



EMPLOYMENT TRIBUNALS

Claimant: Ms A Karim
Respondent: Tesco Stores Limited
Heard at: East London Hearing Centre
On: 1, 2 and 3 December 2020
Before: Employment Judge McLaren
Members: Ms J Land
Dr L Rylah

Representation

Claimant: In person
Respondent: Mr. P Gorasia, Counsel

JUDGMENT

The unanimous decision of the tribunal is that

1. **The claimant is disabled**
2. **Her claim for direct discrimination fails.**
3. **Her claim for discrimination arising from disability fails**
4. **Her claim for failure to make reasonable adjustments fails**

REASONS

Background

1. We heard evidence from the claimant on her own account and from Mr Y Damalitis and Mr B Osei-Tutu on behalf of the respondent. We were provided with a bundle of 238 pages as well as 2 additional documents. These were the handwritten notes of the meeting of 30th May 2019 and a letter from the claimant's GP dated 9th September 2020.

2. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by helpful submissions from both parties.

Issues

3. There had been a number of preliminary hearings on this case and the parties were directed to finalise the issues list following a preliminary hearing on 23rd June 2020.
4. The claimant brought claims of unfair dismissal, direct discrimination, discrimination arising from disability and failure to make reasonable adjustments.
5. At the outset of this hearing both parties confirmed the agreed issues were as set out at pages 38I-38K of the bundle.

Finding of facts

6. There was very little dispute of fact between the parties. The claimant started working for the respondent on 19 November 2009 as a customer assistant on the checkouts.
7. Her employment ended on 23rd April 2019 when she was dismissed for conduct and paid her notice monies. The claimant wishes to be re engaged into a role she can carry out as that will help her address her depression most effectively.

Medical evidence of depression

8. The bundle contained copies of the claimant's GP records. The history is as follows. The notes show that on 14 July 2014 the claimant attended the surgery and the GP's notes refer to "possible depressive symptoms". This is not a diagnosis of depression.
9. In March 2015 the claimant meets the doctor who makes reference to the fact that she feels she is easily upset, she feels staff are looking at and talking about her and she feels at times people may be waiting for her at home. The notes record that the GP would like to refer her for a psychiatry review and then, when it was explained the claimant this was by a doctor and was an opinion only, she agreed to be seen.
10. The bundle contained at page 44 a letter to the claimant's GP from North-East London Mental Health services dated 24 April 2015 stating that the claimant had not attended appointments with the assessment team and in fact had contacted that assessment team to explain that she no longer felt she required intervention. The letter records that the claimant says with hindsight she feels the symptoms she described to the GP were her imagination and that she had not experienced any more symptoms for at least two months. The letter concluded with a request from the assessment team that the claimant's mental health continue to be monitored.
11. The claimant told us about this. She recalled that a doctor had turned up at her home and her parents had told them that she was out. She had been persuaded by her parents that it would not be wise to see this individual in case it meant that she had to take time off work and therefore lost her job. Her family said that they would support her with her depression at that point. We find that the claimant did continue to suffer from symptoms, despite what she said to the assessment team and that she gave them the explanation they record from concern about the impact of her illness on her job.

12. There is no further reference to depression in the GP's notes or any other medical evidence provided by the claimant until after the claimant's dismissal when, on 24 April 2019 the claimant's sister rings worried about the claimant's mental health

13. As part of the dismissal process the claimant obtained a letter from her GP and this was at page 45 dated 24 April 2019. That letter stated that the claimant had a depressive episode in 2014 which resulted in counselling sessions and that she has had recurring depressive symptoms which sometimes affected her work. This letter also noted that the claimant was reporting difficulties in most of her activities of daily living. It's suggested that the claimant had confirmed that more flexible working hours would be helpful to improve her mental state.

14. There was additional correspondence that shows that after dismissal the claimant has continued to have support with mental health issues including talking therapies and cognitive behavioural therapy. As of 20 January 2020 her GP notes that she was at that point taking medication to assist and was currently stable. This letter also notes that the claimant's depressive episodes have persisted since the initial episode reported on 14 July 2014.

15. The claimant was very clear that she suffered from depression from at least 2014. She explained its impact on her was to give her difficulty with recollection and difficulty in concentrating. It also affected her mood. It made her lazy and that she was not able, for example, to continue to go and see her GP and it made it difficult to get up early in the mornings.

16. The GP's initial note is not ,as we have noted ,a confirmatin of depression, only a suggestion of this as a possibility.While that is the case the first page of the notes under the heading active major problems,states "Depression". It is unclear at what point the tentative diagnosis becomes a firm opinion but we conclude that it has done so.

17. The question of disability is a matter for the tribunal to decide.We find, based on the evidence before us, that the claimant had an ongoing depressive illness from 2014 which had a substantial adverse impact on her ability to carry out day-to-day activities.

History of disciplinary warnings

18. The claimant accepted that throughout her employment there had been issues over her practice at the checkout. She was taken to the document at page 70 which was a summary history of the various discussions that had taken place since 29 May 2010 about breaches of procedure in relation to her checkout activities.A significant number predate the depression.

19. The claimant accepted that the respondent originally took an informal route, and there were informal discussions about double scanning and /or overcharging customers on 16 October 2012, again on 5 July 2013, again on 5 November 2013 and on 11 July 2014.As a part of this process she was provided with a breakdown of steps to take to avoid the errors.

20. It was also common ground that on 5 May 2015 she was issued with a first written warning over double scans. On 14 August in the same year she was issued with a verbal warning about double scanning. On 8 July 2017 she was issued with a verbal warning over double scanning and till shortages. On 27 July the respondent held a “let’s talk” session with her over double scanning items, the claimant accepted this was a supportive conversation about the issue.

21. That did not resolve matters, however and on 3 October 2017 the claimant was issued a first written warning for overcharging a customer . A few months later, on 13 February 2018, she was then issued with a final written warning for overcharging a customer. That warning was expressed to last for 26 weeks. Unfortunately, the matter occurred again and on 5 February 2019 she was issued with another final written warning about letting a customer walk out without paying and this warning was expressed be live for 52 weeks.

22. There was no dispute that the respondent acted in accordance with its own policy on these matters. At all the meetings which amounted to official disciplinary action (other than at the appeal meeting against the dismissal) the claimant was accompanied by the same trade union representative. Both he and the claimant signed the notes that were produced of these meetings. No questions at the time were raised as to their accuracy. The claimant did not appeal against any of these disciplinary sanctions.

23. We find that as at the date of the disciplinary meeting that led to the claimant’s dismissal, the claimant had a valid final written warning on her file. This had been given after multiple incidents over a number of years. The claimant had been supported during the time she worked for the respondent with training and coaching. The respondent could, under its policy, have moved to dismissal at an earlier stage, but had not done so. Instead it had given the claimant many opportunities to improve and supported her to achieve this.

The respondent’s knowledge of the claimant’s depression

24. The claimant was adamant that she had made individuals within the management chain of the respondent aware of her depression prior to her dismissal. She told us that she had mentioned this to Mrs Jez Saggi, who she told us joined checkouts in 2018 to 2019 as her checkout manager. The claimant also told us that she had mentioned this to her senior customer services manager, Mrs Razna Uddin in 2018 and that she mentioned this at a couple of meetings that they had together.

25. The bundle contained notes of the meeting between the claimant and Mrs Uddin which formed part of the disciplinary procedure on 3 October 2017. This is before the date on which the claimant says she mentioned her disability to this individual and there is certainly no reference to it in the meeting notes.

26. At this meeting the claimant was represented by a trade union official and she signed as accurate a copy of the notes. They confirm the claimant understood the seriousness of the matter and that she could lose her job for double scanning. She gave an explanation as to why it happened and suggested that she felt like she had been set up. The claimant expanded on that in answer to cross examination questions and said that she felt that some customers were perhaps setting her up and waiting until she was busy.

27. In the notes the claimant confirmed that she's had enough training which has been really good. The claimant also confirms that she wants to stay on checkouts and rejects the suggestion from Mrs Uddin that checkout was not the right department for her. The claimant also rejected a suggestion that someone else sit with her to assist on the basis that she would get distracted.

28. Given that the claimant tells us that she was suffering from depression from 2014 it is perhaps surprising that, when asked for an explanation of the cause of her double scanning issues she does not make any mention of depression, but instead puts forward a theory about being set up by customers which she repeated to us in her answers. We conclude that, whatever the claimant's analysis of events now is, at that time she did not acknowledge depression as a potential cause of her problems and she did not raise it with her line management chain at this point.

29. Page 124 of the bundle contained notes of a further meeting with Mrs Uddin on 13 February 2018, which, from the claimant's account, is after she had made this individual aware of her disability. This is also a disciplinary meeting. In this meeting the notes record that the claimant is asked if she wishes to be moved from tills and she says no. She is also asked for an explanation and says she does not know how the double scan happens.

30. She is recorded as saying again that she does not want to change her department. The claimant say that a lot goes on in her brain and "I need to change myself". There is no reference to depression, nor do we find that this comment would alert an individual to potential depression.

31. At this meeting Mrs Uddin is recorded as asking the claimant if she is aware that if she continues to make mistakes she will lose her job and the claimant says that she is. The meeting is adjourned and in the second half of the meeting the claimant is asked if there is anything she wants to add and she says no. She confirmed again that she is happy where she is and does not want to move department and Mrs Uddin tells her there is nothing else they can do for her and she needs to understand the seriousness of the double scan.

32. The claimant confirmed that she does understand that and says give her two weeks, if she double scans again she will leave herself. There is no reference in these meeting notes to the claimant giving her depression as an explanation. Her offer to leave voluntarily is at odds with her having advised the respondent of her depression.

33. The claimant suggested that the notes were inaccurate and it was not her fault that they had not properly recorded the fact that she had raised her depression. We find that the notes are accurate. They are signed by the claimant at the time when her memory is likely to be clearer as to what was said her recollection now. They were also signed by her trade union representative. The notes do not record him raising any questions about depression or making any reference to that either. If, as the claimant said, he was aware of this and the depression being the reason for the claimant's conduct we would have expected him to raise it even if the claimant did not. That does not happen and we conclude that the issue simply was not mentioned.

34. We were told by both Mr Damilitis and Mr Osei- Tutu that there were no records on the claimant's personnel file that indicated she had raised the issue of depression. Had she done so occupational health support would have been available to her. We accept their evidence that there is nothing on the claimant's personnel file. This is consistent with the fact that it is not mentioned in any of the disciplinary notes prior to dismissal.

35. Mr Osei Tutu accepted that there would only be something on her file had there been a referral to occupational health. He told us that either a manager or an HR colleague could make a referral on behalf of an individual. Mr Damilitis told us that only a manager could refer. On balance we prefer the evidence of Mr Osei Tutu as he appeared to have a greater in-depth knowledge of the respondent's procedure in this area. We find therefore that the claimant could have self referred and did not.

36. We have found,as set out above, that the claimant had not shared knowledge of her illness with her line managers. However, both Mr Damilitis and Mr Osei Tutu were made aware by the claimant of her depression and both confirmed they believed the claimant when they chaired respectively the dismissal and appeal meetings. She told them she was suffering from depression and they accepted this.

37. Both were also clear in the evidence they gave the tribunal that they thought this could amount to a disability. Neither individual decided to pursue an occupational health referral and they told us this was because it was not required. It would merely confirm what the claimant had told them. On the basis of the evidence they gave to us today, we find that both individuals involved in the dismissal and appeal were on notice of the claimant's disability.

The disciplinary event which led to dismissal

38. Again, it was common ground that a further incident took place on 10 April 2019 regarding a product not being scanned on a customer transaction. Page 149 is the start of the notes of an investigation meeting which took place on 13 April. The claimant confirms that she could not remember all the details of the customers but she saw herself on CCTV and it was definitely her that failed to scan the item. She is asked after that if there is anything she's not sure about and the claimant says that she wants to say one thing, she doesn't whether it's too early to say but she has so much going on with her own life. She is advised that the hearing is a chance to say anything she feels she needs to discuss and she accepts that.

39. The claimant is invited to a disciplinary meeting by letter of 18 April and that meeting takes place on 23 April. The claimant was again accompanied by the same trade union representative who had been with her throughout all her previous disciplinary issues and the meeting was again noted. Those notes were signed by the claimant and her representative as being accurate.

40. Mr Damilitis was the chair of that meeting and the decision-maker. The notes show that when the claimant is asked to describe what happened she says she does not know how it happened but had a lot on her mind, "depression, stress and family issues". She confirmed that she understood the importance of

correctly charging customers and that she was responsible at the point of purchase.

41. Mr Damilitis asked her to describe why there seemed to be a lack of concentration and the claimant replied that if someone was talking to her she gets confused. She expands on this when she is asked if she has any other thoughts when she explained that in around 2012 she started thinking that Tesco was stalking her, that Tesco people were around her at home. She explained that she had seen the GP but her family dissuaded her from any further action in case she lost her job. She explained that this was about two years ago. She had been referred to a psychiatrist but did not see them.

42. The claimant asked whether, if she got a letter from her GP it would assist. She repeated again that the GP had said to go for a scan and maybe speak to a psychiatrist for help but her parents had persuaded her to cancel this.

43. The meeting was adjourned for a decision and Mr Damilitis set out in his witness statement that he considered a number of things. The claimant had not disputed the allegation and this had a financial impact and a secondary impact on the stores stock records. He was aware that the claimant had previously received training and had been informed of the impact on many times during his employment. She had confirmed during the hearing that she understood the impact. He also considered that the claimant had had a series of warnings for very similar issues over the years and had not improved or taken any action to try to improve.

44. He concluded that the claimant had demonstrated a concerning pattern of behaviour and that her failure to follow process had repeatedly cost the respondent money. Because the claimant had admitted the misconduct he gave further thought to potential mitigation of any disciplinary sanction. He took into account the fact that she was honest about her actions and he was confident that she was not tried to steal from Tesco ,but considered that was a serious pattern of behaviour showed a significant lack of care on the claimant's part. He also carefully considered the claimant's comments about her depression. He reached the view the information had a very limited impact on the current disciplinary case.All she had said was that she was distracted when some one talked to her but also there was no distraction when the incident with the umbrella had taken place.

45. Mr Damilitis also considered whether it was possible to transfer the claimant to an alternative department. The claimant had not suggested this during the hearing, but nonetheless he turned his mind to this point. He concluded that it was not possible because colleagues from other departments are frequently asked to help out in the checkout during busy hours and therefore it was likely that she would have to perform checkout duty during any shift. Staff need to be multiskilled. He therefore concluded that the only possible step was to dismiss the claimant with her contractual nine week notice.

46. We asked Mr Damilitis why he did not consider waiting for additional medical evidence, such as the letter from the GP that the claimant had suggested she could provide. He told us that in his view it would make little difference. The conduct was not disputed. The lack of concentration to which the claimant

referred meant that there were no other roles that she would be able to do inside the store. Additional medical evidence would not have assisted.

The appeal hearing

47. The claimant appealed her dismissal sending a letter of 1 May 2019 which enclosed a copy of a letter from her GP of 24 April. This letter is referred to above and states that the claimant had a depressive episode in 2014 and that she has recurrent depressive symptoms which affect her work sometimes. It is this letter that makes the claimant's request for more flexible working hours. The appeal hearing was arranged and Mr Osei Tutu was appointed as the appeal chair.

48. His statement confirmed that he had experience of the disciplinary procedure and that he has in the past overturned decisions on appeal. In accordance with his usual practice he reviewed the papers prior to the appeal hearing and he was therefore aware that the claimant had received a series of warnings for similar conduct. He was also aware the claimant had raised that she had been feeling unwell and referred to depression. This is a point he wants to explore with the claimant at the appeal meeting.

49. That meeting took place on 30 May 2019. Both the typed and handwritten notes had been provided to us, the typed notes, being at pages 182 -186. The claimant again disputed the accuracy of these notes but for the reasons set out above we conclude that they do reflect what was said by the parties at the time. The claimant explained that she thought she was unfairly treated, that she had mentioned depression and explained again that she had visited her doctor five years ago and was referred to a psychotherapist. While that individual had made a home visit she had not opened the door and her parents had told him that she was not there.

50. The claimant was asked her reason for appeal and she said that she explained to Mr Damilitis that she was going through depression and that she could provide letters of proof, but he dismissed her anyway.

51. The claimant was asked whether she thought it was a mistake not having taken the treatment and she confirmed that she wished she had taken it as it had become worse. She was also asked about why she had not moved to another department. The claimant said that she was offered clothing, shop floor and fish counter but she had a bad back, could not deal with cold or standing too long. During the hearing the claimant also told us that she had a significant heat allergy and could also not work in an area that was too warm. Her GP letter had also suggested more flexible shifts to assist her depression.

52. The claimant now says that she did not accept a move to another department because she feared that her hours, and therefore her money, were going to be cut. This is not something that she volunteered at the time. It is not something that is referred to in the notes of the meetings with Mrs Uddin when she asks the claimant about moving departments. Mr Osei Tutu did tell us, however, that if a colleague is moved to a vacant role, they are moved to the hours for that job. We find that the claimant was not told this nor did she articulate this to the respondent as a reason for not moving and they were not therefore able to assist her with any information on this point. The respondent

was therefore faced with an individual who was refusing to move to other departments and had given no reason for this.

53. The claimant was also asked what would be different were she to be reinstated and she said he did not know. She confirmed she would like another chance to start again with less hours and overtime, shorter days and maybe six hours a day because she needs to get out the house and not think about what is happening to her. The notes record Mr Osei Tutu as reading the GP letter. He then adjourned the meeting for around an hour and ½ to make his decision.

54. During this adjournment we were told today that Mr Osei Tutu took the opportunity to phone Chris, a senior manager at the store at which the claimant worked. He did so because the claimant makes reference to having told Chris about her depression at the beginning of the meeting. He did not make a note of the questions he asked this individual or the answers they gave. He did not share the information about the call or its contents with the claimant. He told us that Chris had said the claimant had not mentioned her depression to him. Nonetheless, in answer to questions from the panel, Mr Osei Tutu confirmed that he did believe that the claimant was suffering from depression.

55. After the adjournment Mr Osei Tutu gave the claimant his decision and that is recorded in what must be a summary form in the notes of the meeting. He also expands in his witness statement on the matters that he considered. Some of the points he makes his witness statement were contradicted in the evidence he gave to us today. His witness statement at paragraph 23 stated that he did not think that there was information that showed a link between the claimant's symptoms and the failure to follow procedure on the checkout. His witness statement repeats paragraph 27 that he did not think the symptoms of depression were relevant to her misconduct.

56. In answer to our questions he said that in fact he thought there could be a link between the lack of concentration and her depression.

57. Mr Osei Tutu also expanded on some the things that he told us he thought about during the adjournment. In the context of considering potential reinstatement, although that was not his decision, he said that he reflected on the period of time that the claimant would need to be absent for medical treatment and thought about whether she could take advantage of a lifestyle break which could allow up to 12 weeks off work to take advantage of the therapy that she now was keen to seek. This is not mentioned in his witness statement or in the summary note of his decision.

58. We accept his evidence that he bases decision on the following. The claimant had not denied the misconduct had occurred or that she had been offered the opportunity to move to other departments that had declined. He considered whether a transfer to another department would be appropriate at this point but there was no guarantee that any other department would have a suitable vacancy. Also in any other department the claimant would still be required to step onto the checkout if the store was busy as that was standard practice. He was concerned that if she was only working the checkout in busy times it could mean that double scanning and other issues were more likely to occur as she would be working under the pressure of a busy time in the store. He therefore upheld the decision to dismiss.

Allegations of direct discrimination

59. The claimant makes specific allegations of direct discrimination. She states that Mr Osei Tutu said three things to her, that she was using the letters to get her job back, that in reference to correspondence from the claimant's GP, that instead of getting a job back she should seek treatment for her depression and that he did not accept her medical letters. Mr Osei Tutu denies making these comments.

60. The first two comments are not directly or indirectly recorded in the notes. We have previously accepted the accuracy of the respondent's notetaking process and find again that the notes of the appeal hearing are an accurate record of what was said. We therefore find that these two comments were not made by Mr Osei Tutu.

61. The comment about instead of getting a job back she should be seeking treatment for her depression is also not in the notes. It is possible, however, that the claimant misheard or misconstrued, a comment that he did make. Mr Osei Tutu accepts that he said the claimant had told him that she was unwell and he advised her she should focus on getting better. This was intended to be a supportive comment and was made in sympathy, partly because of his own experience with the effects of depression in a family member. The notes of the appeal meeting record this comment and we have readily accepted the accuracy of these notes. We therefore find that the comment was not made in the terms the claimant states.

62. The claimant has stated that they were made because she was disabled but she simply makes this assertion. We accept Mr Osei Tutu's account that he did not make the comments that are attributed to him and any comments he did make were indeed, as he has told us, intended to be supportive. They were not made because of her disability.

Reasonable adjustments

63. The claimant considers that the respondent should have offered her the option to transfer to a different department rather than to dismiss her. We have noted the number of occasions the claimant refused any such transfer. We find that it was considered by both the decision-maker and appeal chair as part of the dismissal process.

64. They both concluded that there was no role within the store which did not involve going on the tills at some point and therefore that aspect of the role could not be avoided. The claimant was convinced that the respondents could have offered her a role restocking the baked goods within the store, reviewing their expiry dates and repricing as well as removing such goods and packaging. She also gave evidence that she needed a role with a later start time so that she could take her time getting ready and dressed to leave the house. She needed a role which would allow her to do her job properly, but with opportunities to relax and be calm. She needed a role that would allow her to take regular breaks and additional breaks as required.

65. The details of this possible job were explored in more detail by the respondent's witnesses. They explained that the role as described by the claimant did not exist. There was a role that required the morning goods to be

taken in cages onto the shop floor and put onto shelves. At set times during the day the role also involved checking the PDA system ,which is linked to stock control, to identify items that needed to be discounted, printing out those labels and putting them on the goods. The role also requires stock reconciliation where items appear to be missing or are out of kilter with the automated stock records. Gap checking was an active part of the role. There was a further element which was legal and safe checks. At set times of the day there is an obligation to check particular things, for example the temperature the fridges in which fresh cream products are kept, the safe removal of any slip or trip hazards. All these things had to be dealt with and recorded.

66. While the store in which the claimant worked has some 300 to 350 colleagues in it, the individuals who work on restocking the morning goods generally work a very early shift. Of all the colleagues in the store only some 40 or 50% work the hours that the claimant worked on the till. It was likely that any such role would require much earlier hours which the claimant has identified were not suitable for her.

67. Both witnesses also made it clear that every role had to be able to man the tills at busy periods. This is a business with a high turnover but low margins and one of its differentiating factors is its level of customer service. In order to maintain that, it's important that whenever a queue builds up staff can be deployed from other roles onto the tills. The respondent could not create a role where that did not happen.

68. We were told of one exception to this in Mr Osei Tutu's store where one individual is excused from till duty but instead at busy times assist with customer service by removing long and heavy stacks of trolleys around the car park and the store to make sure they're available for customers. This would not be suitable for the claimant

69. A role on the shop floor generally was mentioned. Both the respondent's witnesses gave evidence that on the shop floor there was significantly more customer interaction. We accept the evidence of the respondent's witnesses that they did not consider any such role, even if it existed, to be suitable because the claimant was likely to be more distracted and have even more customer contact.

70. We accept the respondent's position that the claimant's main symptom is an inability to concentrate. The respondent does not have any roles where an inability to concentrate would not have consequences on customer service and brand perception.

Relevant Law

Disability discrimination

71. Section 6 of the EqA, provides:

“(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities. ...

" 15. Section 212(2) of the EqA provides that an effect is substantial if it is more than minor or trivial.

16. Paragraph 2 of Schedule 1 to the EqA sets out the definition of "long-term" in this context.

It provides: "(1) The effect of an impairment is long-term if –

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months,

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

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur..."

17. It is not in dispute that the term "likely" in this context means something that "could well happen", and is not synonymous with an event that is probable: see *SCA Packaging Ltd v Boyle* [2009] ICR 1056 per Lord Hope at [2], Lord Rodger at [35], Baroness Hale at [73] and Lord Brown at [78]. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the EqA is to be assessed as at the time of the alleged contravention: see *McDougall v Richmond Adult Community College* [2008] ICR 431, per Pill LJ at [24] and Rimer LJ at [33].

18. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the EqA.

Direct discrimination

72. S.13(1) of the Equality Act 2010 (EqA) provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

73. A successful direct discrimination claim depends on a tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. It is for the tribunal to decide as a matter of fact what is less favourable. The test posed by the legislation is an objective one — the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.

S 15 discrimination arising from disability

74. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if: A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) goes on to state that '[S.15(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.'

75. We were referred to *Pnaiser V NHS England* which summarised the proper approach to establishing causation under S.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

76. Any allegation of discrimination arising from disability will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

77. We were referred to *Henman v ministry of defence* where, the EAT held that the tribunal had failed to have regard to the business considerations of the employer — in particular, the employer's business needs — when assessing proportionality

Reasonable adjustments

78. The duty to make adjustments comprises three discrete requirements, any one of which will trigger an obligation on the employer to make any adjustment that would be reasonable. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person — S.21.

79. The first requirement which is relevant here applies where a provision, criterion or practice (PCP) has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

Burden of proof

80. In *Igen v Wong Ltd* [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts

have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

81. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

82. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground (see B v A [201 O] IRLR 400, per Underhill Pat [22]). Therefore 'something more' than a difference of treatment is required.

Unfair dismissal

83. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the parties agree that the reason was conduct and it was the respondents position that the conduct included dishonesty.

84. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

85. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

"... the determination of the question whether the dismissal is 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.

86. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful

not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Conclusion

87. We have considered the relevant law as we have set it out, together with our findings of fact and have reached the following conclusions when considering the agreed issues list. We address the issues in the order set out in that list.

88. We have considered the claim of unfair dismissal. We have accepted that the claimant had a live final written warning at the time of her dismissal, she was dismissed with notice rather than for gross misconduct and she admitted the conduct for which she was dismissed. She had previously acknowledged that she had had training, she had requested not be moved from that area. We conclude that the respondent therefore carried out a reasonable investigation in the circumstances and dismissal was within the reasonable range of responses. On that basis the claim for unfair dismissal does not succeed.

89. The issues list contained a question of jurisdiction, but the respondent accepted that that did not arise. We have therefore made no finding on this point

90. We have found that the claimant was disabled, that a disability began in 2014 and was ongoing at the time of her dismissal. We have found that the respondent was on notice of the fact of her disability.

91. We have found that Mr Osei Tutu did not make the comments about which the claimant complains as direct discrimination. The complaint of direct discrimination is therefore dismissed.

92. The claimant says that she was discriminated arising from her disability and that the something arising is her "propensity to make mistakes". This propensity she says was the reason that she was dismissed and is accepted the dismissal would be unfavourable treatment.

93. We find that the reason the claimant was dismissed was because she made continual mistakes. We note that she made such mistakes and was put through a formal and informal disciplinary process prior to 2014 when she was first diagnosed with depression.

94. We are, nonetheless, prepared to accept that her depression causes the mistakes. It is these mistakes that lead to dismissal. We have already concluded that the decision-maker and appeal chair had notice of her disability and the potential link between this and her actions.

95. We conclude, however, that dismissal was a proportionate means of achieving a legitimate aim and the respondent was entitled to rely on its legitimate aim of maintaining revenue, accurate stock levels, stopping revenue from being lost in failing to collect payments from customers and maintaining confidence in the competence of staff to carry out their duties. The claim is therefore dismissed.

96. Finally, a complaint of failure to make reasonable adjustments is made. We have already found that the respondent knew that the claimant had a disability at the time of the dismissal. It did not, however apply the provision, criteria or practice of dismissing employees who repeatedly made mistakes. The claimant's own history shows that is far from the case. Indeed, the respondent

seems to go to great lengths to avoid dismissal giving the claimant in this case many opportunities to improve her performance.

97. The claimant's case therefore does not succeed on this basis, but we also gone on to conclude that there were in fact no reasonable adjustments that could have made. Given the way in which the claimant's disability manifests itself, we accept the respondent's position that there is simply no role within the store that could be adjusted to accommodate her lack of concentration.

98. For these reasons we dismiss all the claimant's claims

**Employment Judge McLaren
Date: 3 December 2020**