EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Neil Duke	**AND**	**B & M Retail Limited**

JUDGMENT OF THE TRIBUNAL

Heard at: Manchester **ON: 14 – 18 September 2020**

Before: Employment Judge A M Buchanan
Non-Legal Members: Mr G Pennie and Mr S Hussain

Appearances

For the Claimant: Mr Lee Bronze of Counsel
For the Respondent: Ms Laura Kaye of Counsel

JUDGMENT having been sent to the parties after the conclusion of the hearing on 18 September 2020 and reasons having been requested, the following reasons are provided:

REASONS

Preliminary matters

1.1 The claimant instituted proceedings in the Liverpool Tribunal on 17 January 2019 supported by an early conciliation certificate on which Day A was shown as 9 December 2018 and Day B as 7 January 2019. A response was filed on 20 February 2019 in which the respondent denied all liability to the claimant.

1.2 At a private preliminary hearing before Employment Judge Ryan on 12 June 2019 the various claims advanced and the issues arising for determination were defined and case management orders were made. Those orders included the listing of a public preliminary hearing ("PH") to determine whether the claimant was a disabled person pursuant to section 6 of the 2010 Act at the material time, whether the claims advanced by the claimant were in time and, if not, whether time should be extended and whether any or all of the claims had no or only little reasonable prospect of success.

1.3 At a public PH before Employment Judge Hoey on 4 November 2019 it was determined that the claimant was a disabled person at all material times and that all claims advanced were advanced in time. No strike out or deposit orders were made.

1.4 The matter came before this Tribunal as set out above. Reasonable adjustments were made to the conduct of the hearing to accommodate the disability of the claimant. The claimant attended by cloud video - platform but all other parties were present in the Tribunal room. Due to an administrative error, the parties attended the wrong tribunal office on 14 September 2020 and therefore the hearing did not begin properly until 15 September 2020.

1.5 An oral judgment was given on 18 September 2020. After judgment had been announced counsel for the parties asked for time to discuss remedy. After 90 minutes counsel returned to say that all matters were agreed but final authority was awaited. As a result, and by agreement, the non-legal members were released (it being late in the afternoon) and the Employment Judge agreed to wait for the confirmation of settlement of the remedy issues. Some 90 minutes later, counsel attended to say that the authority would not be available until 21 September 2020. As a result, a short Judgment on Liability was issued and the question of remedy was adjourned for the parties to advise the Tribunal of settlement. Some days later a timely written request for these reasons was received. There was an administrative delay in that request being forwarded to the Employment Judge. These reasons are now issued pursuant to that timely request and the delay in being able to do so is regretted. In the event of any inconsistency between the oral and written reasons, these written reasons prevail.

The claims

2. The claimant advances the following claims to the Tribunal:-

2.1 A claim of direct disability discrimination relying on the provisions of sections 6, 13 and 39(2)(d) of 2010 Act.

2.2 A claim of indirect disability discrimination relying on the provisions of sections 6, 19 and 39(2)(d) of 2010 Act.

2.3 A claim of disability discrimination by failure to make reasonable adjustments relying on the provisions of sections 6, 20/21 and Schedule 8 and 39(4) of 2010 Act.

The Issues

3. The issues in the various claims advanced to the Tribunal are as agreed between the parties:

Knowledge of disability

3.1 Did the respondent know the claimant was disabled?
3.2 If so, when did the respondent have knowledge?
3.3 If not, ought the respondent to have known the claimant was disabled?
3.4 If so, when was it reasonable for the respondent to have known?

Direct Discrimination

3.5 Is the reduction of the claimant's salary, by agreement and following a request to transfer to a smaller store, detrimental treatment within the meaning of section 13 of the 2010 Act?
3.6 If so, did the respondent treat the claimant less favourably than:
3.6.1 Laura Brooks
3.6.2. Vicki Smith
3.7 Is there a material difference between the circumstances relating to each comparator's case?
3.8 Was the reduction to the claimant's salary by agreement and on transfer to a new store because of his disability?
3.8.1 Are there facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened section 13 (such that the burden of proof passes to the respondent)?
3.8.2 Can the respondent show that it did not contravene the provision - section 136(1) of the 2010 Act?

Indirect discrimination

3.9 Is the respondent's practice, relied on by the claimant, discriminatory in relation to the protected characteristic of disability within the meaning of section 19(2) of the 2010 Act?
3.9.1 The respondent accepts it has a practise of operating a pay banding structure for the store managers based on store performance ("the PCP").
3.9.2 The respondent accepts it applied the PCP to the claimant and other employees.
3.9.3 What is the particular disadvantage to a disabled person when compared to a non-disabled person? The claimant alleges a disabled person is more likely to work in a smaller and therefore lower banded store.
3.9.4 Did the claimant suffer that particular disadvantage?
3.9.5 What is the appropriate comparator pool?
3.9.6 Is there a causal connexion between disability and a particular disadvantage both in the comparative group and the individual disadvantage to the claimant?
3.10 Can the respondent establish that the PCP was a proportionate means of achieving a legitimate aim? The respondent relies on:
3.10.1 To ensure parity, fairness and consistency of store managers' pay nationwide
3.10.2 To ensure store managers at larger stores are properly and fairly remunerated for the higher-level management required in a store with higher turnover, a larger workforce and an increased workload.

Reasonable adjustments

3.11 Has the respondent failed to comply with its duty to make reasonable adjustments pursuant to sections 20/21 of the 2010 Act?
3.11.1 The respondent accepts it has a practice of operating a pay banding structure for the store managers based on store performance.
3.11.2 What is the substantial disadvantage to a disabled person in relation to a relevant matter when compared to a non-disabled person? The claimant alleges a disabled person is more likely to work in a smaller and therefore lower banded store.
3.11.3 Did the claimant suffer the substantial disadvantage?

3.12 What steps were taken by the respondent to alleviate the substantial disadvantage?
3.12.1 The respondent transferred the claimant to a smaller store closer to his home following his request.
3.12.2 The respondent offered the claimant a further transfer to a higher banded store (band 2).
3.13 Were the steps taken by the respondent reasonable in all the circumstances such as to alleviate the disadvantage? The claimant contends that the following would have been reasonable adjustments:
3.13.1 To maintain his salary at £28000 following an agreed transfer to a smaller store closer to his home
3.13.2 To back date the claimant's pay rise (from £24000 to £26000) awarded in October 2018 to May 2017.

Remedy
3.14 If the claimant is successful to what remedy is he entitled?
3.14.1 What are the claimant's losses arising from any discriminatory acts?
3.14.2 What is the appropriate Vento band to apply in the circumstances?

Witnesses

4. In the course of the hearing, the Tribunal heard from the following witnesses:

Claimant

4.1 The claimant gave evidence and called no other witnesses. We found the claimant to give his evidence in a straightforward manner. We note but do not adopt the small criticisms of the claimant as a witness referred to in the Judgment of Employment Judge Hoey.

Respondent

4.2 For the respondent evidence was heard from:

4.2.1 Darren Bagshaw ("DB") - the officer who investigated a grievance raised by the claimant on 22 July 2018. This witness was ill at ease in giving evidence and he was not an impressive witness. He appeared unsure as to his evidence at times and struggled to answer some straight-forward questions in cross examination.

4.2.2. Colin Rockcliffe ("CR") – the officer who dealt with an appeal from the decision of DB. This witness was more assured than his colleague and appeared to have a firmer grip on his own evidence. His involvement in the matter was late in the day and we conclude that he approached his role as grievance appeal officer in a spirit of trying to resolve an old issue which by then had been ongoing, not to say festering and causing problems, for some years. His approach was understandable and pragmatic but it meant that he did not address his mind to the question of disability and disability discrimination which by then were clearly to the fore. We note that both witnesses for the respondent (and for that matter the claimant himself as a store manager) had not received any training in the Equality Act 2010. The witnesses for the respondent evinced little understanding of the concept of disability and of their

duties under the 2010 Act. Given the size of the respondent company, we find this surprising at best.

Documents

5. We had an agreed bundle running to some 158 pages. Some pages were added during the hearing by the respondent with the consent of the claimant. An application by the claimant to add documents at the outset of the hearing was refused on the basis that such documents were not relevant. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

Findings of Fact

6. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given and having considered the documents to which we were referred, we make the following findings of fact on the balance of probabilities:

Background

6.1 The claimant was born on 16 September 1964 and commenced work for the respondent on 29 July 2013 as store manager in the Walkden store. In 2015 he was promoted to a bigger new store in Whitecroft, Manchester. The claimant moved to manage the store at Market Way Blackburn on 1 May 2017 at his request. The claimant continues to work for the respondent in that last capacity.

6.2 The respondent company employs around 30,000 people across over 600 stores in the UK. It is a retailer of goods throughout the UK. It operates a salary scale for its store managers and other staff members which grades stores between 1 and 5. The lowest grade is grade 1 which is defined as a store with annual sales of below £50k. The highest is grade 5 with annual sales of over £200k. Within each band there is a minimum salary and a maximum salary for the manager. There are similar scales for deputy managers, other managers and supervisors. We find that Area Managers have an element of discretion in the operation of those scales in relation to store managers. Twice each year the respondent considers the sales records of each store over the previous 13 weeks and, if sales figures indicate that a store has moved into a different band, it will be re-graded accordingly. However, any such move has no relevance to the salary of the Branch Manager ("BM") who remains at the salary band to which s/he was appointed. The incentive to increase sales for a BM is through a discretionary bonus. We have no evidence of that bonus system. The respondent has a large HR department based centrally in Liverpool which is the HR resource for the whole company. The current salaries attributable to each band of store were set out on page 96. The respondent's record keeping in this regard is poor and it was only very shortly before the hearing that it disclosed the 2017 figures (page 95b) which had been *"discovered in HR".*

6.3 The claimant's terms of employment were set out in a document signed 17 July 2013 (pages 70 and 72) showing his salary to be £26000 per annum. He was told to raise any grievance with his Area Manager ("AM"). During his employment which is ongoing, the claimant has had five area managers including Barry Whinpenny ("BW") who was his AM when he moved from Whitecroft to Market Way Blackburn in 2017.

His present AM is the witness CR. The actions of BW are central to certain of the claims advanced to us. We did not hear from BW and were told he did not give evidence because of his personal circumstances. BW retired from employment with the respondent in 2018. The claimant moved to the store at Market Way Blackburn on 1 May 2017 from when his annual salary was reduced to £24000 from its then current level of £28000. Revised terms and conditions were issued (Page 81) in 2018. The Whitecroft store was a band 4 store: the Blackburn store was a Band 1 store when the claimant moved to it but has subsequently been re-graded as a band 2 store. The claimant was told at his induction in 2013 that no manager was paid over the banding attributable to the store at which s/he worked.

Occupational Health ("OH")

6.4 On 15 September 2017 (page 90) an appointment for the claimant with OH was deemed necessary and should have taken place on 4 October 2017 but did not. The claimant did follow up that missed appointment on two occasions but when he received no reply, he took the matter no further. The only OH appointment to have resulted in a report on the claimant took place on 13 September 2019 (page 92) which is beyond the relevant date in relation to the various claims advanced in these proceedings. The 2019 OH report noted the claimant suffered from a bad back and a lung disease. The claimant was diagnosed with degenerative disc disease ("DDD") and lower back arthritis ("LBA") in 2007 and then in 2016 with Sarcoidosis. The claimant had made adjustments to his duties to take account of these conditions which amount to a disability. In 2019 the OH opinion was that he was fit to work but that, if operationally possible, the adjustments made by the claimant should remain in place and included a recommendation that he do "*mainly administrative work where possible".* Given the content of the Judgment of Employment Judge Hoey, we infer that had the report from OH been obtained, as it should have been, in 2017 then that same information would have been forthcoming. If the referral to OH (which we have not seen) contained a request for an opinion as to whether the claimant was disabled or not, no response to that question was provided and we infer the question was not asked.

Comparators

6.5 The claimant relies as comparators on two people:

6.5.1 **Laura Brooks**. This SM worked at Croston store band 4 and moved to Hyndburn band 3 at the request of the respondent in September 2018. Contrary to what CR initially wrote in his witness statement at paragraph 21, the salary paid to this comparator from September 2018 did not fall within the band of a band 3 store but lay in band 4. In fact, she received £1500 per annum over the maximum for a band 3 store.

On 1 August 2019 she moved at her request from Hyndburn to Hulme which is a band 2 store. She confirmed this request in writing at page 103 which confirms her understanding that her salary would drop to £28450. This was done after the claimant had filed his claim. There is no evidence of any manager moving bands and having a salary reduction prior to the claimant's claim being lodged. When this comparator moved at her request to Hulme, she retained a salary of £28970 which fell in band 3 notwithstanding that the store fell into band 2: in fact, the salary was £490 per annum

over the maximum for a band 2 store. CR attributed that circumstance to a "*keying error*". The virtually illegible document at page 101A refers. By July 2020 this comparator was earning £32000 per annum.

6.5.2 **Victoria Smith.** This SM works at a Blackburn store and previously at Westhoughton store. She moved to Blackburn in 2015 (a different branch to that of the claimant). Both stores are grade 2 stores and when she moved some 5 years ago in October 2015 it was a sideways move. The Blackburn store at which this comparator works is now a band 1 store. Her salary has remained at band 2 level throughout and is still at band 2 level even though it is now a band 1 store. There was a considerable period between 2015 and 2019 when this comparator received £1500 per annum more than the maximum salary attributable to the band of store in which she worked.

The Judgment of Employment Judge Hoey

6.6 The following matters of relevance were found in this Judgment:

6.6.1 The claimant presented to his GP with a persistent cough on 4 March 2016 and was seen by a specialist surgeon who diagnosed a chronic cough on 15 April 2016. On 14 July 2016 the doctor noted that the appearances were highly suggestive of sarcoidosis (an inflammation of the lung). On 26 September 2016, the cough was said to be extremely troublesome and interfering with his quality of life. Steroids were prescribed. The claimant was diagnosed with degenerative disc disease and lower back arthritis in 2007.

6.6.2 The claimant sought to mask the effects of his impairments which included attending work and by not showing the effects of his impairment outwardly. The claimant's medical position was not materially different in October 2018 to that pertaining in May 2017.

6.6.3 There were some inconsistencies in the evidence of the claimant and his answers in cross examination were in some parts confusing but that did not result in his evidence being incredible. On the whole, the claimant was found to be a credible and reliable witness.

6.6.4 On balance the claimant did suffer pain on a daily basis from DDD and LBA and he was lethargic and lacking in energy in a material way. This impacted his ability to drive and concentrate. His ability to walk, sit and move was affected as was his ability to have a conversation and to converse with others and to lift everyday objects and climb ladders. The claimant's impairments caused him to materially restrict his working on the shop floor carrying out lifting, ladder and stock work. The claimant struggled to concentrate as a result of the pain and the fatigue he encountered stemming from his impairments and his energy levels were considerably reduced. These effects occurred on a daily basis and by 30 April 2017 had lasted 12 months. His chronic cough made it more difficult for him to communicate with others and made him unsteady on his feet and resulted in in him having to walk at a slower pace. The cough exacerbated the pain in his back which resulted in the difficulty in lifting and moving everyday objects and driving. The claimant's ability to carry out day to day activities were both substantially and adversely affected and this went beyond the normal differences that may exist among people. The claimant suffered pain on a

daily basis which impacted on his ability to walk, drive and concentrate. He suffered lethargy which impacted on his ability to concentrate and communicate with others. His chronic cough also made it more difficult for him to communicate with others and made him unsteady on his feet and resulted in him having to walk at a slower pace.

6.6.5 The claimant was a disabled person as at April 2017 and up to the outcome of his appeal in October 2018.

6.6.6 The claimant attended work and the respondent's witness may not have witnessed the effects on the claimant but there was no reason to doubt the impact of the impairments the claimant experienced on a day-to-day basis which could have occurred when the colleague was not with the claimant or out-with working hours. The claimant may have sought to downplay or mask the effects the impairments had when at work. The witness who appeared at the public PH was a colleague of the claimant who did not see the claimant at all times during working hours.

6.6.7 The claim of direct discrimination was lodged out of time but was raised in a period which was just and equitable.

Chronology of Relevant Events

6.7 On 22 July 2016 the claimant advised his then AM Barry Wimpenny that he had sarcoidosis (page 104). It was only at this time that the claimant began to consider that condition together with his other ongoing conditions of DDD and LBA posed a serious health problem. The response from BW was brief and read: "*Hopefully it will be sorted out. I will catch up with you on Sunday we can discuss then".* We accept the claimant's evidence that no meaningful reference was made to that diagnosis by BW at any time and no reference made of the claimant to OH. The claimant had expected there to be "*welfare chats"* organised with him by BW but that was not done at any time. We have not seen any policies of the respondent but we accept that managers are expected to hold "*welfare chats"* with employees who are experiencing health difficulties. That is what the claimant does with the staff under his control, that is what CR now does with the claimant (hence the referral to OH referred to above) but that is not what BW did at any time for the claimant. We accept the evidence of the claimant that he tried to get BW to engage with him about his health issues but that BW would not do so and evinced no interest in such matters – preferring to concentrate only on the performance of the claimant's store.

6.8 On 6 November 2016 the claimant raised a grievance ("the 2016 Grievance") by email (page 106) with Laura Minards of HR and Robin Postans his then LM headed "*Grievance raised, Behaviour at work, Health and Safety at work, Harassment".* This related to several matters some of which do not concern this Tribunal. That message contained a concluding paragraph (page 107) which reads: "*My health, I have been suffering since 2015 going from doctor to hospital having test to find out what is wrong with me as I was coughing, vomiting and feeling weak only to find out I have a lung disease called SARCOIDOSIS and I have manage(d) to continue working with no sick days and suffering a lot, feeling weak and I have chest pains. I am on treatment and have to have monthly visits to the hospital, at the moment treatment is to last 12 months and then see how I respond after that which is unknown to date".*

6.9 We accept that BW visited the claimant in his store on a regular basis – weekly visits are normal from the AM. We accept the evidence of the claimant that BW witnessed the effects of the impairments from which the claimant was suffering namely those mentioned in the above grievance. We accept the claimant's evidence that BW witnessed the adjustments which he had himself put in place to accommodate his disabilities namely the variation of his duties. These included the claimant reducing his own workload and taking steps to avoid twisting, bending, reaching over, kneeling, standing, using stepladders and lifting. We infer that BW knew of these adjustments but did not re-act to them as the claimant was not absent from work at any time and his attendance record was thus not flagged to BW or HR as a problem.

6.10 We accept that the statement in the 2016 Grievance about his health from the claimant provoked no response from HR or BW. We accept that the 2016 Grievance related to other issues arising out of disciplinary proceedings which had by then concluded and that those issues were investigated and dealt with but the "Health" issues clearly set out in the 2016 Grievance were not investigated or dealt with in any way. We infer such health matters were either overlooked or a decision was taken that they merited no action. Without the trigger of sickness related absence, the respondent ignored what should have been, and was in fact, obvious namely that there was a serious health issue crying out to be investigated. We note that there clearly were issues within the respondent company in 2016 about the claimant's working pattern for some adverse comments about them from another manager were the subject of the 2016 Grievance.

6.11 On 4 April 2017 at a routine meeting and without any warning, the claimant asked BW if he could move to another store. The claimant stated that he was not managing with his health and the demands of the large store and wanted a store which was smaller and closer to home so that the 50-mile round trip daily, which the claimant also found difficult by reason of his disabilities, would be avoided.

6.12 That request provoked no enquiry of any kind from BW. No discussion or enquiry took place as to the rationale for the request and we conclude BW chose not to investigate the obvious reasons which lay behind that request namely the ill health of the claimant. We infer that BW did not refer the matter for advice from HR. However, BW found the Blackburn store close to the claimant's home and offered the claimant a move to it. The claimant agreed. Subsequently BW attended the claimant's store and told him he would have to take a £4000 per annum (15%) drop in salary when moving and presented the claimant with documents to sign. We accept that by this point the claimant was desperate to move and would have agreed to virtually any proposal to achieve his aim of a smaller store more suited to his health needs.

6.13 On 18 April 2017 the claimant wrote (page 109) to BW recording his request was "*due to my health because of the demands in a big store*". That message sought some reassurance about the future of the store to which the claimant had agreed to move. In accepting the reduction in salary, the claimant understood he was being treated just like any other manager who moved to a lower graded store and did not question the matter at that stage and did not do so until he had evidence that he had in fact been treated differently. The claimant duly moved to the Blackburn store at the end of April 2017.

6.14 On 21 July 2017 the claimant wrote to Alex McGuffie of HR (page 111) subsequent to a disciplinary hearing which had resulted from allegations made against the claimant which had resulted in a period of suspension. The message ended with a sentence which reads: "*Going forward I need your support……. bearing in mind how frail I am".* The reply asked the claimant to break down exactly what it was he needed in terms of support. The claimant indicated he would have expected a return to work meeting at another store with his AM. This had not occurred. At that time BW remained his area manager.

6.15 On 3 August 2017 the claimant raised a grievance against "*many colleagues"* which arose out of the disciplinary allegations against him and which included at point 6 out of 11 points: "*I believe I was discriminated against with my poor health".* He refers to not having had a day off sick "*even with my poor health"* (page 114) and that BW had (amongst many other matters) "*failed to follow company policy from the store manager employment law training 2013".* He continues later: "*The reason I believe Barry is discriminating against my health and wants me out is because he does not care to have a week (sic) link in his managers or excuse for any reason, approximately March 2016 I was constantly coughing, choking, vomiting, weak and very tired and Barry saw me at my worst but I still went to work unable to do my job to the best of my ability.*

I was going from doctor to visits to the hospitals to see consultants who could not find the reason for it until July 2016, I sent Barry an email on 22.7.2016 telling him I had Sarcoidosis to both lungs, Barry replied on the same day saying he will have a meeting with me but that did not happen, no risk assessment or meeting to look at ways to support me, it took me in 2017 to ask Barry to move me to a smaller store from 580 Whitecroft closer to home as to date I still suffer but not as bad and still visit the hospital every 6 to 8 weeks, I am on 5 lots of medication and still suffer with tiredness and weakness and my coughing has started to come back, I have felt all alone with no support and I was expected to go back to work and after asking for support to once again receive none".

6.16 The grievance hearing was chaired by Natalie Payne ("NP") and resulted, amongst other things, in a referral of the claimant to OH. NP requested that the claimant set out for her a list of the medication he was taking and this he did by email on 15 September 2017 (page 120).

6.17 On 15 September 2017 there was a referral of the claimant to OH with an appointment scheduled for 4 October 2017. The meeting was to be by telephone at a time when the claimant was on leave and the claimant waited for 45 minutes but received no call. The claimant reported the matter to the respondent (page 122). The claimant wrote again (page 119) to HR to report that failure and at the same time advised he had been taken off Qvar aerosol and put onto Prednisolone. The failure of the respondent through HR to follow through what had been agreed by HR in terms of a referral to OH is surprising at best and leaves a poor impression of the organisation and efficiency of the HR department.

6.18 In or around April 2018 the claimant received information that some of his colleague LMs had received a pay rise which he had not received and also that some managers were being paid over the banding for the store in which they worked. The claimant felt as a result that he was being treated less favourably than his colleagues

because of his disability and his resulting need in 2017 to move to a smaller store. The claimant determined to raise the matter with the respondent.

6.19 On 26 April 2018 the claimant wrote to BW (page 123) saying he felt he was "*being treated unfairly with regard to any pay rise and the reduction in wage when I moved to Market Way".* In that message he recorded that he had asked to move to Market Way in May 2017 "*due to ill health".* He grieves informally about the lack of any pay rise and the reduction in his salary on transfer. That grievance was passed by BW (who was then retiring) to the new AM Andrew Cocker ("AC"). The claimant had an informal meeting, which appears not to have been minuted, with AC and Jess Perkins of HR on 13 July 2018.That informal grievance yielded no satisfactory result so far as the claimant was concerned and so the claimant decided to raise a formal grievance.

6.20 On 22 July 2018 the claimant raised a formal grievance with AC. In that letter he traced the history of his cough from January/February 2016 and how he had kept BW informed until the diagnosis on 22 July 2016. He recorded how he had informed BW of the diagnosis of sarcoidosis on 22 July 2016 and that BW had replied saying he would catch up with the claimant but that that meeting did not happen. He went on to say that in other meetings he had told BW that he was not managing with his health, but BW showed no sign of interest and the claimant himself felt in no fit state to fight his corner. The history of the move in May 2017 to Market Way was recorded. The claimant stated he would have signed anything "*as I was in a desperate state…..".* The claimant grieved the failure of the OH appointment on 4 October 2017. He grieved the failure of AC to follow up the informal grievance raised with BW on 26 April 2018. The claimant stated in that document: "*I also suffer with Degenerative Disc and Arthritis of the lower back".*

6.21 The claimant was invited to a grievance meeting for 6 August 2018 but at the claimant's request it was altered to 8 August 2018. He attended with his union representative. The hearing was to have been taken by Simon Smith but this was subsequently altered to the witness DB who was an area manager and who was accompanied by a note taker Ann Chester.

6.22 The claimant spoke to his grievance and said he had evidence that colleagues had received more favourable treatment when moving stores but he did not name those colleagues. He asked to be treated fairly and for the respondent to recognise the efforts he had put into his new store. He asked for his salary to be re-instated at band 4 and for the back pay. He asked for a 2% salary increase such as other managers had received.

6.23 The grievances were discussed at the hearing. The claimant re-iterated that there had been no meetings with BW about his (the claimant's) health. DB said that he had spoken to BW who had said he did speak to the claimant about his health, but the claimant did not agree. When asked what he sought to achieve from the grievance, the claimant stated that he wished the respondent to recognise its responsibility to care for employees with health issues and not take advantage of them being in a desperate state and to follow its own fair treatment policy. There had been no discussion with him about the reduction of his salary and he believed he had been unfairly treated in comparison to two others. The claimant made it clear that he considered himself disabled under the 2010 Act. DB informally offered the claimant

the chance to move to a band 2 store but the claimant refused not wishing to move from what was still to him a relatively new store where he had just been able to build his team and the consequent relationships. The claimant accepted that the re-instatement of his salary should be with "*transitional payments"* to reflect the fact that, as a manager of a band 1 store, he would be being overpaid at least initially by being retained on a band 4 scale.

6.24 The outcome was sent by letter dated 7 September 2018 (page 138). That outcome letter refers to the claimant being unable to "*provide any evidence of any requests you have submitted to discuss your salary over the last 14 months".* having expected "*reasonable adjustments".* The decision was that the pay reduction was justified as the claimant had transferred to the new store at his own request. In relation to the pay rise of 2% it was noted that pay rise awards were on a "*private and confidential basis and at senior management discretion. You have failed to provide me with any evidence or specific information of a store manager being awarded a pay rise".* However, a pay rise of 2% was offered backdated to 1 April 2018: this would result in a gross payment to the claimant of £221.52p. In relation to the claimant's health, it was proposed that informal welfare chats would be conducted with the claimant: *"I will pass details of your condition to Colin Rockcliffe, Area Manager and you can discuss between you the frequency of these chats and how you would like for them to be conducted".* The grievance was not upheld and a right of appeal was notified.

6.25 In looking into the grievance, DB did not conduct any investigation into the salaries of any other line managers and completely missed the opportunity to investigate the reason why the claimant asked for the move away from Whitecroft in April 2018 and the opportunity to inform himself, and thus the respondent, about the health of the claimant. DB had no appreciation that the claimant was or might be a disabled person and, even if he had had such appreciation, he had little, if any, appreciation of his duty towards such an employee under the 2010 Act. The fact that the claimant had not been absent from work and the fact he had requested the move in April 2018 effectively closed any possibility to the presence of disability in the mind of DB. Neither did HR raise that possibility with DB as a matter to investigate.

6.26 The claimant appealed by email dated 9 September 2018 (page 140). The grounds of appeal were lengthy and included reference to the Equality Act 2010 and the rights and protection at work of a disabled employee. The claimant again refers to suffering from Sarcoidosis. In relation to his health, the claimant wrote that BW could not be bothered to engage with him in relation to his health and sent no apology for not attending the meeting he (BW) referred to in the reply to the claimant's email to him of 22 July 2016 and that he had tried to talk to BW about his health but without success. The claimant also noted at page 142 "*a total disregard to the equality act 2010 and the disability discrimination act, denying important employment rights and protection at work. An underhand move from Barry to reduce my pay by £4000 without any discussions knowing that I was in a desperate state. I have managed to make my own reasonable adjustments at Market Way and I am managing a good balance to manage my health and work, it is unreasonable to expect me to move to another store. Another manager in a band 1 store receiving £1500 above the band wage and £500 of it from a pay rise, unfair treatment is shown to expect me to move store or not pay me more money …".*

6.27 The appeal was taken by the witness CR accompanied by Kirsty Stevens. The hearing was due to take place on 25 September 2018 but was re-arranged at the request of the claimant for 18 October 2018. The claimant attended with his union representative. The meeting was minuted (pages 146-156).

6.28 The appeal looked at four specific matters. The fact the claimant believed his comparators (whom he named) had not received pay reductions when moving to lower banded stores, that the claimant would have signed anything to secure the move in 2017, that he had had to make his own reasonable adjustments to his role and that that was the reason for the delay in raising the matters.

6.29 At the appeal hearing the claimant named Vicky Smith and Laura Brooks as comparators. He asserted Vicky Smith was paid £1500 more than her band grade when moved and that Laura Brooks had moved to a lower banded store with no pay reduction. It was confirmed by CR that DB had not interviewed either of those managers as part of his investigation. The claimant complained that DB had not investigated matters directly with BW. CR noted that the claimant had signed off the pay cut. The claimant responded that BW had taken advantage of him when he was in a poor state. The claimant confirmed he was still under the care of the hospital and had to visit every six months and was still taking medication. The claimant asserted that other managers had been treated differently than him and that his previous line manager had said that other managers were not paid more than him on moving store, even though he knew that they were, and he sought honesty from the respondent in that process. Towards the end of the meeting, a proposal to increase the claimant's salary to £26,000 was discussed.

6.30 The outcome was sent by letter dated 24 October 2018 (page 157). It was confirmed that there were other store managers within the area that "*are potentially paid above their sales band and there would be individual reasons for this occurring, however due to confidentiality, I could not discuss this further".* The decision to offer a 2% increase was revoked and in its place an increase on salary to £26000 was implemented. It was not accepted that any increase could be backdated. The increase was "*a reflection of the store's improved sales performance, not as acknowledgement of an unfair reduction in salary due to the move to a smaller band store".*

6.31 In his evidence as to the treatment of the comparators CR stated he had investigated the two comparators and had "*since prepared a note for these proceedings that reflects my findings and this is at page 101 of the bundle".* The outcome letter itself made no reference at all to any such investigations. We do not accept that there were any meaningful investigations at the time. The evidence which this witness had written in his witness statement had to be considerably amended at paragraph 21 when he was called before us. CR also missed the opportunity to look into the reasons why the claimant sought the move in April 2017 and his health generally – in fact that step was only taken about 12 months later as referred to above. CR also had no inkling that the claimant was disabled or that his disability could have been behind his request to move in April 2017. In addition, CR was not alerted by HR as to any possible question of disability and he had no such concern himself. The thrust of the approach of CR was to settle the matter and move on. He was a new AM for the claimant and in cross examination he stated that he *"wanted*

to put to bed what was wrong beforehand". This witness visits in his capacity as AM 2/3 stores per day namely 10-15 stores per week.

6.32 The claimant entered early conciliation on 9 December 2018 and filed this claim on 9 January 2019. As these proceedings were being prepared for hearing in July 2019, the claimant raised a further grievance about matters which are not relevant to these proceedings. That grievance was investigated by the respondent's Head of HR Stephanie Williams who took the opportunity when doing so to question the claimant about these proceedings: that questioning made the claimant feel very uncomfortable.

Submissions

7. We received detailed written submissions from the representatives of both parties. These were supplemented by oral submissions and all are briefly summarised.

Claimant

7.1 Even if the claimant was not fully aware that his health condition rendered him disabled for the purposes of the 2010 Act, given his constant cough and his use to the managers of the respondent of the word "chronic" and "acute" in relation to his condition, it was apparent to anyone that he was disabled. The claimant made this clear throughout the grievance and appeal process. The respondent became aware of the disability when it received the claimant's email of 22 July 2016 (pages 104- 5). If not, the email of 6 November 2016 (page 106) gave the respondent the required knowledge and failing that, the request to move stores on 4 April 2017 (page 109) gave no reason other than the claimant's health. In the email of 21July 2017, the claimant described himself as "frail". Once the HR Department of the respondent had knowledge of the claimant's impairment, the respondent cannot dispute it had the required knowledge. The claimant could hardly have done more than he did to acquaint the respondent of his condition.

7.2 The EHRC Code of Practice on Employment 2011 ("the Code") requires an employer to do all it can reasonably be expected to do to find out if a worker has a disability. The respondent failed to fulfil its undertaking to hold "welfare chats" with the claimant which would have confirmed the position to the respondent. The respondent also reasonably should have known the claimant was placed at a substantial disadvantage. In any event, the email of 18 April 2017 (page 109) makes the link between the size of the store being managed and the claimant's health.

7.3 It is clearly a detriment to the claimant to be transferred to a smaller store with a much-reduced salary even following a request so to do.

7.4 The claimant was treated less favourably than LB and VS in terms of the salaries attributable to the differently banded stores. The evidence in relation to the salary scales was not credible and the Tribunal was asked to draw inferences from the evidence produced in respect of the salary scales of the managers. Such information as is available was produced very shortly before trial. The witness CR was forced to clarify and amend his witness statement at the outset on this important matter.

7.5 Comparators relied on for the purposes of a direct discrimination claim do not have to be “clones” of the claimant in every respect. What matters is that the circumstances which are relevant to the treatment of the claimant are the same, or nearly the same, for the claimant and the comparators. The material difference case advanced by the respondent has shifted and morphed at every stage as the case has evolved. Furthermore, the respondent can only point to pay decreases for store managers moving store after the presentation of this claim and that is no coincidence.

7.6 The claimant does not need to show that any of the managers of the respondent consciously discriminated against him because of his disability: subconscious discrimination is also prohibited. The Tribunal should consider whether disability played a significant part in the treatment of the claimant. Disability does not need to be the only cause of the discrimination. Neither the grievance officer nor the appeal officer answered the questions posed by the grievance despite the gravity of the allegation made by the claimant. No information has been put forward to justify the decision to change the pay banding of the claimant which is unrelated to his ill health. If the health of the claimant and the move to a smaller store cannot be separated, then it is because of his disability. The claimant was desperate for a move and so eventually requested one but that does not mean he has not suffered a detriment.

7.7 In terms of indirect discrimination, the respondent accepts that it had a practise of operating a pay banding structure for store managers based on store performance and that it applied that PCP to the claimant and others. The pay is higher in larger stores because it is harder work. There is more physical work in larger stores. Disabled managers are more likely to work in smaller stores. The claimant was obliged to move to a smaller store because of his health and thus suffered particular disadvantage. The pool for comparison is the pool of managers, or at least the managers who move store bands. The particular disadvantage must affect those who have the same disability as the claimant. The respondent has failed to show that the PCP is a proportionate means of achieving the legitimate aims advanced.

7.8 In terms of the reasonable adjustment claim, it is submitted that disabled store managers are more likely to work in smaller and therefore lower banded stores. The respondent failed to make reasonable adjustments of maintaining the salary of the claimant at £28,000 following an agreed transfer to a smaller store closer to the claimant’s home and of backdating the claimants pay rise awarded in October 2018 from £24,000 to £26,000 to May 2017. Modifications of pay can be considered as reasonable adjustments and just because the respondent may have provided one adjustment in terms of a store move does not mean that their duty is satisfied. Pay protection can be considered as a reasonable adjustment. Such a measure may be a reasonable adjustment as part of a package to keep a claimant at work.

Respondent

7.9 The claimant was disabled by virtue of three physical impairments: sarcoidosis from sometime in 2016, degenerative back disease since 2017 and lower back arthritis since 2007. The Tribunal must consider what the respondent ought reasonably to have known at the time and not apply hindsight. The claimant stated he did not consider his conditions had a significant impact until the diagnosis of sarcoidosis which exacerbated the symptoms in the back.

7.10 There was insufficient information contained in the correspondence from the claimant to fasten the respondent with knowledge of the claimant's disability. The claimant had remained in full time employment and had taken no sickness absence and had made no formal request for support or adjustments. The symptoms which the claimant describes did not and could not reasonably have put the respondent on notice of disability. It should not be overlooked that the claimant accepted in this period that he had been prescribed steroids which had improved his symptoms, but these had later regressed. The claimant did not raise a grievance until 3 August 2017 and there is no documentary evidence of the claimant having raised the issue of his health with BW. This is in sharp contrast to the claimant raising a grievance when he had an issue with another store manager. The email of 21 July 2017 made reference to the claimant's health, but he accepted that he was referring to his mental health. Even after the grievance of 3 August 2017, there was still insufficient for the respondent to know of any disability. The evidence of the respondent's witnesses is that they were unaware of any disability at the time the claimant's grievance and appeal were dealt with. It was not reasonable for the respondent to have known of any link between the claimant's back condition and the sarcoidosis.

7.11 The reduction of the claimant's salary following a request from the claimant to move and with knowledge of the salary structure cannot be said to be detrimental treatment. Viewed objectively, the reduction was a consequence of a supportive step. The claimant signed a contractual variation form to evidence his agreement.

7.12 The comparator Smith moved from band 2 to band 2 and not to a lower banded store. The claimant's move from a band 4 store to a band 1 store is manifestly different. It is accepted that the comparator Brooks move from band 4 to band 3 and that her salary was maintained but the material difference is that that was at the request of the respondent. Alternatively, the comparator Brooks requested a move to a smaller store and she was informed in advance that the salary would reduce and her agreement was sought. The evidence shows neither comparator was treated more favourably than the claimant. The position of Brooks is materially different when compared to the claimant's move from a band 4 store to a band 1 store. This comparator should have been paid £28450 but was paid £28970. That is explained as a keying error, but in any event, the difference is very much less than the £4000 involved in the claimant's move and it is materially different.

7.13 Even if less favourable treatment is shown, there is no evidence that it was because of disability. The Tribunal must seek to find what was influencing the mind of the alleged discriminators. It is very relevant that the decision of the respondent in treating the claimant as it did was neither irrational nor perverse. There is no evidence that disability was an effective cause of the treatment complained of. The burden of proof provisions in section 136 of the 2010 Act do not apply if the respondent shows, as it has, that it did not contravene the relevant provision. Even if the burden passes to the respondent to explain the treatment, the respondent has provided an explanation which suggests there is no discrimination.

7.14 In relation to the indirect discrimination claim, the claimant bears the burden of proof in relation to the first three elements of the claim and section 6(3)(b) of the 2010 Act requires that the claimant shows that the particular disadvantage affects those who

share his disability. There is no evidence that such employees would be more likely to work at a lower banded store. The claimant has produced no medical evidence to support his contention and, in any event, any disadvantage does not stem from the application of the PCP but rather from other factors.

7.15 If the claimant establishes liability then the respondent relies on two aims as legitimate aims: first to ensure parity, fairness and consistency of store manager salaries nationwide and secondly to ensure store managers at larger stores are properly and fairly remunerated for the higher-level management required in a store with a higher turnover, a larger workforce and increased workload. The aims are legitimate and the respondent acted proportionately to such aims. If liability is established, the Tribunal should conclude that there was no intentional motive and award no compensation.

7.16 The reasonable adjustment claims require that the respondent has knowledge of the disability and of the substantial disadvantage. Once again there is no evidence that disabled persons are more likely to work in smaller and therefore lower banded stores. In any event the respondent contends that the claimant could successfully have worked at a higher banded store if it had been closer to his home.

7.17 The adjustments sought by the claimant would not have eliminated the substantial disadvantage - if such is established. It would not have been reasonable to make either adjustments contended for. In any event the respondent did make an adjustment of transferring the claimant to a smaller store closer to his hom .

8. The Law

Direct Discrimination

8.1 We have reminded ourselves of the provisions of section 13 which read:

(1) 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….

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

8.2 We have reminded ourselves that direct evidence of discrimination is rarely forthcoming and thus there are particular rules in respect of proving unlawful discrimination referred to below. It is now readily accepted that discrimination need not be conscious. Some people have an inbuilt and unrecognised prejudice of which they are unaware. A discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of 'significant influence', see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR572** at page 576. In some cases, discrimination is obvious. However, the Tribunal in most cases will have to discover what was in the mind of the alleged discriminator. In **Nagarajan**, Lord Nicholls said at page 575 that:

"Direct discrimination, to be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the

complainant has received less favourable treatment. This is a crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in the obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision would have to be deduced, or inferred, from the surrounding circumstances".

8.3 The Tribunal has reminded itself of the guidance in **Igen -v- Wong & Others 2005 IRLR 258** which it has considered in full although does not trouble to set it out here. In particular we have reminded ourselves of the two stage test.

8.4 We have noted the decision in **Madarassy v Nomura International Plc**, where in the Court of Appeal, Lord Justice Mummery said at paragraphs 71 and 72:

*"Section 63A(2) [Sex Discrimination Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or a situation for which comparisons are made are not truly like the complainant or a situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not in the grounds of her sex or pregnancy. Such evidence from the respondent could if accepted by the tribunal, be relevant as showing that contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in **Liang** (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".*

Indirect Discrimination

8.5 The provisions of section 19 of the 2010 Act provided:

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) the relevant protected characteristics are …disability

8.6 We have reminded ourselves that in considering a claim of indirect discrimination it is necessary to consider the matter in stages. First has the respondent applied the PCP contended for by the claimant to the workforce or a part of it. Secondly, if so, to consider if there is particular disadvantage to those with the relevant protected characteristic under consideration. To undertake this exercise, we must identify the pool of people to be considered and in considering the pool we must not overlook the provisions of section 23 of the 2010 Act set out below. Thirdly, if group disadvantage can be established, we must consider whether the claimant has shown that he suffers particular disadvantage by reason of that PCP. If all those matters are satisfied, then we must consider whether the respondent has shown that the application of the PCP is a proportionate means of achieving a legitimate aim.

8.7 We have reminded ourselves of the decision in **Rutherford –v- Secretary of State for Trade and Industry (No 2) 2006 ICR 785** and **Somerset County Council –v- Pike 2009 IRLR 870** to the effect that in considering the pool the Tribunal should not bring in any who have no interest in the advantage or disadvantage in question. We note that that position particularly holds good in so called “access to benefit” cases.

8.8 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination and was referred to again in the decision in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

“Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances”.

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

8.9 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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 take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2): a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

8.10 The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

8.11 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if

any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

8.12 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

8.13 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away: this will be the case where the position is irretrievable and this may be the position reached during a period of extended ill health. This may be the case also where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v- Weaver 2008 AER 291** made it clear that a Tribunal must take account of the wider implications of any proposed adjustment and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

Burden of Proof and other relevant provisions of the 2010 Act.

8.14 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

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

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……."

8.15 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

8.16 We have reminded ourselves of the provisions of section 23(1) of the 2010 Act which read:
"On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case".

Discussion and Conclusions

9. We approach our conclusions by dealing with the various claims advanced and issues arising in the order set out in the agreed list of issues.

Knowledge (Issues 3.1-3.4)

10.1 We refer to our findings of fact and our summary of the contents of the Judgment of Employment Judge Hoey. The claimant had a troublesome cough from March 2016 which affected his ability to concentrate and converse. His ability to lift and to climb ladders was also affected both by the cough (sarcoidosis) and the impairments of DDD and LBA, and this occurred on a daily basis from April 2016 through to April 2017. We accept the evidence of the claimant that BW, as his area manager, visited his store frequently. We did not hear evidence from BW and thus the evidence about the conduct of BW principally comes from the claimant whose evidence we found reliable. We conclude that BW must have regularly witnessed the effects on the claimant of the impairments from which the claimant suffered in the 12 months leading up to April 2017. We conclude and infer that, given his frequent visits, BW must have seen the adjustments to his working practices which the claimant had put in place to deal with his physical impairments. In our judgement, that is sufficient to fasten BW with knowledge of the ill health of the claimant, which it is now established amounted to a disability, by not later than the beginning of April 2017.

10.2 Furthermore the claimant told the respondent on 22 June 2016 that he had sarcoidosis. This was done in writing and we note the response from BW which was to the effect that the matter would be discussed on the following Sunday. We accept the claimant's evidence that that discussion did not take place then or at any other

time and that BW failed in his duty to organise "*welfare chats"* with the claimant at any time up to the time of his move to the Blackburn store at the end of April 2017. In addition, on 6 November 2016 the claimant raised the 2016 Grievance which went both to HR and to a different line manager which gave information to the respondent in the clearest terms that the claimant was suffering with coughing, vomiting and feeling weak and had been diagnosed with sarcoidosis and was on treatment which would last at least 12 months. This very loud alarm bell went unheeded both by BW and by the respondent through its HR Department.

10.3 We refer to the Code to which we were taken by Mr Bronze and have noted the contents of paragraphs 5.13 - 5.16 inclusive. In particular, we have noted paragraph 5.15 which states that an employer must do all it can reasonably be expected to do to find out if a worker has a disability. An example is given of an employee with depression with a good performance record who becomes emotional and upset at work for no apparent reason. It is said that that sudden deterioration in performance should have alerted an employer to the possibility that the deterioration was connected to a disability and that it is likely to be reasonable to expect an employer to explore with the worker the reason for the change in performance.

10.4 In this case the respondent failed to react in anyway either through BW or HR to the warning bells which the claimant was sounding throughout 2016. In 2017 the claimant made a request with no notice to move to a smaller store and again that provoked no questioning or check with the claimant either from BW or from HR. The only reaction was through BW who quickly sourced a smaller store and then, we infer with input from HR, sought to have the claimant sign an agreement to move store with a consequent drop in salary of £4000 per annum without questioning that decision or seeking to understand why that, on the face of it very surprising, request had been made.

10.5 We conclude that those circumstances were sufficient by April 2017, being the time of the reduction in salary of which the claimant complains in the direct discrimination claim, to fasten the respondent with knowledge of the claimant's illness which amounted to a disability. The respondent cannot simply close its eyes to the obvious - let alone the blindingly obvious.

10.6 We were not impressed by the actions of the respondent's HR Department in this case at all. In particular, the failure of the HR Department to react to the claimant's 2016 Grievance and the information contained in it about his health was extraordinary - especially since the department has responsibility for such a large workforce and should reasonably be alert to all such matters.

10.7 If that is wrong, then we conclude the respondent ought reasonably to have known the claimant was disabled by the time of the request to transfer to a smaller store from the claimant in April 2017. We refer again to the Code which states that an employer must do all it can reasonably be expected to do to find out if an employee has a disability. The respondent in this case patently failed to do so. There was no use of "*welfare meetings"* to inform the respondent of the details of the claimant's health which was and is the very purpose of such meetings.

10.8. If that is wrong, then we accept the submission of Mr Bronze that the Respondent ought to have known at latest by October 2017 after it referred the

claimant to OH in September 2017 and did not chase up that referral. Had that referral taken place, we infer that what was discovered in September 2019 would have been known in October 2017 and thus by that time at the latest the respondent ought to have known of the disabilities of the claimant. Once again, there were concerning failures by the HR Department of the respondent which allowed a referral to OH to be made and then did not follow up the matter in spite of two reminders from the claimant himself. If that should be wrong, then clearly by the time of the grievance and the grievance appeal the respondent had had several more alerts to the question of the claimant's health but had failed to follow up on any of them. We conclude that the respondent did know or alternatively ought reasonably to have known of the claimant's disability at all material times for the purposes of all the claims advanced.

Direct Disability Discrimination

General matters

11. Before moving to consider the specific issues in relation to this claim, we consider it is right to set out our findings in respect of three matters which are of central importance to our assessment of this claim and which inform our drawing of inferences in relation to this claim.

12. The respondent relies for its explanation of any less favourable treatment in this case on the salary scales which it applies to its staff working in its stores which it grades from band 1 to band 5. We accept that the respondent has shown there is a system of salary banding. The only written evidence produced to us related to the figures applicable to those various bands over differing financial years. That is all. Nothing was produced in relation to the details of the application of the policy. It was left to cross examination and to questions from the Tribunal to enable us to understand how a store might move from one band to another and what happens to the salaries of the staff working in a store if it moves from one band to another. It is clear that area managers have discretion over salaries to be paid to the managers of stores and yet we were shown nothing in writing to evidence the existence of that discretion or how such a discretion was to be exercised. It is clear managers can be paid salaries out-with the range applicable to a certain store. We had no evidence of the steps which needed to be taken to obtain such authorisation or of the steps that need to be taken to confirm the exercise of discretion or how and where the exercise of discretion should be recorded. The record keeping of the respondent in this regard was woefully inadequate. Given the size of the respondent company and the number of its staff and branches, this is surprising. The respondent was only able within days of the final hearing to produce figures for the banding of stores for the year 2017 when the claimant moved from a band 4 store to a band 1 store. These important matters ought to be recorded in order for there to be transparency and consistency in an area of the business where discrimination can so easily occur and yet the records produced to us were few in number, in some cases illegible, had just been discovered "in HR" and in our judgment were frankly inadequate.

13. The actions of BW lie at the heart of the claim of direct discrimination. We did not hear from BW in evidence. It is clear from the evidence that for a period of at least 12 months in 2016 and 2017, BW managed the claimant and failed to address with him the very obvious health impairments which were affecting the claimant at work throughout that period. We accept that BW, as an area manager, was required to

hold welfare meetings with those whom he managed if the need arose. We conclude that there was a clear necessity to do so in the claimant's case, but BW failed so to do. BW failed in that period to engage with the claimant's health issues at all, let alone in any meaningful way. By the time of the claimant's request in April 2017 to move stores, BW knew, or should reasonably have known, that the claimant was disabled: we refer to our findings at paragraphs 10.1-10.8 above. When the claimant made his request to transfer, there was no enquiry as to the reason behind that request which would in turn have revealed the health issues of the claimant. BW chose not to investigate something which patently should have been investigated and we are bound to wonder why that was so. Instead, he acceded quickly to the claimant's request to transfer and then, shortly before the transfer, presented documents to the claimant to sign in order to evidence the claimant's agreement to a reduction of £4000 per annum in his salary. We infer by reference to the comparators that, as area manager, BW had a discretion in relation to salary when the claimant moved but he did not consider the exercise of that discretion in favour of the claimant: again, we are bound to wonder why that was so. We infer that the claimant's health had become an issue between the claimant and BW in the previous 12 months in what was an important store, in terms of revenue, but which BW chose not to address or did not know how to address. However, when an opportunity presented itself to BW in April 2017 to solve that issue, we infer he seized it without giving any thought as to what lay behind the request to transfer. We infer that a material reason for the reduction in salary and the failure to consider the exercise of any discretion was the illness of the claimant and we agree with the submission of Mr Bronze that it is impossible to separate the health of the claimant from the reason for the transfer of stores in April 2017. We infer that, at least sub-consciously, the health/disability of the claimant was a material influence on BW and the way he dealt with the matter at that time.

14. Neither of the witnesses DB and CR who dealt with the grievance hearing and the grievance appeal hearing respectively had received any training in their responsibilities as managers to employees under the terms of the 2010 Act and, in particular, no training as to their duties towards disabled employees. We infer that the same applied to BW. We had no evidence before us that the respondent company takes seriously its obligations to ensure that its employees/managers were aware of their duties and responsibilities under the terms of the 2010 Act generally, or in relation to disabled employees in particular. The fact that the claimant could be referred to OH in 2017, could chase up the failure on the part of OH to keep the appointment on two occasions and still not have the appointment is hardly a mark of an employer which takes seriously its responsibilities towards the health of its employees. If a referral to OH is deemed necessary, then an employer ought to ensure that that referral takes place. It was surprising that the witness CR could not recall ever having referred an employee to OH before, despite the fact that he had been an area manager with the respondent for some years. Neither of the respondent's witnesses from whom we heard evinced any understanding of the concept of a risk assessment in the context of the health of an employee. CR chose not to engage in his investigation with the issue raised in respect of the 2010 Act despite that clearly forming a ground of appeal but chose instead to see the appeal being "*more about pay than illness".* We note that the Head of HR herself saw it appropriate to investigate a further grievance raised by the claimant as this matter was being prepared for trial and, during that investigation, chose to question the

claimant about these proceedings. That could have been a dangerous course of action and one which could be said to invite a claim of victimisation under section 27 of the 2010 Act and again is indicative of a cavalier approach to the provisions of the 2010 Act. It is in the context of an organisation with such an approach to the 2010 Act that we must assess this matter.

15. We conclude that by April 2017 the claimant was suffering serious health problems which amounted to a disability and felt he had no choice but to request a move to a smaller store for the good of his health and to shorten his driving time each day because the store he moved to was much closer to his home. The claimant was driven to this action by the failure of BW to engage with his health issues. The claimant did not request the transfer on a whim or entirely voluntarily. He felt compelled to do so by the circumstances of his health - which all the officers of the respondent involved failed to appreciate or chose not to appreciate.

16. We have reminded ourselves again of the two-stage test in allegations of direct discrimination to which we refer above. We remind ourselves that it is not necessary in every case for a tribunal to go through the two stage process and, in some cases, it may be appropriate simply to focus on the reason given by the employer ("the reason why") and if the tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the two stage test. However, in this case the claimant relies on two actual comparators and we did not hear evidence from BW whose actions lie at the heart of this direct discrimination claim. In those circumstances we consider it appropriate to follow the traditional two stage test in assessing this claim and indeed the list of issues prepared by the parties pointed us towards this method of assessing this claim.

Detriment: Issue 3.5

17. We have considered whether the reduction in salary by agreement and following a request from the claimant to transfer was detrimental treatment. We have considered the submissions of Ms Kaye to the effect that the move to the band 1 store and the reduction in salary were the result of a supportive action by the respondent and agreed in writing by the claimant and thus did not amount to a detriment to the claimant. We do not agree with that submission. That submission fails to take account of the inactivity of the respondent throughout the 12-month period prior to April 2017 when the request to transfer was made. We accept that the claimant felt he had no choice but to request the transfer in April 2017 and agree to the reduction of £4000 per annum in his salary which was presented to him by BW a matter of days before the transfer was to take place and without discussion of any kind. A detriment is defined effectively as a disadvantage. We have no hesitation in concluding that the reduction in salary, even in the context of an ostensible agreement by the claimant, was a detriment to him and the provisions of section 39(2)(d) of the 2010 Act are engaged. It was treatment which clearly disadvantaged the claimant to the tune of some 15% of his then current salary. The submissions of the respondent to the contrary are not accepted.

Comparators: Issues 3.6 and 3.7

18. We consider whether the respondent treated the claimant less favourably than the comparators.

19. We refer to our findings of fact. We conclude that the two comparators were treated more favourably than the claimant in that they both moved to stores in lower bands and yet were paid, at least for a time, at a salary range attributable to their previously higher banded store. The discretion which we find exists in relation to the store pay scale to pay at a salary level attributable to a higher banded store was exercised in relation to the comparators but not so much as considered, let alone exercised, in relation to the claimant. There is less favourable treatment of the claimant in this regard for when he was moved, he was obliged to accept a substantial pay cut.

20. Thus we engage with the question of material difference. Section 23(1) of the 2010 Act requires that we are satisfied by the claimant that there is no material difference between the relevant circumstances relating to the claimant and his two comparators. We have considered the submissions made to us and find ourselves in agreement with the submissions of Mr Bronze set out at paragraphs 24 - 28 of his written submissions. The respondent made much of the fact that the comparator Laura Brooks was requested by the respondent to move store and that that was a material difference. We do not agree with that submission. The comparators and the claimant were all store managers moving to different stores in different bands. The claimant was treated less favourably than the comparators. The discretion to pay at a different banded store rate which exists was considered and exercised in relation to the comparators but not in relation to the claimant. We have considered the factor raised by Ms Kaye that the claimant moved through three bands of store from 4 to 1 whereas the comparators moved across only one band of store from 4 to 3 or 3 to 2. We have seen nothing to suggest that the discretion which exists in relation to the salary scale only applies if a manager is moving across one band of store only. The circumstances of the claimant and the comparators are not materially different in this regard and we are satisfied the treatment of the claimant was less favourable than that afforded to the comparators and that there is no material difference in the circumstances applicable to any of them.

21. If that is wrong, then we note that the comparator Laura Brooks requested a move from a band 3 store to a band 2 store but yet retained a salary in band 3 which is said to have been attributable to a “keying error”. We do not accept that explanation. The claimant was treated less favourably than his comparators.

Was the treatment of the claimant because of disability? Issue 3.8

22. We have considered if there are facts from which we could decide that the respondent contravened section 13 of the 2010 Act. We have concluded that the claimant was treated less favourably than the comparators when his salary was reduced when he moved from a band 4 store to a band 1 store in April 2017. We note that less favourable treatment alone is not sufficient to shift the burden of proof to the respondent - there must be some additional factor. We conclude in this case there are several factors which lead us to say that there is sufficient to shift the burden of proof to the respondent. We refer in particular to our conclusions at paragraphs

12-14 above. The inactivity of BW in relation to the claimant's health in a period of at least 12 months leading up to April 2017 is remarkable. The fact that we did not hear from BW and the fact that the witnesses from whom we did hear chose not to address or engage with the allegations in respect of the claimant's health and disability discrimination, which were clearly before them, is also a remarkable feature of this case. The cavalier approach of the respondent to the provisions of the 2010 Act is also a sufficient additional factor in itself to lead us to the conclusion that the burden of proof shifts to the respondent in this case.

23. We have considered the explanation advanced. The explanation is that the salary bands attributable to the different banded stores are effectively sacrosanct and that is why the claimant's salary was reduced as it was. We do not accept that that is so and we note again the position of the comparators which clearly points away from any such rigid position. In addition, we have seen no policy document or written evidence from the respondent that that is in fact the policy of the respondent. We note the evidence of Ms Brooks reducing her salary when she moved to a lower banded store at her own request. We have not heard from Ms Brooks. We note that that occurred after this claim was instituted. There is no evidence that such was the policy of the respondent before the claimant was moved. We share the scepticism of Mr Bronze in relation to that particular piece of evidence in respect of Ms Brooks. In any event, Ms Brooks was paid at a higher salary than that attributable to the store to which she moved at her own request. We engage with the submission of Ms Kaye to the effect that the claimant accepted in cross examination that it was clear his salary reduced because of the salary banding. That is not determinative. It is for this Tribunal to consider the question which is at the heart of this claim which is why was the claimant treated as he was? In reaching our conclusion, we have not overlooked the fact that when the claimant moved to a band 1 store, his salary was placed at the mid-point of band 1 rather than a lower point.

24. We conclude that the actions of BW and then DB and CR were materially influenced by the ill health and disability of the claimant. The claimant requested a move to a lower banded store because of his ill health which we conclude amounted to a disability. The respondent knew or should have known that the ill health amounted to a disability. The failure of BW and then DB and CR to engage with the question of the ill health of the claimant or to engage with the reason why the claimant requested a move of store or to consider the exercise of discretion not to reduce salary leads us to the conclusion that their actions were materially influenced – albeit subconsciously – by the disability of the claimant. We infer that all three officers of the respondent failed to consider any outcome other than a reduction in salary despite the availability of discretion and that one of the reasons they did so was the disability of the claimant. We do not accept the explanation advanced by the respondent that the salary scale was the reason for the reduction in salary. There were more factors in play than that and one of the material factors was the disability of the claimant. We do not accept that the respondent has established that it has not contravened the provisions of section 13 of the 2010 Act.

25. in those circumstances the claim of direct disability discrimination succeeds and the claimant is entitled to a remedy.

Indirect Disability Discrimination: Issues 3.9-3.10

26. We note that the respondent accepts that it operated a pay banding structure for store managers based on store performance. This is the PCP on which the claimant relies in relation to this claim.

27. We have considered the question of particular disadvantage. In this case we prefer the submissions of Ms Kaye over those of Mr Bronze. The claimant's case is based on an assertion that a disabled person is more likely to work in a smaller and therefore lower banded store. An additional factor in relation to this particular claim is that particular disadvantage is to be shown to those persons who share the same disability as the claimant.

28. We do not accept the premise that disabled people are more likely to work in smaller and therefore lower banded stores. We received little if any evidence of group disadvantage in relation to this matter. In any event, we conclude that a disabled manager with the disabilities of the claimant was just as likely as a non-disabled manager to work in larger and therefore higher banded store. We accept the case advanced by the respondent that higher banded stores have a greater number of management hours attributed to them and thus there is more scope in a larger store for flexibility in working hours which would more easily accommodate the needs of a disabled employee. We accept that a higher banded store has more employees and therefore greater scope to accommodate the needs of disabled employees. We accept that a higher banded store has a larger variety of roles available within it including administration roles, stock and warehousing roles, driving roles and shop floor work which, if they exist at all in the lower banded stores, are much reduced in number. We accept that in the higher banded stores there is far more scope to assigning a disabled person a specific role to accommodate the disability from which s/he suffers. We note and accept that stores with a higher turnover, and thus a higher band, are not necessarily larger in physical size and we accept that some higher banded stores are located in purpose-built buildings which have a physical lay-out more suited to those with the disabilities of the claimant in particular DDD and LBA.

29. We had no evidence placed before us of group disadvantage and were simply asked to assume that the disadvantage to disabled people was obvious. It is not and we do not agree. Further when the additional factor is taken into account namely that the claimant needs to show group disadvantage to those who suffer from the same disability as him, then there was simply no evidence to that effect. The claimant suffers from rare impairments namely sarcoidosis, DDD and LBA and we had no evidence placed before us that the PCP in this case subjected such disabled people to particular disadvantage in relation to relevant PCP. The combination of impairments which make up the claimant's disability is so unusual that we are simply not able to draw any conclusions from our general experience to the effect that such people would suffer particular disadvantage in relation to the PCP relevant to this claim. In those circumstances, this claim of indirect disability discrimination falls at this second hurdle and is dismissed.

30. In case that is wrong then we have briefly considered if the respondent acted proportionately to legitimate aims in applying the PCP.

31. The aims relied on were first to ensure parity, fairness and consistency in the pay of store managers nationwide and secondly to ensure that store managers at larger stores are properly and fairly remunerated for the higher-level management required in a store with a higher turnover, a larger workforce and an increased workload. We accept that both such aims are legitimate.

32. We are required to assess objectively the reasonable needs of the respondent in applying the PCP against the potentially discriminatory effect of the PCP on the claimant and then to assess if an appropriate balance has been struck. We conclude that the respondent did not act proportionately to either aim in reducing the claimant's salary as suddenly and as drastically as it did. A period of salary protection, at least, would have been one way to reduce the discriminatory effect of the PCP on the claimant without damaging the integrity of the PCP in the context of the legitimate aims. That factor allows us to conclude without much difficulty that the operation of the PCP was not proportionate to the legitimate aims in the circumstances of this case. However, in the absence of group and individual disadvantage being established in relation to this particular claim we need not dwell further on this aspect of the matter.

33. The claim of indirect disability discrimination fails and is dismissed.

The claim of failure to make reasonable adjustments: Issues 3.11-3.13

34. We have dealt with the question of knowledge above.

35. We note that the PCP referred to in relation to the claim of indirect disability discrimination applies also in relation to this claim.

36. We have considered the question of substantial disadvantage. We remind ourselves that in this context "*substantial"* means something more than minor or trivial.

37. To test substantial disadvantage we must compare the effect of the PCP on disabled store managers compared to those without a disability. We do not agree with the submission of Mr Bronze that it must be true that a disabled person is more likely to work in a smaller, and therefore lower banded, store.

38. On the contrary we prefer the submissions of Ms Kaye on this point at paragraph 52 of her written submissions. Those were compelling submissions. We repeat the findings we make at paragraph 28 above. For the same reasons we do not accept that a non-disabled employee/manager is placed at a substantial disadvantage by the operation of the PCP. We do not accept that non-disabled employees /managers are placed at even a minor or trivial disadvantage by the operation of the PCP.

39. If that is wrong, then we have engaged with two other matters.

40. Did the respondent have knowledge or constructive knowledge of the alleged substantial disadvantage. If there was one, we conclude that that should have been known to the respondent - had it put its mind to it – at the same time as it should have acquired knowledge of the disability of the claimant. In any event by the time the

grievance and grievance appeal were dealt with those matters were abundantly clear and should also have been clear to BW when he acted as he did in April/May 2017.

41. If the claim of substantial disadvantage had been established, then we have considered if the respondent failed to make a reasonable adjustment to alleviate the substantial disadvantage. We conclude that it did - in failing to give some measure of protection to the salary of the claimant at the time of the transfer of stores. We conclude protection for three years would have been reasonable. This would have enabled the claimant to adjust his finances, to have (as in fact has happened) used his abilities to build up the store to which he moved and perhaps move it to a higher band and it would have removed the disadvantage to him of the PCP. The cost to the respondent would have been small (£12k maximum before add-ons) and it would have been an adjustment easily explainable to other colleagues had there been a necessity to do so.

42. We would have concluded there was a failure to make a reasonable adjustment had the claim reached that point.

43. However in the absence of substantial disadvantage the claim of failure to make reasonable adjustments fails and is dismissed.

Remedy.

44. If the remedy to which the claimant is entitled has not been resolved between the parties, a remedy hearing will be convened at the earliest opportunity.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28 December 2020
JUDGMENT SENT TO THE PARTIES ON

15 January 2021

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL.