EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Denise Ondowa Boesi	**v**	Asda Stores Limited

Heard at: Bury St Edmunds (by CVP)

On: 17, 18, 19 and 20 May 2021

Before: Employment Judge M Warren

Members: Ms M Prettyman and Ms S Laurence-Doig

Appearances
For the Claimant: Mr K Antwi-Boasiako (Legal Executive).
For the Respondent: Mr J Wallace (Counsel).

JUDGMENT

The Claimant's claims of unfair dismissal, discrimination on the grounds of race and discrimination on the grounds of disability each fail and are dismissed.

REASONS

Background

1. Miss Boesi worked for the respondent as a Warehouse Operative at its Brackmills Depot in Northampton. She was dismissed on 13 June 2019 and on 15 August 2019, issued these proceedings claiming unfair dismissal, discrimination on the grounds of race, discrimination on the grounds of disability, failure to make reasonable adjustments and victimisation.

2. The case was managed at a preliminary hearing before Employment Judge Michell on 4 May 2020, when this hearing was set down.

3. There was a draft List of Issues before Employment Judge Michell. He directed that the claimant should provide further and better particulars of her claim, the respondent had leave to file amended grounds of resistance and thereafter, the parties were to agree and file a final List of Issues.

4. Further and better particulars were provided dated 8 June 2020.

5. After liaison between the legal representatives, a final Agreed List of Issues was settled upon as appears in the bundle.

The Issues

6. In discussions at the outset of the hearing, the representatives and I identified some omissions from the List of Issues. Arising out of those discussions:

   6.1 Mr Wallace confirmed that the respondent conceded that Miss Boesi was a disabled person as defined in the Equality Act 2010 at all material times and the respondent's knowledge thereof was conceded.

   6.2 Alternative employment which should have been considered, which should have been offered as a reasonable adjustment, the failure to offer which was an act of direct discrimination, on the claimant's case, is a role working in the respondent's, "Ops Room".

   6.3 The substantial disadvantage arising out of the PCP contended for on the part of Miss Boesi is she says, that because of her back condition she could not undertake heavy duties.

   6.4 The reasonable adjustments previously contended for at (iii), (iv) and (v) could be summarised as, "offering Miss Boesi the PI role, the Key Colleague role or the Ops Room role".

   6.5 Mr Antwi-Boasiako wanted to add that as a reasonable adjustment, the respondent ought have offered Miss Boesi a role with more hours at a local supermarket than the 8 hours she says she was offered. Mr Wallace objected. We refused the application. Miss Boesi has had legal representation throughout. Her claim was properly and competently pleaded. She has provided further and better particulars. The issues have been discussed at a preliminary hearing. A list of issues has been agreed after careful liaison between the representatives and the respondents case has been prepared accordingly. It was not in our judgment, in accordance with the overriding objective to allow such a late amendment. There was no great prejudice to the Miss Boesi, given the foregoing and that she already had a detailed case to put before the tribunal. The prejudice to the respondent would be the cost of an adjournment to prepare further evidence, or proceeding without an adjournment

and not having had a fair opportunity to answer a point raised at the last moment.

6.6 In respect of the comparators relied upon in relation to the claim of direct race discrimination, there were three further named comparators: (d) Alexander Savko; (f) Violetta Brodsueska and (e) Aneta Kiryluk.

6.7 The protected acts relied upon for the victimisation claim are: (1) the provision of assistance to a Mr Kuma in his complaint of sexual orientation discrimination, including three communications with the respondent and their lawyers on 5, 11 and 18 December 2018 and attending a meeting between the respondent and the union GMB, the date of which is not known, and (2) claiming reasonable adjustments in the workplace.

7. I have cut and pasted below the List of Issues as originally agreed between the parties amended by me to reflect the points set out above:

1 Was the Claimant dismissed for a potentially fair reason pursuant to s.98(2)(a) of the Employment Rights Act 1996 (**ERA**), namely capability?

2 Did the Respondent act reasonably in treating the Claimant's capability as a sufficient reason for dismissing the Claimant, in that:

2.1 Did the Respondent have a sound, good business reason to dismiss the Claimant?

2.2 Did the Respondent carry out reasonable consultation with the Claimant?

2.3 Did the Respondent follow a reasonable process in effecting the dismissal?

2.4 Did the Respondent act reasonably in looking for alternative employment for the Claimant?

2.5 Did the Respondent consult the Claimant regarding the reasons for their absence?

2.6 Did the Respondent make reasonable efforts to facilitate the Claimant's return to work?

3 Did the Respondent reasonably believe that the Claimant was unfit to carry out their job (with any reasonable adjustments)?

4 Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the Respondent?

5 Did the Respondent follow a fair procedure when dismissing the Claimant?

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

Disability

7 That the claimant was disabled and that the respondent knew she was disabled at all material times is conceded.

8 …

9 …

10 …

11 …

Direct Disability Discrimination

12 Who is the comparator for the purposes of the Claimant's claim of direct discrimination? The Claimant relies on a hypothetical comparator who is not black-African and is not disabled

13 Did the Respondent treat the Claimant less favourably than it would treat the relevant comparator? The Claimant alleges that the Respondent treated her less favourably by:

(a)Only moving her from 'box room' to 'Hanging' in 2017 which was identical to her usual duties;

(b)Only offering a 12 months unpaid healthcare leave instead of light duties;

(c)Only offering 'box', 'pick', and 'hanging' at the capability review meeting on 5 March 2019;

(d) only offering 'box', 'pick', 'hanging', 'replen', "loading", and 'sortation' roles in April 2019, May 2019;

(e)Failing and refusing to offer her a PI job, Ops or a key colleague role in March/April 2019 and May 2019; and

(f)Dismissing or causing her dismissal on 13 June 2019.

14 If so, was the less favourable treatment because of/on the grounds of the Claimant's disability, contrary to the Equality Act 2010?

Reasonable adjustments

15 Did the Respondent know/could the Respondent reasonably have been expected to know that the Claimant had a disability? If not, when ought the Respondent to have been aware of the Claimant's disability?

16 Did the Respondent apply a provision, condition or practice (**PCP**)?

17 What is the PCP? The Claimant alleges that the Respondent applied a PCP of requiring her to perform heavy duties which involved pulling, pushing, sorting, picking, packing and loading.

18 If so, did that PCP place the Claimant at a substantial disadvantage in comparison with employees who were not disabled? The Claimant says that because of her back condition she could not undertake heavy duties.

19 Did the Respondent fail to make reasonable adjustments? The Claimant alleges that the Respondent failed to make adjustments by

i. Only moving her from 'box room' to 'Hanging' in 2017 which was identical to her usual duties;

ii. Only offering a 12 months unpaid healthcare leave instead of light duties;

iii. Offering her either the PI role, the Ops role or the Key Colleague role.

vi. Dismissing or causing her dismissal on 13 June 2019.

Direct Race Discrimination

20 The Claimant is a black-African. Who is the comparator for the purposes of the Claimant's claim of direct race discrimination? The Claimant relies on the following:

(a) An actual comparator who is white named John;

(b) An actual compactor who was an Indian lady;

(c) An actual comparator named Ursula Gonshore who is a Polish lady;

(d) Alexander Savko;

(e) Aneta Kiryluk, and

(f) Violetta Brodsueska.

21 Did the Respondent treat the Claimant less favourably than it would treat the relevant comparator? The Claimant alleges that the Respondent treated her less favourably by:

(a)Only moving her from 'box room' to 'Hanging' in 2017 which was identical to her usual duties;

(b)Only offering a 12 months unpaid healthcare leave instead of light duties;

(c)Only offering 'box', 'pick', and 'hanging' at the capability review meeting on 5 March 2019;

(d) only offering 'box', 'pick', 'hanging', 'replen', "loading", and 'sortation' roles in April 2019, May 2019;

(e)Failing and refusing to offer her a PI job, Ops role or a key colleague role in March/April 2019 and May 2019; and

(f)Dismissing or causing her dismissal on 13 June 2019.

22 If so, was the less favourable treatment because of/on the grounds of the Claimant's race, contrary to the Equality Act 2010?

Victimisation

23 Has the Claimant done or do they intend to do, or are they suspected of having done or are intending to do, a 'protected act' within the meaning of the Equality Act 2010?

(a) The Claimant relies upon the following as protected acts:

i. Providing assistance to Mr Kuma in his complaint of discrimination on the grounds of sexual orientation, including three communications on 5, 11 and 18 December 2018 and attending a meeting with the GMB on a date unknown.

ii. Claiming reasonable adjustments in the work place.

(b) In so far as the alleged protected acts are upheld, was the Claimant treated less favourably as a result? The Claimant alleges less favourable treatment as she was:

i. Only moving her to a 'box room' to 'hanging' in 2017 which was identical to her usual duties;

ii. Only offering a 12 months unpaid healthcare leave instead of light duties;

iii. Only offering 'box', 'pick', and 'hanging' at the capability review meeting on 5 March 2019;

iv. Only offering 'box', 'pick', 'hanging', 'replen', "loading", and 'sortation' roles in April 2019, May 2019;

v. Failing and refusing to offer her a 'PI job' or a 'key colleague role' in March/April 2019 and May 2019; and

vi. Dismissing or causing her dismissal on 13 June 2019.

Jurisdiction

24 Was the claim form submitted more than 3 months (plus the applicable early conciliation extension period) after the Claimant's dismissal? If so:

(a) was it reasonably practicable for the Claimant to present her complaint within the specified time limit?

or

(b) did the conduct complained of form part of a chain of continuous conduct which ended within 3 months (plus the early conciliation extension period) of the claim form being submitted?

(c) If not, would it be just and equitable for the tribunal to hear elements of the claim that relate to conduct which occurred more than 3 months (plus the applicable early conciliation extension period) before the claim was submitted?

Remedy

25 If the Claimant's claims are upheld: what remedy does the Claimant seek?

26 What financial compensation is appropriate in all of the circumstances?

27 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate?

28 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

29 Has the Claimant mitigated her loss?

30 Should there be any award for injury to feelings and, if so, in what amount?

Evidence

8. We had before us a bundle of documents in pdf format running to page number 391, which I believe was prepared by Mr Boasiako, for which we are grateful.

9. We also had from Mr Boasiako a bundle containing the three witness statements relied upon, that is the statement of Miss Boesi and of the respondents two witnesses, Mr John Williams and Mr Paul Dodridge.

10. Mr Wallace produced an opening note and some written submissions.

11. The Tribunal read the witness statements and either read or looked at the documents referred to in the witness statements, before hearing evidence from each of the three witnesses. We reminded the representatives that we did not read the bundle from beginning to end and it was important that they took us to what they considered to be the important documents and the passages therein, during their cross examination of the witnesses.

12. The respondent's two witnesses were in the same room together, watching the proceedings on the same device. That did not matter until they came to give evidence. It was a tad surprising the respondents had not thought about this in advance. When the two witnesses came to give evidence, there was nowhere else for the other to go so as not to be in the same room. The solution we settled upon was that whilst one gave evidence, the other sat behind him in view of the camera, so that we could see that the one who was not giving evidence was not assisting the one who was. This would be akin to the arrangements that would have pertained in an actual tribunal room. Mr Antwi-Boasiako very sensibly agreed with the arrangement.

The Law

13. The relevant law is set out in the Equality Act 2010.

14. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

15. Race and disability are amongst the protected characteristics identified at s.4.

16. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

17. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Direct Discrimination

18. Miss Boesi says that she was directly discriminated against because of her race. Direct discrimination is defined at s.13(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".*

19. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

20. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? There is no difference in meaning between the term, "because of" in section 13 and "on the grounds of", under the pre-Equality Act legislation, (see Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40).

21. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

22. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

23. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that she had been disadvantaged in the circumstances in which she had thereafter to work. However, an unjustified sense of grievance does not amount to a detriment.

Reasonable Adjustments

24. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which is that which might apply in this case set out at subsection (3) as follows:-

> *"The first requirement is a requirement, where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

25. Section 21 provides that a failure to comply with that requirement is a failure to make a reasonable adjustment, which amounts to discrimination.

26. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

    26.1 The relevant provision criterion or practice applied by or on behalf of the employer;

    26.2 The identity of non-disabled comparators, (where appropriate);

    26.3 The nature and extent of the substantial disadvantage suffered by the disabled employee;

    26.4 The steps the employer is said to have failed to take, and

    26.5 Whether it was reasonable to take that step.

27. The obligation to make reasonable adjustments is on the employer. That means that it must consider for itself what adjustments can be made, thus for example in Cosgrove v Caesar and Howie [2001] IRLR 653 the duty was not discharged simply because the Claimant and her GP had not come up with what adjustments could be made. An employer that does not make enquiries as to what might be done to ameliorate the disabled persons disadvantage, runs the risk that it fails to make a reasonable adjustment.

28. The duty is to make "reasonable" adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective, (Smith v Churchill Stairlifts plc [2006] ICR 524). Our focus should be not on the process followed by the employer to reach its decision but on whether there is an adjustment that should be considered reasonable.

Burden of Proof

29. Section 136 deals with the burden of proof:

> *"(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 subsection (2) does not apply if (A) shows that (A) did not contravene the provision.*

30. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

31. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

Unfair Dismissal

32. The right not to be unfairly dismissed is contained in Section 94 of the Employment Rights Act 1996, (ERA).

33. Section 98(1) and (2) of the ERA set out five potentially fair reasons for dismissal, which include the capability or qualifications of the employee for performing work of the kind which she was employed to do.

34. If the employer is able to show the reason for dismissal was one of the potentially fair reasons set out in Section 98(1) and (2), the Tribunal must then go on to apply the test of fairness set out at Section 98(4) which reads as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the*

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

35. In applying the test of fairness set out in s98(4) the tribunal must not substitute its decision as to what was the right course to adopt and in considering the reasonableness of the employer's conduct, there will usually be a band of reasonable responses the reasonable employer could adopt and it is to that, one should have regard; a decision inside that band is fair, a decision outside that band is unfair, (Iceland Frozen Foods Limited v Jones [1983] IRLR 439).

36. That an employee is disabled and that an employee is absent from work by reason of disability does not preclude the employer from fairly dismissing the employee, see Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 552. Whether taking disability related absences into account is unlawful will depend on whether the employer has acted reasonably and is justified in taking those absences into account.

37. Where an employee is dismissed by reason of lack of capability occasioned by ill health, the question must be, when looking at the fairness of the dismissal, whether in all the circumstances the employer can be expected to wait any longer, and if so how much longer? One should take into account the nature of the illness, the likely length of continuing absence and the need of the employer to have done the work which the employee was engaged to do, see Spencer v Paragon Wallpapers Ltd [1976] IRLR 373.

38. Furthermore, before a dismissal for ill health is effected, one would expect to see consultation, discussion and steps taken to discover the true medical position, see East Lindsey District Council v Daubney [1977] IRLR 181.

39. One would also expect to see consideration given to whether there are options other than dismissal open to the employer and whether there is some other employment that could be provided that is within the capabilities of the employer.

40. Tribunals are enjoined to have regard to any relevant ACAS Code of Practice in considering a claim of unfair dismissal. The only potentially relevant code of practice is that on disciplinary and grievance procedures of 2009, which has no application to cases of dismissal on the grounds of long term ill-health as its focus is on misconduct. However, ACAS have also issued a guide entitled "Discipline and Grievances at Work (2009) which, notwithstanding its title, contains an Appendix on, "Dealing with Absence. Under the heading, "How should longer-term absence through ill health be handled?" it includes the following:

Where absence is due to medically certificated illness, the issue becomes one of capability rather than conduct. Employers need to take a more sympathetic and considerate approach, particularly if the employee is disabled and where reasonable adjustments at the workplace might enable them to return to work.

There are certain steps an employer should take when considering the problem of long-term absence:

- *employee and employer should keep in regular contact with each other*

- *the employee must be kept fully informed if there is any risk to employment*

- *if the employer wishes to contact the employee's doctor, he or she must notify the employee in writing that they intend to make such an application and they must secure the employee's consent in writing (Access to Medical Reports Act 1988). …*

…

- *on the basis of the GP's report the employer should consider whether alternative work is available*

- *the employer is not expected to create a special job for the employee concerned, nor to be a medical expert, but to take action on the basis of the medical evidence*

…

- *where the employee's job can no longer be held open, and no suitable alternative work is available, the employee should be informed of the likelihood of dismissal*

- *where dismissal action is taken the employee should be given the period of notice to which he or she is entitled by statute or contract and informed of any right of appeal.*

Facts

41. The respondent is a huge supermarket chain with over 600 stores in the United Kingdom and approximately 140,000 employees. Miss Boesi's employment with the respondent commenced on 26 December 2012 as a Warehouse Operative at its clothing warehouse near Northampton. There are 600-700 warehouse workers working at that facility.

42. It is accepted that at all material times Miss Boesi was a disabled person as defined in the Equality Act 2010, by reason of degenerative disc disease in her lower back. Knowledge is also accepted. Her role entailed picking stock out of boxes or off rails, sometimes lifting whole boxes of up

to 15 kilograms in weight, or lifting tied together bundles of clothes on a rail of a similar weight, pushing around a trolley or a clothes rail containing the picked stock, loading stock onto or off delivery vehicles, putting stock onto or lifting off moving rails overhead/at overhead height called Jets, putting boxes onto conveyor belts. All these tasks entailed to varying degrees bending, lifting, stretching, pushing and pulling.

43. There are three tasks involved in the lighter duties which Miss Boesi says she could and should have been offered as a reasonable adjustment. The first is called PI; this entails finding a location for stock that has not been allocated a location, picking up stock that has fallen on the floor or has been misplaced, taking such stock to an area where it is placed on a table for sorting and placing it where it should be. It is a task that is necessary from time to time. The second is that of Key Colleague – a Key Colleague is somebody appointed to step up for the shift manager if that shift manager is absent for any reason. The third is work in what is referred to as the Ops Room. Ops Room staff provide support in relation to operating machinery and the respondent's systems. The operations staff sometimes carryout the PI role.

44. The respondent has a Sickness Absence Policy the content of which are agreed by virtue of a collective agreement with the recognised trade union for the respondent, the GMB. There are passages relating to managing long term sickness in the bundle at page 98 which provide that colleagues on long term sick should be contacted by their manager, either at home or invited to a visit at the depot, to enquire as to their welfare, to understand the nature of their illness and to provide any support which might facilitate their return to work.

45. At page 99 are provisions for dismissal if there is ill health incapability, which basically say that if a colleague is absent from work for a long period of time and it is not possible to make adjustments to facilitate their return to work. dismissal on the grounds of ill health capability may be considered.

46. At page 105 is reference to something we will hear about later, healthcare leave criteria. Under these provisions, the respondent allows an employee a period of leave. It is unpaid, but the employee remains in the respondent's employment during the agreed period of leave. To benefit from healthcare leave, the employee must have 3 years' service, a good attendance record, there should be an Occupational Health report confirming that individual should be able to return to the business once they have recovered and there should be clear guidance about the timespan of their potential absence.

47. Miss Boesi was absent from work to begin with, between 19 November 2014 and 30 January 2015 with back pain. She was absent again for the same reason between 1 September and 22 October 2015. She returned to work on 22 October 2015 and we can see from a return to work interview document at page 142, that she returned to what were

described as lighter duties for a period of 8 weeks, which included a reduction in her hours from 32 to 16.

48. Miss Boesi was absent from work due to back pain again between 22 April and 1 June 2016. On that occasion, she was referred to a physiotherapist for a report, although we did not have the benefit of that report in the bundle, (or at least if it was there, we were not referred to it). Her absence was reviewed and a sanction imposed on 1 June 2016, (we see this at page 168) this is after what was described as a stage 1 interview. She is recorded as having said that on her phased return to work on 22 October, she was expected to pick on box every shift and keep taking time off with her back as when reporting to managers to rotate or change her department this had not been carried out. The author of the letter, (Ms Betteridge) states that she noted that Miss Boesi was placed on a phased 8 week return to work; 4 hours per day, only working 2 days per week for a period of that phased return and that it had not been possible at that time to transfer her to hanging on a permanent basis. The sanction imposed was what they called the removal of the first three waiting days, (presumably to do with sick pay) and she was to be monitored in terms of her absence for the next 26 weeks.

49. In tandem with her back problems, Miss Boesi developed a problem with fibroids, which became progressively worse until it required surgery in 2017. Thus we see that she was absent from work with the fibroids issue between 26 January and 9 February 2017. She was then absent from work for a further period during which she underwent an operation in respect of fibroids; that was between 15 June and 17 August 2017. She returned to work on 17 August 2017 and the return to work interview is at page 210. We note that by this time, she was working in the Hanging Department. We can see here that there is a phased return to work over 8 weeks again, as recommended by Occupational Health. She was to complete all tasks, “within reason” but Ms Betteridge is recorded as having said to Miss Boesi that she was to say if she was struggling.

50. In December 2017, Miss Boesi had a further period of absence due to issues that were related to her fibroids problems, post-operative.

51. On 9 January 2018 an Occupational Health report was obtained. This is in the bundle at page 219. The focus of this Occupational Health report is the fibroids issue rather than Miss Boesi’s back.

52. There was a further period of absence as the problems with fibroids persisted, between 31 January and 28 February 2018. Thereafter, Miss Boesi’s absence continued, but we see from the next fit note that the reason given for her being unfit to work is “back pain unspecified”. In that fit note, she was certified by her GP as not being fit to return to work until 26 March 2018, (page 226). There are no suggestions of possible amendments to duties in the fit note.

53. On 28 February 2018, Miss Boesi met with her line manager Ms Betteridge. A note of this meeting is at page 225. Here, she is said to be feeling a little better, although struggling to sleep. It is noted that she will not be fully fit to return to work when her sick pay runs out and she says that she would like the option of healthcare leave, (HCL).

54. On 7 March 2018, Miss Boesi met with her managers, that is Ms Betteridge and Mr Williams, noted at page 227. At this meeting it was agreed that as requested, Miss Boesi could have 3 months healthcare leave, having exhausted her company and statutory sick pay. During this meeting, it was suggested to Miss Boesi that she might consider a transfer to an Asda Supermarket in the area. There are a number of Asda Supermarkets in the area. The respondent says that Miss Boesi turned down this proposal. Miss Boesi says she only turned it down after Ms Betteridge looked into it and found that there was only a vacancy for two 4 hour shifts. Mr Williams' evidence was that staff could transfer to an Asda store, all they had to do was find a vacancy and apply for it, which the warehouse management would support. We accept that it was made clear to Miss Boesi that she could transfer to a store of Asda as an option, that she knew how to look out for a vacancy and that she knew that she could apply and the respondent would support her. We accept that the particular vacancy available at this time looked into by Ms Betteridge was for a role of two 4 hour shifts, which Miss Boesi did not want.

55. On 17 June 2018, Miss Boesi met Mr Williams and because of her ongoing back pain issues, he agreed at her request, to extend her healthcare leave to 11 March 2019. That would mean her total HCL would be for a period of 1 year, the maximum permissible.

56. Subsequently, Miss Boesi's GP referred her to the NHS Pain Management Service, who provided a report on 6 September 2018 which we find in the bundle at page 238. This refers to a period of back pain that has lasted for more than 3 years, that has been worse since December 2017 and that she has been off work since then. The back pain is said to be increased by any activity, by prolonged sitting, that it impacts on her ability to continue with her work and it affects her sleep. She is said to have tried physiotherapy which provided no pain relief and that pain could be relieved by nothing at that time.

57. On 28 February 2019, as the healthcare leave was due to expire, Miss Boesi had a meeting with Mr Williams, noted at page 245. In this meeting, she was told that she could not have any more healthcare leave, despite her request for more. Miss Boesi said that she was still undergoing treatment and was not fully recovered. She was told that if she could not return to work, the respondent may need to start its capability process, which Miss Boesi accepted. Mr Williams indicated there would be an Occupational Health referral.

58. On 5 March 2019 a capability review meeting took place between Miss Boesi and Mr Williams, noted at page 249. Ms Boesi referred to a

hernia following the fibroids surgery, which itself would require surgery. She referred to pain management treatment, said it was a long process and that she would recover little by little. She said that pain management had said that she needed more time, as there was no improvement and they would need to give her more exercises to do. During this meeting, Mr Williams ran through jobs in the warehouse or on what is known as dot com, as set out at pages 252 and 253. With regard to all of these various jobs, he asked her whether she could do any of them and each time she answered that she could not for now and that she would speak to her GP. Ms Boesi confirmed that she could not indicate a likely return to work date. Mr Williams indicated that he would arrange for an Occupational Health and physio appointment and for the physio to undertake an assessment. Ms Boesi asked if there were any flexible duties that she could do temporarily and Mr Williams indicated that he would review that once he heard from her GP.

59. Miss Boesi says in her witness statement that Mr Williams asked her to resign at this meeting. This is not something that is recorded in the notes and it is denied by Mr Williams. Miss Boesi signed that note as an accurate account of what had been said. We accept Mr Williams' evidence that he did not ask Miss Boesi to resign. In cross examination Miss Boesi said that in fact it was Ms Betteridge who had spoken to her and said she might have to resign. That is a new allegation that the respondent was unable to answer as Ms Betteridge was not here. We find that Miss Boesi was not asked to resign.

60. A report from the physiotherapist following examination of Ms Boesi was produced dated 8 April 2019, it is in the bundle at page 256. The physio is employed by Asda, she is familiar with all the various roles in the warehouse. In the report she wrote:

> "Denise has very high pain levels and is very restricted in her movement and function. Denise is unable to walk or stand for longer than 10 minutes, on assessment was unable to bend to pick up an empty tote from the floor and had very restricted back movements.
>
> …
>
> Following my assessment I do not feel she would be fit for any warehouse duties at present. Denise is currently under a pain management clinic which she has just started treatment, her symptoms may ease slightly with time but she is likely to have ongoing pain long term, which is unlikely to fully resolve.
>
> There is not much I can offer in terms of treatment at this time, so I have now discharged her case."

61. At the foot of the report we note that there are three options for the physio to select; either that the employee is fit to return with no restrictions, that the employee is fit to return but only if recommended restrictions can be accommodated by management and thirdly, that the employee is not fit to

return at present. The physio selected the latter option, that Miss Boesi was not fit to return at present.

62. On 2 May 2019 there was a disciplinary hearing before a Mr Ashfield, a typed note of which is at page 267. A handwritten note at page 262 through to page 264. This disciplinary hearing was for Miss Boesi's failure to return to work when she was due to do so on 11 March 2019, after the expiry of her healthcare leave. During the course of this meeting, it is recorded that Miss Boesi had requested an extension of her healthcare leave in order that she might complete an access course that she was undertaking. So the request for an extension apparently was to do with the access course, not to do with any treatment that was pending. During this disciplinary hearing, she was referred to the physiotherapist's report, which she said she had not seen. She said the physio had said that she would send her a copy and that she was going to ask the respondent to extend her healthcare leave. Miss Boesi is recorded as saying that she might be able to do alternative duties, but she could not guarantee it, which was why she was waiting for the physio's assessment and wanted to see it. She confirmed that she had completed the access course. She was told that she would be referred on for a disciplinary hearing for gross misconduct. As far as we can make out, the respondent's concerns appear to be that the access course was behind the extended leave of absence and her not returning. However, apparently that is something the respondent chose not to pursue, for in the meantime on 10 June she was invited to a final capability meeting, to take place on 13 June with Mr Dodridge.

63. The notes of the final capability meeting are at page 270. Miss Boesi said that she was no better, that she sleeps in pain, wakes up in pain, that pain management was not working, that it was not possible for her to return to work, that she did not want to end up in a wheelchair. Mr Dodridge asked about specific tasks in relation to departments known as intake or dot com, which he regarded as slightly less taxing. Miss Boesi was clear she could not do those tasks. Mr Dodridge referred to the physio report and Miss Boesi confirmed she had still not seen it. She said that she had told the physiotherapist that she could not lift or bend and so the physio had said to her that she would ask for an extension of the healthcare leave. Mr Dodridge gave Miss Boesi a copy of the physio report and adjourned so that she had an opportunity to read it. He pointed out that the physio had said that Miss Boesi was not fit for any warehouse duties. Miss Boesi did not dispute that, but said that the physio had said to her that she would ask for more time.

64. During the meeting on 13 June, Miss Boesi presented a further fit note from her GP dated 12 June, certifying her as not fit for work. This fit note is completed in such a way that the GP has deleted all references to the possibility of adjustments being made to facilitate her return to work. She was certified as unfit until at least until 15 September 2019. The reasons for her ill health were given as depression, back pain and hypertension. Miss Boesi's attending trade union representative said to Mr Dodridge that

she not fit to return to work and would benefit from further time away from the business. After an adjournment, Mr Dodridge informed Miss Boesi that she was dismissed for incapability. At that point she and her representative protested that she had not been offered alternative duties that were appropriate to her situation.

65. Miss Boesi appealed against her dismissal by a letter dated 18 June, which is at page 278. In this letter it is apparent that she seeks compensation, she says because she is disabled and she has been dismissed without being offered alternative duties. She also said that her disability had been caused by the respondent, (an unfounded allegation). She suggests that with further training, she could have been offered employment in the Ops Room, on PI, Key Colleagues or Reception. Pausing there, we should note that the possibility of work on Reception is not something which Miss Boesi advanced in her case and did not appear in the pleadings or the List of Issues. During cross examination, she confirmed that Reception was operated by security guards and Miss Boesi agreed that she could not do the work of a security guard.

66. On 1 July, Miss Boesi was invited to attend an Appeal meeting. The next day she sent an email saying in effect, that she had now engaged ACAS and wanted to leave the matter in their hands and did not wish to proceed with the Appeal process.

67. Relevant to Miss Boesi's claim is that a colleague called Mr Kuma working on a different shift, a night shift, raised complaint about being the victim of sexual orientation discrimination. He was supported in that claim by the GMB and a local full time officer, Sian McClaren. In her witness statement, Miss Boesi spoke of Miss McClaren as a representative of the respondent who was at a meeting with the GMB she attended. Miss Boesi clearly became confused in cross examination and said that Sian McClaren was a legal representative for the respondent attending at a tribunal preliminary hearing which she had attended to support Mr Kuma. She seems to have thought that Miss McClaren would have reported back to Asda that Miss Boesi was supporting Mr Kuma, which we have to say, we find very unlikely indeed.

68. Certainly we accept that Miss Boesi supported Mr Kuma in bringing a complaint about being subjected to sexual orientation discrimination. We accept the evidence of Mr Williams and Mr Dodridge that they did not know that Mr Kuma was making such a complaint and did not know that Miss Boesi was helping him in any way.

Conclusions

69. So this brings us to our conclusions. We shall use the List of Issues to guide us through the various questions that we must answer along the way, but will approach matters in a slightly different order dealing with the question of unfair dismissal at the end.

Direct Disability Discrimination

70. So the first claim is of direct disability discrimination. Miss Boesi relies on a hypothetical comparator; that would be a person who does not meet the definition of disability in the Equality Act, but who has been absent from work for the same length of time, for whom a GP and a physio has provided the same sort of information and who has responded in the same way as she has done in various meetings with the respondent.

71. Next we turn to the allegations of direct discrimination. The first is of the respondent, as it is put in the List of Issues, only moving her from Box Room to Hanging in 2017 which was identical to her usual duties. It was rather difficult to understand what exactly Miss Boesi meant by this. In her witness statement on this topic, she cross refers to her dismissal letter (page 276). In the dismissal letter Mr Dodridge writes:

> "You told me that you had asked for support at your return to work interviews. I can see that we have supported you with reduction in hours, paid sick leave, a 12 month period of healthcare leave and a temporary move of departments to hanging after one of your periods of absence for 6 months."

It is not clear when that change to hanging was.

72. The claimant's absences and medical issues in 2017, according to the evidence to which we have been referred, were primarily her fibroids issue. The operation was in the middle of 2017. Apart from the reference in the dismissal letter, we were referred to and heard no other evidence about Miss Boesi being moved from Box Room to Hanging in 2017; not in her witness statement, nor in the documents during oral evidence and cross examination. The allegation is I am afraid, simply not made out, it does not make sense. Hanging is different from box work because as we understand it, hanging involves working standing upright, so it seems to us not even to make sense to say that the duties are identical.

73. The second allegation is that the respondent only offered Miss Boesi 12 months healthcare leave, rather than offering her light duties. The healthcare leave was originally for 3 months, from March 2018. It was extended to a year in June 2018. It is clear that there was no question of the claimant being physically able to return to work at all during that time. It is also clear that the healthcare leave was what Miss Boesi wanted, she asked for it. This allegation is not made out.

74. The third allegation is of Miss Boesi only being offered box, pick and hanging in the capability review meeting of 5 March 2019. We have seen that Mr Williams ran through all of the tasks in the warehouse and that Miss Boesi made it clear that she would be able to do none of them. We note that she did ask whether there were any flexible tasks she could do and it is at this point, Mr Williams said that they would wait and see what her GP said and they would then review. He said that because she had

expressly said she was going to speak to her GP about whether she could do anything. Subsequently, her GP provided a certificate which said flatly that she would not fit to work until September and expressly deleted any references to the possibility of her returning to work with changed duties. This allegation is not made out.

75. The fourth allegation is of only being offered box, pick, hanging, replen, loading and sortation in April and May 2019. So far as we can see on the evidence that we have been referred to, there was no meeting in April 2019. The only meeting in May was the disciplinary meeting and by then, the respondent had the 8 April physiotherapist report saying in very clear terms that she was not fit to return to work at all. So it is not a case of only being offered those posts, in fact nothing was offered to her and that was because the physiotherapist report had said she was not able to return to work at all and the capability meeting was pending. This allegation is not made out.

76. The fifth allegation is of the respondent failing and refusing to offer Miss Boesi PI tasks, the Key Colleague role and the Ops Room role in March, April and May 2019. The respondent did not refuse to offer those roles, Miss Boesi did not ask for them. But it is the case that in fact she was not offered those tasks or roles, so to that extent this allegation is made out. The question then is whether the hypothetical comparator would have been treated differently, anymore favourably? Are there any facts from which we could conclude that the reason was Miss Beosi's disability? The advice from the physiotherapist was simply that Miss Boesi was not fit to return to work. The PI and Key Colleague roles in any event were occasional tasks that arise from time to time, they were not a flexible roles that one could return to. As for the Ops Room, Miss Boesi was not able to bend to pick up an empty box, she could not sit or stand for more than 10 minutes; that is the report from the physio. Whatever the Ops Room duties were, even if there was a vacancy, she would not have been able to undertake them. The hypothetical comparator in the same circumstances as Miss Boesi but not meeting the definition of a disabled person would have been treated in exactly same way. There is therefore no less favourable treatment.

77. The sixth allegation is of direct discrimination by dismissing her. Well Miss Boesi was dismissed, so to that extent this allegation is made out. Was the reason that she was dismissed that she was disabled? Was there less favourable treatment? Are there facts from which we could conclude that the reason Miss Boesi was dismissed was her disability? We find that Mr Williams dismissed Miss Boesi because she had a very long period of absence, (a year and a half) the medical advice was that she was not fit to return to work and there was no prospect of her being able to do so in the immediate future, certainly not before September. A hypothetical comparator in the same circumstances as Miss Boesi but not meeting the definition of disability would have been dismissed in those same circumstances. There is no less favourable treatment. She was not dismissed because she was disabled.

78. For these reasons, the complaint of direct discrimination by reason of disability fail.

Failure to make reasonable adjustments

79. Turning then to the complaint of failure to make reasonable adjustments. The PCP relied upon is that of requiring Miss Boesi to perform heavy duties which involve pulling, pushing, sorting, picking, packing and loading. The duties of a Warehouse Operative generally did require that they may have to perform these actions from time to time and the weights involved were up to 15 kilograms.

80. The next question then is whether this PCP placed Miss Boesi at a substantial disadvantage, because of her back condition? She was clearly unable to undertake these duties. She certainly could not lift such weights, she could not bend, walk or sit for more than 10 minutes. Plainly then, she was placed at a substantial disadvantage.

81. Did the respondent fail to make reasonable adjustments? Well the short answer is that Miss Boesi was simply unfit for work in any capacity. She was saying she could not work. The GP had not made any recommendations and had deleted the options for recommendations and Miss Boesi knew the respondent was waiting to see what the doctor said. The physiotherapist, who knew the respondent's operations well, reported categorically that she could not pick up an empty box, she could not walk or sit for more than 10 minutes and was not fit for any duties in the respondent's warehouse, an observation made by somebody who knew precisely what duties there were. The physiotherapist chose not to tick the box that would have given the option of suggesting adjustments. There were no reasonable adjustments that could have been made. That said, we consider the reasonable adjustments contended for:

    81.1 The first is that the transfer from Box to Hanging in 2017 was not enough. As a free standing allegation, we make the observation that this is out of time. We were not taken to anything about the move from Box to Hanging in 2017 or of any suggestion by Miss Boesi that it was not enough. The issues in 2017 were primarily fibroids. We saw in August 2017 that it was made clear to Miss Boesi that she should say if she could not cope. There was in our judgment, no failure to make a reasonable adjustment.

    81.2 The second adjustment contended for is only offering her healthcare leave and not light duties and we have already dealt with this. Healthcare leave is what Miss Boesi wanted, it is what she asked for.

    81.3 The third adjustment contended for is to provide her with either PI, Key Colleague or Ops Room work. PI and Key Colleague were not roles as such, they entailed ad hoc tasks and it would not be

reasonable to allocate that as a job role as such. As for the Ops Room, that might have been a role that could have been allocated to Miss Boesi, but on the facts she simply was not fit to go back to work and do whatever that might have entailed. Had she been fit to return to work with adjustments, that might have been an option and in those circumstances, to say that she would have to apply for a vacancy in the Ops Room and there had to be a vacancy might not have been enough. However as it stands, it is not reasonable to expect the respondent, in the face of such clear medical advice that Miss Boesi is not fit to return to work at all, to appoint her to some position in the Ops Room.

81.4 The fourth adjustment contended for would be choosing not to dismiss her. Her length of absence already, the anticipation of a further 3 months absence, the negative indication of the physiotherapist about her prospects of improvement and the advice from the GP in the fit note – in light of those points it would not be reasonable to expect the respondent to extend the absence even further. There comes a point where it has to be reasonable to terminate the employment relationship and the respondent and Miss Boesi had reached that point.

82. The allegation of discrimination by failing to make reasonable adjustments therefore fails.

Direct Race Discrimination

83. We then come to the allegation of direct race discrimination. Here, Miss Boesi relies upon some actual comparators. Three of them were not in the original List of Issues, but they were in the further and better particulars and they therefore fall to be considered:

83.1 The first comparator is a white person known as John. The respondent was unable to identify who this individual was, not unreasonably. Miss Boesi says that he was moved to PI and he had a back problem, although she did not know the diagnosis. She did not know whether he had been moved onto PI full time or not.

83.2 The second is an Indian woman. Again Miss Boesi could not give a name and not unreasonably, the respondent was not able to identify who Miss Boesi was referring to. She acknowledged that all she knew about this person was that she had a health problem and that she moved to PI, but Miss Boesi's recollection about this individual was very vague.

83.3 The third is a named comparator, a Polish woman called Ursula Gonshaw. Miss Boesi says that she was moved from Hanging to the Ops Room. She does not know when that was and all she does know, is that Ms Gonshaw had health issues, she was not sure what they were and she confirmed she did not know what

the circumstances of the move were. Mr Williams says of Ms Gonshaw, that she successfully applied for a role when there was a vacancy and that had nothing to do with her health condition. We accept the evidence of Mr Williams in that regard.

83.4 The fourth comparator is a Mr Alexander Savko. Miss Boesi says that he had back issues and was moved to Ops as a result. Mr Williams says that this is not so, he says again, that Mr Savko successfully applied for a role in the Ops Room when there was a vacancy and his move had nothing to do with a back issue. We accept Mr Williams evidence.

83.5 The fifth is an Aneta Kiryluk, Miss Boesi says that she had a health, condition although she does not know what it was and she says that Ms Kiryluk was moved from Hanging to Ops. Mr Williams says that this person successfully applied for a position and that her move was nothing to do with her health condition. We accept his evidence.

83.6 Lastly, there is a Violetta Brodsueska. Miss Boesi says that she was made a Key Colleague even though she was not even a permanent employee and if that could be done for her, it could be done for Miss Boesi. Mr Williams confirmed that Miss Brodsueska was a Key Colleague but that it was not a permanent role, it was a title, not a task. We accept his evidence in that regard.

84. None of these comparators are true comparators; none of them are in the same circumstances as Ms Boesi. Nonetheless, they have the potential to inform how a hypothetical comparator would have been treated. Miss Boesi does not, according to the List of Issues, rely in the alternative on a hypothetical comparator, but we have considered that anyway. The hypothetical comparator would be a non-black African person absent from work for the same reasons as Miss Boesi, for the same length of time, for whom the same information has been provided by a GP and physiotherapist and who has responded in the same way in meetings with the respondent. With that in mind, we consider the allegations again. We have already explained that the allegations, the 1st, 2nd, 3rd and 4th allegations are not made out. The 5th allegation, failing or refusing to offer Miss Boesi the PI, Key Colleague and Ops Room roles, as we have said there was not a refusal, but there was a failing. The hypothetical comparator in our judgment, would have been treated in exactly the same way. There are no facts from which we could conclude properly that a non-black African person would have been treated any more favourably. The burden of proof does not shift.

85. The sixth allegation is the act of dismissal. There are no facts from which we could properly conclude that the hypothetical comparator, a non-black African person in exactly the same circumstances, would have been treated any differently, any more favourably. The burden of proof does not shift.

86. For these reasons, the complaint of direct race discrimination fails.

Victimisation

87. That brings us to the complaint of victimisation. The first thing we have to do, is find whether or not Miss Boesi did protected acts. We certainly accept that she provided support to Mr Kuma in his complaint of sexual orientation discrimination, in terms of communications with the respondent's lawyers and either at a meeting with the GMB as suggested in the List of Issues or perhaps at a tribunal preliminary hearing, it really does not matter, either way, she was involved with Mr Kuma in his discrimination complaint.

88. The second protected act relied upon is claiming reasonable adjustments in the workplace. On the evidence that we have seen, Miss Boesi never puts it in those terms. She never advanced in terms of the respondent's Equality Act obligations, that there is some failing on the respondent's part. She never does anything to indicate that she is going to bring a complaint under the Act nor complains that there is some breach of the Act. She did ask for flexibility and she did ask about lighter tasks, but that did not amount to indicating that she was claiming reasonable adjustments under the Equality Act and that she was claiming or likely to claim that the respondent was in breach of its obligations under the Act.

89. The same set of allegations are made as amounting to detriments because of the protected act as are made under each of the other heads of claim and as we have noted, only two of those allegations are upheld. There is in fact no evidence that the claimant's assistance to Mr Kuma was passed back to the respondent by the respondent's lawyers. In any event, we accept the evidence of the decision makers Mr Williams and Mr Dodridge that they knew nothing about it. So their actions could not and were not influenced in any way whatsoever by the fact that Miss Boesi assisted Mr Kuma. Nor were they influenced in any way by any thought that Ms Boesi had or might make a complaint or a claim under the Act. Her complaint of victimisation therefore fails.

Unfair Dismissal

90. That brings us to the complaint of unfair dismissal. Miss Boesi was dismissed for the potentially fair reason of capability. The respondent had sound business reasons to dismiss her. There comes a point after a prolonged period of absence, that employment has to come to an end, where there no prospect of a return to work within a reasonable period of time. Employers cannot be expected to keep posts open indefinitely. It is not right to say that there was no cost to the respondent of keeping Miss Boesi on healthcare leave, there is a list of the rights and benefits retained by employees on healthcare leave noted in the letter at page 228. There is the ongoing administration costs of keeping in touch and of course there is the fact the employee retains employment rights. It strikes

us that healthcare leave is in fact a generous provision provided by Asda, one that is not often found elsewhere with other employers.

91. Was there reasonable consultation? Yes there was, there were regular meetings with the Miss Boesi and after the end of the healthcare leave, there were meetings on 28 February and 5 March with Mr Williams, on 13 June with Mr Dodridge and there was the physiotherapist consultation. In our view, a reasonable process was followed, there was ample warning of the potential outcome, meetings were held attended by Miss Boesi, she had the right to representation and she knew it, she had representation at the final meeting, the respondent sought medical advice from the physiotherapist, it awaited advice from Miss Boesi's GP and it acted on clear information from those sources that Miss Boesi was not fit to return to work. The respondent in our view, did act reasonably in looking for alternative employment; the information which it had was that Miss Boesi was not fit to return to work. She understood she could apply for roles in the local supermarket and that if she did so, she would be supported by her manager. She chose not to do so.

92. In the List of Issues, the questions posed at 2.5 and 2.6 seem to be repetitive, in answer to those questions, yes the respondent reasonably consulted with Miss Boesi over the reasons for her absence and yes, it made reasonable efforts to facilitate her return to work. The respondent did reasonably believe that Miss Boesi was unfit to carry out her job and could not make reasonable adjustments. Miss Boesi herself said so, her GP said so and the physiotherapist said so. The respondent in our judgment, did act reasonably in treating capability as a reason for dismissal, that decision was within the range of reasonable responses and the dismissal was therefore fair. I am afraid the complaint of unfair dismissal also fails.

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Employment Judge M Warren

Date: 9 June 2021

Sent to the parties on: 6 July 2021

S. Bhudia

For the Tribunal Office