not know, responding that this was why she had asked for occupational health [346].

70. The meeting ended with a commitment to find a role that was suitable for the claimant but that at that time an office-based job was not available. Scan-as-you-Shop was raised as a possibility. The claimant confirmed that she would 'try anything'. It was agreed that a seat would be provided for the claimant in the interim. We found that this was a temporary measure pending a decision on the sit stand stool that had been recommended.

71. Despite this report, no one carried out a risk assessment regarding the Bubblemat Anti fatigue entrance standing Non-slip Safety Mat and sit stand stools were not ordered.

72. On 19 June 2017 claimant was absent from work for one month with Spondyloarthropathy [367] and again was absent from work from 25 July 2017 until 14 August 2017 with vertigo [374]. Whilst off, the claimant emailed Access to Work expressing concern that cold payed a major part in her condition and Autumn/Winter approaching, under current conditions, she would be unable to work.

73. We also found that by 22 June 2017, or within days of that date, Julia Thompson had been provided with the detail of what support had been recommended for the claimant by Access to Work as they wrote to Ms Thompson that day confirming the same support as recommended within the body of the report [368-370].

74. On her return to work, on 14 August 2017, the claimant had a Return to Work meeting with Kirsty Cooze. We found that from this point Kirsty Cooze was responsible for managing the claimant generally and specifically managerially responsible for managing her sickness absence. At that meeting the claimant committed to try working in the Respondent's phone shop but that she did not feel able to work on Scan-as-you-Serve due to the length of time spent standing.

75. On 11 September 2017, the claimant had a meeting with Kirsty Cooze in which Kirsty Cooze confirmed that Occupational Health had been contacted. The claimant's hours of work were discussed to enable the claimant to attend exercise and physio/medical appointments and it was also agreed that the claimant would work just Monday and Tuesday with unpaid leave on a Wednesday.

76. On that date the claimant was also sent a letter confirming that Occupational Health providers for the respondent were changing to Nuffield Health [391]

77. Kirsty Cooze met the claimant again on 14 November 2017 [410]. She raised again that:

    a. she was worried about winter due to the cold; and
    b. she was disappointed that adjustments had not been made.

78. We found that at this point in time heaters were in place for the claimant [411] but that she did not consider that the one provided which was in front of her was sufficient and wanted a large heater on the customer services desk. Ms Cooze committed to look into this.

79. The claimant also reported that she was having difficulty in getting up with the chair that had been provided. The claimant reminded Ms Cooze that a sit stand stool had been recommended and was told that this was being reviewed by Occupational Health. Ms Cooze did not deal with this in her statement and was not cross-examined on it but we found from our review of the notes that Ms Cooze committed to reviewing the adjustments recommended in the June 2017 Access to Work Report when Julia Thompson returned to the store. The claimant also confirmed that whilst she would increase her hours after Christmas, she indicated that she would not be able to do so without adjustments.

80. On 23 January 2018, after being chased by the claimant regarding what adjustments were going to be made for her, the claimant had a further meeting with Kirsty Cooze. At that point the claimant had a telephone assessment with occupational health, but no evidence was before us from either party or within the Bundles, and we make no findings on what that assessment concluded.

81. At that meeting the claimant and Ms Cooze discussed the personal adjustments that the claimant had been making to ease her pain and that these included:

    a. heaters;
    b. chair to rest;
    c. no lifting or bending;
    d. order extra uniform;
    e. taking extra comfort breaks.

82. On cross examination it was put to Ms Cooze that these were agreed in the context of the claimant waiting on occupational health and that the claimant was waiting for the adjustments that had been recommended by Access to Work to be put in place. Ms Cooze was unable to answer. We found that it was likely that any agreement from the claimant at this meeting regarding adjustments in place, was agreement pending the adjustments recommended by Access to Work, namely anti-fatigue matting and the sit stand stool, and not a general agreement that the adjustments were reasonable for her.

83. However, we also found that the respondent did provide heaters for the claimant at some point between March and November 2017 and that these were in place by November 2017. We also found that the claimant had access to extra thermal uniform. We also found that the claimant chose not to avail herself of that clothing, choosing instead to wear her own thermal garments.

84. On 29 January 2018, the Claimant was absent from work with pleurisy and did not return to work until 19 March 2018 [427-431].

85. On 27 March 2018, the claimant attended a return to work meeting which confirmed that additional support would be discussed following the workstation assessment which was carried out later that day by Mr John Keogh from Virosafe.

86. Prior to the commencement of her workstation assessment, and indeed her meeting Mr Keogh, the claimant noted that Mr Keogh was already in some discussion with Mr Wannacott, Lead Trade Manager. Whilst the claimant did not know the detail of their discussion as she was not present at that meeting, she was unhappy for Mr Wannacott to be present.

87. The assessment then took place and at the end of the assessment, John Keough was seen by the claimant having further discussions with Mr Wannacott and Ms Cooze.

88. It is accepted by Ms Cooze that some discussion took place regarding reasonable adjustments. This was also reflected in the interviews conducted subsequently as part of the claimant's grievance (including grievance appeal). In those discussions Mr Keogh discussed with Ms Cooze and Mr Wannacott his recommendations of:

    a. the removal of the heaters for health and safety reasons; and
    b. alternative employment.

89. We also found that on that day, the claimant did not know what the three were discussing. She was not privy to their discussions. Notwithstanding lack of knowledge on the content of their discussion, the claimant was upset and annoyed by the *fact* of a discussion between Mr Keogh and management.

90. On the following day, the claimant emailed John Keogh raising that management wanted her to work on till 91 (furthest away from the main door,) but that this would mean that she would not be able to use the stand sit stool as that till was used mainly for cigarettes and lottery and would effectively mean that the claimant needed to stand for the majority of her shift.

91. The claimant also submitted a grievance [letter dated 28 March 2018, 459-461] complaining that:

    a. it had taken over four years for an Occupational Health assessment;
    b. that the recommendations from previous Access to Work assessments had not been implemented and that she continued to struggle; and
    c. that John Keough had been unprofessional and had shared her private information with Matt Wannacott without her consent.

92. For the first time the claimant also raised with management her conversation with Lynette Davies in July 2016 and that it had upset her [at 460].

93. With regard to the complaints regarding John Keogh's conduct, the claimant was concerned regarding Mr Wannacott's presence and that he was seen by the claimant having a discussion in the manager's with Kirsty Cooze and John Keough. She also alleged that her private, personal information was discussed in front of and with Mr Wannacott.

94. In that discussion Mr Keogh:

    a. did not discuss the claimant's health condition;
    b. raised health and safety concerns regarding the heaters, and that the chair provided to the claimant was an issue for other staff;
    c. did discuss a reasonable adjustment of enabling the claimant to apply for an administration role.

95. An investigation into the claimant's grievance was instigated in accordance with the respondent's grievance process and Chris Halsey, Lead manager was appointed grievance investigator.

96. In the interim, John Keogh completed his report. A version of that report was provided to us within the Bundle at pages 450-452. We make no findings as to whether this was the original version or indeed the version that was provided to the claimant initially by way of email dated 16 April 2018 [482].

97. Within that report John Keogh [450] recommended:

a. a sit-stand stool;
b. Orthosole insoles;
c. to assist with the pain due to the claimant feeling cold, heated clothing or thermal clothing, and heating units fitted within the work area, recommending that they be wall-mounted as floor standing heaters could pose a health and safety risk.

98. He also suggested that clothing may be a better option than heaters as they would provide localised warmth and that another option would be to deploy the claimant to an office-based role if a suitable vacancy was available John Keogh discussed his recommendations with the claimant before the report was provided to her. The claimant did not consent to the release of the report as she considered it contained inaccuracies.

99. Notwithstanding this lack of consent from the claimant:

a. Insoles were ordered by him and arrived at the store. These were provided to the claimant at some point by 9 April 2019. The claimant had emailed John Keogh that day complaining that they were too big, and that if they were cut to size, they would not support her feet [479];

b. a sit-stand stool was ordered and had also arrived in the store by 9 April 2018 [479]. The claimant was not allowed to use the stool until the claimant consent to the release of the report.

100. On 16 April 2018 the claimant and Kirsty Cooze met again at a meeting that is referred by the respondents as a 'Let's Talk' informal discussion. In that discussion a role for the claimant in Wages was discussed with the claimant informing Ms Cooze that she would prefer to stay on the customer services desk.

101. Ms Cooze did not have the benefit of the Keogh report at that meeting, as no consent for disclosure had been given by the claimant. Notwithstanding that, we concluded that Ms Cooze was, by the time of that meeting, aware of the recommendations made as the equipment that Mr Keogh had recommended and discussed with the claimant, had already been delivered to Risca store.

102. Two vacancies in Wages existed at that time (weekly hours of 20 and 30 hours). Despite the closing date for applications having passed, the claimant was told that she could still apply. The claimant applied and was interviewed by Darren Bridge, Stock Admin. Team Manager. Whilst we have not heard evidence from Mr Bridge, he had been interviewed as part of the claimant's grievance by the grievance appeal manager.

103. In the latter part of April/beginning of May 2018, Mr Halsey conducted his grievance investigation interviewing the claimant, Ms Cooze, John Keough, Ms Davies, Harry Danish, Mr Wannacott, Darren Bridge and Nicola Williams). The grievance interview notes with Mr Bridge reflect, and we found as a result, that the claimant was not considered suitable for the role as she was unable to work 20 hours per week [781]. No consideration was given to any adjustments to the hours to that role to accommodate the claimant.

104. On 11 June 2018, the claimant received the outcome to her grievance from Mr Halsey [649] which concluded that:

    a. Her complaint that it had taken 4 years to receive an Occupational Health assessment was upheld.
    b. Her complaint that the Access to Work recommendations had not been implemented was partially upheld; and
    c. her complaint that John Keogh had been unprofessional on the day of his assessment was not upheld.

105. In relation to the third element of her grievance, relating to John Keogh, Mr Halsey concluded that it was the remit of the occupational health adviser to liaise with the store on a referral. He also concluded that Mr Wannacott held accountability for the store that day in the store manager's absence [651].

106. On 20 June 2018, the Claimant appealed the grievance outcome [703]. The appeal related to a number of issues including the outcome regarding the occupational health assessment.

107. The appeal was conducted by Kirsty Powell who interviewed those who had been interviewed by Mr Halsey as well as Mr Halsey himself and the claimant's representative, Darren Sendell. On 25 July 2018 the claimant was sent a letter confirming the outcome of the appeal [810] which was:

    a. that the Access to Work recommendations had not been implemented;
    b. that reasonable adjustments for the claimant were shared with Mr Wannacott as Lead Trade Manager without her consent and contrary to policy.

108. On 14 August 2018, the claimant's occupational health appointment with a Dr Atkinson, Occupational Health Adviser was arranged. However as insufficient time had been allocated for the assessment, this was adjourned to a later date and in the interim, on 2 September 2018 the claimant again reported sick.

109. The assessment did not take place until 1 October 2018. In her report prepared following that assessment, Dr Atkinson made a number of recommendations including:

    a. a suitable chair,
    b. consideration is given to changing the floor area, and
    c. providing heaters.

110. On 6 October 2018, the Claimant submitted this claim to the Employment Tribunal.

Submissions

111. The respondent's counsel presented written submissions comprising 27 pages and 103 paragraphs. The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

112. The claimant's counsel also presented written submissions comprising 27 pages and 112 paragraphs. Again, there will be no attempt to summarise those submissions and they are again incorporated by reference.

113. Both representatives made some limited supplementary oral submissions.

The law

114. Counsel for both the claimant and respondent had helpfully set out the legislation and relevant case law in respect of each issue before us and this is repeated only in brief within this judgement.

Jurisdiction

115. Under s. 123(1) Equality Act 2010 ("EqA") a claim must be presented to the tribunal before the end of the period of three months starting with the date of the act to which the complaint relates. Where the act complained of it a failure to do something, it is taken as occurring when the respondent made the decision not to act (s.123(3)(b) EqA). In the absence of evidence to the contrary, an employer is to be taken as deciding not to do something when it does an act inconsistent with doing it (or, if there is no inconsistent act, at the expiry of the period in which it might reasonably have been expected to do it (s.123(4) EqA).

116. Both parties' counsel referred us to the following cases:

a. *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, the Court of Appeal held that where the employer's breach is a failure to act, time begins to run from the end of the period in which the employer might reasonably have been expected to comply with the relevant duty, and that period should be assessed from the employee's point of view.

b. *Humphries v Chevler Packaging Ltd* UKEAT/0224/06, the EAT held that time starts to run when an employer makes a decision not to make an adjustment or does an act inconsistent with making an adjustment.

c. *Matuszowicz v Kingston-Upon-Hull City Council* [2009] EWCA Civ 22 where the Court of Appeal held that where an employer's alleged failure to make an adjustment is inadvertent, the three-month time limit for bringing a claim starts to run on the expiry of the period within which the employer might reasonably have been expected to make the adjustments.

117. Counsel for the respondent also referred us to *Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil* UKEAT0097/13

118. In relation to the tribunal's just and equitable discretion to extend time, the discretion is a wide one and the tribunal should have regard to the factors set out in s. 33 Limitation Act 1980,which have not been set out more fully in this judgment.

Section 20 and 21 EqA 2010

119. The relevant provision for this case relates to s.20(3) EqA

> '*requirement where a provision, criterion or practice 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'*

120. Guidance on the approach to be taken in reasonable adjustment claims has been given by the EAT in the *Environment Agency v Rowan* 2008 ICR 218 which has stated that an Employment Tribunal must consider

    a. the PCP applied on behalf of the employer;
    b. the identity if appropriate of a non-disabled comparator; and
    c. the nature and effect of the substantial disadvantage suffered by it.

121. Both parties' counsel referred us to:

    a. *Smith v Churchills Stairlifts plc [*2006] ICR 542
    b. *Archibold v Fife [2004]* IRLR 65

122. Counsel for the claimant also referred us to:
    a. *Hay v Surrey County Council [2007]* EWCA Civ 93
    b. *Royal Bank of Scotland v Ashton* [2011] ICR 632
    c. *Cumbria Probation Board v Collingwood* UKEAT/0079/08/JOJ,
    d. *Leeds Teaching Hospital NHS Trust v Foster* [2011] Eq. L.R. 1075
    e. *Project Management Institute v Latif* [2007] IRLR 579
    f. *Linsley v Revenue and Customs Commissioners* [2019] IRLR 604, EAT.

123. The respondent's counsel also referred the Tribunal in addition to:
    a. *Watkins v HSBC Bank plc* UKEAT0018/18
    b. *Wilcox v Birmingham CAB Services Ltd* UKEAT/0293/10.
    c. *Nottingham City Transport Ltd v Harvey* UKEAT/0032/12
    d. *Walters v Fareham College Corporation* [2009] IRLR 991.
    e. *Newham Sixth Form College v Sanders* [2014] EWCA CIV 734.
    f. *Noor v Foreign and Commonwealth Office* [2011] ICR 695 EAT.
    g. *Chief Constable of Lincolnshire Police v Weaver* UKEAT/0622/07.
    h. Home Office v Collins [2005] EWCS Civ 598
    i. *West v RBS* UKEAT/0296/16
    j. *Tarbuck v Sainsbury's Supermarkets* **Ltd** [2006] IRLR 664

s.15 EqA – Discrimination arising

124. A person (A) discriminates against a disabled person (B) if—
    a. A treats B unfavourably because of something arising in consequence of B's disability, and
    b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(s.15(1) EqA)

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.

(s15(2) EqA)

125. As for the correct approach when determining section 15 claims we refer to *Pnaiser v NHS England and others* UKEAT/0137/15/LA at paragraph 31.

s.26 EqA - Harassment

126. Section 26 EA 2010 provides that A harasses B if:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

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

a. the perception of B;
b. the other circumstances of the case;
c. whether it is reasonable for the conduct to have that effect.

128. Counsel for the claimant has referred us to:

a. *Nixon v Ross Coates Solicitors* [2010] 8 WLUK 104
b. *Dos Santos v Fitch Ratings* Ltd ET Case No.2203907/08, for example

129. Counsel for the respondent has referred us to:

a. *Weeks v Newham College of Further Education* EAT 0630/11.
b. *Pemberton v Inwood* [2018] ICR 1291 CA:
c. *HM Land Registry v Grant* [2911] ICR 1390 CA Lord Justice Elias stated:
d. *London Borough of Haringey v O'Brien EAT* 0004/16.

Conclusions

Jurisdiction

130. The claimant and the respondent agreed that all matters arising from 5 May 2018 are in time.

131. With regard to the discrimination claims, whilst we accepted that over the years, from 2015 through to the date of issue of proceedings, a number of employees within the respondent's management managed and dealt with the claimant, the issues that arose and the matters complained of were of a theme: namely that she was requesting a referral to Occupational Health as requirements of her role were giving rise to difficulty,

in particular pain, and that she wanted, in essence, support on what reasonable adjustments could be put in place for her.

132. With regard specifically to the reasonable adjustments claims, we also accepted that the claimant was not, at any point, told that a decision had been made on any of the adjustments she was asking for. We accepted that the respondent's actions were suggestive of matters being investigated and considered. This was not a case where there was an inadvertent failure by the respondent to make an adjustment. Instead, we concluded that it was the case that it was continually being suggested to the claimant that her concerns, and the management of her adjustments was being addressed and considered, and we concluded that at no point did the respondent make a decision not to make an adjustment or do anything inconsistent with making an adjustment.

133. We therefore concluded that this was a case of conduct extending over a period from March 2016 and all claims, including claims of harassment and failure to make reasonable adjustments, were therefore presented in time.

<u>s.20/21 EqA 2010 Reasonable adjustments claim</u>

Reasonable adjustment: Sit-stand stool

134. It is not disputed by the respondent that:

    a. the respondent applied a PCP of requiring the role of Customer Services Adviser to be carried out whilst standing up, standing for prolonged periods, and/or without a chair; and

    b. that it placed the claimant at a substantial disadvantage.

135. The claimant's case is that it would have been reasonable to provide her with a suitable sit-stand stool and further, that had the claimant been referred to occupational health earlier, the recommendation of sit-stand stool would have been made earlier.

136. Whilst we found that there was no sit-stand stool or chair in place at all from September 2015 to June 2017, the Access to Work Report from April 2017 does not refer to any such adjustments. It further confirms that at that point no adjustments, other than redeployment into a different role, would have assisted the claimant. We therefore did not conclude that, on balance of probabilities, had she been referred earlier, this recommendation would have been made earlier. This was even though later reports, i.e. the second Access to Work report a few months later in June 2017 and the reports in 2018, did make such a recommendation.

137. Following the June 2017 Access to Work assessment, the respondents were aware that two sit-stand stools had been recommended.

138. We concluded that suitable stools, to enable the claimant to easily transition between standing and sitting, with a stable seat and back support, that could be used when in a

standing position could and should have been ordered when the respondent became aware of a recommended adjustment of a sit-stand stool.

139. The failure to order and make available this suitable stool for the claimant was a failure to make a reasonable adjustment by the respondent and that aspect of the claim succeeds.

140. *Date for adjustment*: It was not reasonable for the respondent to delay in ordering and providing these stools and we are not satisfied that there was any credible explanation why the respondents waited a further 10 months from the June 2017 Access to Work Assessment, until the assessment was carried out by John Keough of ViroSafe, to make this adjustment.

141. We considered that it would have taken some time for the respondent to have ordered stools and get the same delivered, and that this should be built into the time frame of when the failure to make this reasonable adjustment arose. When stools had been recommended by John Keogh of Virosafe a year later, they were ordered and delivered within two weeks of his assessment date.

142. Allowing for a similar two weeks ordering and delivery time, we concluded that the failure to make this reasonable adjustment arose on 26 June 2017 (being a date two weeks after the 12 June 2017 meeting).

Reasonable adjustment: Flooring

143. It is not disputed by the respondent that:

a. the respondent applied a PCP of requiring the role of Customer Services Adviser to be carried out whilst standing on the store's standard hard flooring; and
b. that it placed the claimant at a substantial disadvantage.

144. The claimant's case is that it would have been reasonable to provide her with:

a. suitable floor mats to soften the floor surface; and/or
b. resurfaced the floor behind the service desk (in whole or in part) with a softer surface.

145. Essentially the respondent's arguments as to why such an adjustment was not reasonable were that:

c. matting may lead to a tripping hazard / give rise to health and safety concerns; and
d. matting was not practicable taking into account the usage in the area behind the Customer Services desk.

146. Our focus was on whether, having regard to other factors affecting reasonableness (Para 6.28 Code of Practice), there was a chance that the adjustment proposed would be effective in removing or reducing the disadvantage the claimant was experiencing at work as a result of her disability, not whether it would advantage the claimant generally.

147. In that regard we concluded that the issue regarding the insoles and whether these would have been more effective than matting was not a relevant consideration for us. The Access to Work reports and the Occupational Report all concluded that matting of some form would be beneficial for the claimant and we concluded that there was a chance that the adjustments proposed, of either placing suitable floor mats to soften the floor surface and/or resurfacing the floor behind the Customer Services desk would be effective in removing or reducing the disadvantage the claimant was experiencing at work as a result of her disability.

148. We then looked at the question of whether such an adjustment was reasonable.

149. With regard to the trip hazard/health and safety concerns, we accepted that there may very well be a genuine health and safety risk to placing certain matting or changing the flooring behind customer services desk. We concluded that in this case there was and is a genuine concern that matting of any nature could be a tripping hazard, and that this would likely have been more of a risk within the restricted area behind the Customer Services desk when contact could be made with the desk or wall.

150. We did not consider that the fact that matting was removed from the security area was a relevant consideration for us. The security area was in a different location to the Customer Services desk, and separate considerations are likely to have gone into any decision to remove that matting. The fact that the respondent does use mats in other areas of its stores was again was not a relevant consideration for us either, as other areas of the store, such as the fruit and vegetable aisles, would have different considerations to factor in when making a health and safety assessment as to the risk of matting.

151. What concerned us however was that despite this genuine concern, there had been no discrete or separate risk assessment by the respondent of the Customer Services area in Risca, of any specific anti-fatigue matting, or indeed no general risk assessment anti-fatigue matting. This was not in dispute. Furthermore, in this case the respondent had not called any witnesses who worked in the Health and Safety department or in a Health and Safety role to give evidence on this issue.

152. Rather the evidence that we had was of general advice from individuals (not called to give evidence) on risks of matting generally. No one health and safety professional had risk assessed that particular site, against the specific flooring alternatives.

153. Indeed, from March 2016, the need for a risk assessment to be undertaken was flagged up by the Regional Operational Risk Manager and at no point prior to the claimant issuing this claim was that undertaken.

154. We were not satisfied therefore that the respondent has demonstrated to us that any change in floor covering, whether through mats (anti-fatigue or otherwise) or a resurfacing of the floor (in whole or in part) behind the Customer Services desk would have been a health and safety risk such that we can conclude that it would not have been a reasonable adjustment to have made.

155. With regard to the second reason why alternative floor coverings, including mats, would not have been reasonable, we were provided evidence from Jessica Fear that:

    a. anti-fatigue matting made it difficult to move and store stock, and move chairs and cages across them;
    b. that it does not last in busy areas; and
    c. that matting provided less stability for the base of a sit-stand stool.

156. At first consideration this was persuasive but we also concluded that at the relevant times no effort had been made by the respondent to consider specific matting for areas behind such desks taking into account the layout of this particular customer services desk and need for store room access.

157. We were not satisfied that the respondent had proven, that the proposed adjustment of placing some form of orthopaedic non-trip matting or alternative softer floor covering, whether across the whole of the area behind the Customer Services desk, or in part, was not a reasonable adjustment.

158. The failure to place some form of orthopaedic non-trip matting or alternative softer floor covering, whether across the whole of the area behind the Customer Services desk, or in part, was a failure to make a reasonable adjustment by the respondent and that aspect of the claim succeeds.

159. *Date for adjustment*: We considered that it would have taken some time for the respondent to have deliberated over the correct matting and allowing for again ordering and delivery, we concluded that the failure to make this reasonable adjustment arose by the beginning of June 2016 some two months after Lee Orford suggested in March 2016 that a risk assessment should be undertaken on matting.

Reasonable adjustment: Heating

160. We did not conclude that the role of Customer Services Adviser was required to be carried out whilst working in a cold environment as a result of our findings that:

    a. there was a dispute as to whether the respondent's temperature test was found to be 'cold';
    b. whilst the claimant asserted it to be cold, Ms Cooze stated that it had been tested four times and the temperature was 'fine'; and
    c. there was no support by way of comment from other employees to support the claimant's position whereas there were a number of comments within statements taken as part of the claimant's grievance and grievance appeal process which supported the respondent's position

161. We did not find as a result that the temperature at the Customer Services desk was cold whether due to the opening and closing of the front doors or more generally.

162. As the Customer Services Desk was in fact close to the store's entrance, we did conclude that there was a PCP of requiring the role of Customer Services Adviser to be carried out next to the store's entrance.

163. Whilst we accepted that the claimant was asked if she wanted to work on a till further away from the entrance, and chose to work on the till that was the closest of the four tills to the front door, we did not consider that this impacted on the PCP relied upon more generally.

164. However, for the same reasons given above in relation to the first PCP relied upon, we did not conclude that this PCP either placed the claimant at a substantial disadvantage.

165. We did not conclude that the location of the Customer Services desk gave rise to a cold environment for employees. Whilst we accepted that the claimant's impairments did lead to her feeling cold and that the claimant did say that the cold aggravated condition and caused her increased pain, we did not accept the that the claimant had demonstrated to us that the temperature close to the store's entrance was cold and would have specifically created that disadvantage.

166. The claim of failure to make reasonable adjustments in relation to heating therefore is not well-founded and fails as the claimant has not demonstrated that this PCP either required the claimant to work in a cold environment thereby disadvantaging her.

167. If we are wrong on that, and this was a PCP that disadvantaged this claimant, in brief whilst we had no live evidence before us at the hearing, it was also our conclusion, based on the documentary evidence [in particular 373, 706], that the claimant did not express concerns regarding the temperature throughout the year – rather she expressed a concern regarding the temperature as winter approached and during the winter months. It was therefore not a factor that continually disadvantaged the claimant in any event.

168. We also concluded that the respondent had put in place some support as the claimant felt cold in that heaters had been provided by November 2017 and were only removed when it was demonstrated that these were a health and safety risk. In that regard we were satisfied that if there had been an obligation to make a reasonable adjustment, placing heaters under the customer services desk was not a reasonable adjustment due to that health and safety risk.

169. Whilst no heaters were provided from that date, we also concluded that the claimant was provided access to additional thermal clothing and a heatbelt was suggested but rejected by the claimant. The claimant had the opportunity to work on a till further away from the door, on the basis that she was suggesting that this was causing her difficulty, which she declined to take.

170. We therefore concluded that even if, contrary to our primary decision, that this PCP had placed the claimant at a substantial disadvantage, the claim of failure to make a reasonable adjustment should fail.

Reasonable adjustment: Wages role

171. The respondent had accepted that the PCPs of requiring the role of Customer Services Adviser to be carried out whilst standing up, standing for prolonged periods, and/or without a chair and carried out whilst standing on the store's standard hard flooring placed the claimant at a substantial disadvantage. We therefore turned to the question of whether it would have been a reasonable adjustment to move the claimant to the Wages role.

172. We concluded that the only reasons that the claimant was not offered the Wages role was due to the decision, taken by Darren Bridge, the respondent's manager interviewing for the role, that the hours for the Wages role were inflexible, coupled with the fact that no-one discussed with the claimant or Mr Bridge whether there could have been any flexibility with that view.

173. In the context of the obligation to make reasonable adjustments for the claimant, it was not within our comprehension why this was not addressed by the respondent. We accept that Mr Bridge may not personally have known of the claimant's disadvantaged position, but the respondent as an organisation and as employer of the claimant, did. We fail to understand why the respondent allowed Mr Bridge's inflexible position on the hours required for the role to arise, in the context of the respondent's obligation to make reasonable adjustments for the claimant.

174. Even if concerns had been held that as the claimant wanted to ensure a certain level of confidentiality regarding her impairments, no or limited information could be provided to Mr Bridge about the claimant's needs, this could and should have been easily addressed:

    a. either by simply speaking to the claimant to explain the need to disseminate to Mr Bridge the obligation to consider some adjustment to the Wages role to accommodate the claimant and alleviate the disadvantages that she was being subjected to; and/or

    b. putting in place some system whereby Mr Bridge was told or asked to consider if the role could be accommodated on a reduced hours basis.

175. We had no explanation from any of the respondent witnesses why the hours to the Wages roles could not have been adjusted for the claimant. Whilst Darren Bridge may very well have been able to offer an explanation, he gave no evidence and none of the respondent's witnesses before us, including Ms Cooze could proffer any explanation.

176. The claim of a failure to make this reasonable adjustment is well-founded and succeeds.

177. *Date for adjustment:* Having been unable to make findings as to when the claimant would have moved into this role, we concluded that the move to the Wages office role would have taken place on or around 1 May 2018 i.e. following the Wages role interview in April 2018.

Discrimination arising from disability (section 15 EA 2010)

178. In relation to s.15 EqA claim it is accepted that the unfavourable treatment was that the claimant did not receive salary whilst she was off work on sick leave.

179. We then considered the cause for the treatment. The claimant's position was that the 'something arising' in consequence of her disability was her absence from work which arose because she was unable to continue in work in her role, from July 2016 to February 2017, and again in September 2018, because of the lack of reasonable adjustments.

180. We considered that the medical evidence established that the claimant also had significant periods of sick leave unrelated to the impairments that she was relying on to support her disability discrimination claims. The medical evidence also demonstrated to us that the claimant was not fit for work in any capacity during the periods of sickness absence. The FIT notes did not indicate that the claimant could return but with adjustments in place. There was no medical evidence to support the claimant's contention that she was off work because of the failure to make reasonable adjustments.

181. We also considered that the claimant had been in work for lengthy periods, despite the lack of adjustments.

182. Whilst we accept that the claimant did raise the issue of reasonable adjustments and articulated to the respondents that she was struggling in work we were not satisfied that the claimant had established the requisite connection as a matter of fact, between her absence and the failure to make a reasonable adjustments.

183. The claim of discrimination arising from disability is not well-founded and is dismissed.

Harassment (section 26 EA 2010)

18 July 2016

184. We concluded, as was accepted by the respondent, that there was some discussion with the claimant about occupational health being busy and that Ms Davies had referred to other staff being ill with cancer.

185. The comments were so historic however that we were unable to conclude precisely what was said. We concluded that as memory recall would not be that detailed, that the claimant was unable to persuade us, on balance of probabilities, on exactly what was said.

186. We were also unable to conclude that the comments were said in the manner or the tone as implied by the claimant. We noted that even in the claimant's own witness statement, she did not say that Ms Davies was annoyed at her, rather that she '*seemed'* annoyed.

187. The claimant did not complain about Ms Davies' comments or conduct at the time, later that summer in her September 2016 correspondence, or indeed at any time in any of her meetings with the respondent's managers that followed. It was not until March 2018, when she brought her grievance, that she mentions the discussion. Whilst we acknowledged that it is not always be easy for an employee to make an immediate complaint, the claimant did not appear to us to be an employee who had difficulty in raising concerns and we did consider that the fact that she failed to complain was a factor in determining whether the claimant could establish that it had either taken place as she had indicated or that any comment had the proscribed statutory effect or purpose

188. We were therefore not satisfied that the claimant had demonstrated to us either, through her own written statement or on cross-examination, that any comments made by Ms Davies, and/or conduct of Ms Davies as the claimant had presented them, were

    a. of sufficient seriousness to amount to harassment; or
    b. had, in any event, either the proscribed statutory purpose or effect

    to establish a case for harassment.

189. We concluded that had the claimant had not been subjected to harassment on the grounds of her disability on 18 July 2016 and that her claim was not well-founded and was dismissed.

27 March 2018

190. Whilst we accept:

    a. that on 27 March 2018, Kirsty Cooze and Matt Wannacott spoke directly to John Keough immediately before and after the Claimant's assessment;

    b. that the claimant's consent should have been requested in accordance with the respondent's own' Supporting Colleagues with Disabilities'; and

    c. that the outcome of the claimant's grievance appeal was that this part of her grievance was upheld,

    we were persuaded by the respondent's arguments that the fact of discussing reasonable adjustments with the acting Store Manager without the claimant's express consent did not meet the threshold of harassment.

191. Further, we also considered that on 27 March 2018 the claimant was not in any event aware of what was being discussed. On the day, she was simply annoyed that a

discussion was taking place irrespective of the content or detail of the discussion. The detail of the discussion only came to her knowledge following the outcome of the grievance.

192. Whilst we accepted that this was a case where the effect of the meeting had the proscribed effect on the claimant, we also concluded that this was not a case whereby the respondents intended the meeting to have the proscribed effect on the claimant.

193. We did not accept that the simple fact of a meeting between the occupational adviser and management could not be said to amount to any harassment of the claimant related to her disability.

194. Having found that Mr Keough was discussing reasonable adjustments without the claimant's consent, taking into account both

    a. the claimant's perception of that meeting; and
    b. the other circumstances of that case i.e. that Mr Keough was at the store to undertake an assessment of the claimant and the workstation, that Mr Wannacott was acting store manager that day and that they did not discuss the claimant's condition

    we considered that it was not reasonable for the conduct to have had the effect on the claimant and that it was not in any event, sufficiently serious to warrant the effect that it had on the claimant.

195. We concluded that as a result the claimant had not been subjected to harassment on the grounds of her disability in relation to the 27 March 2018 discussions and that her claim was not well-founded and was dismissed.

196. The case will be listed for a one-day remedy hearing.

Employment Judge Brace

10 February 2020

Sent to the parties on 11 February 2020

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For the Tribunal: