EMPLOYMENT TRIBUNALS

Claimant: Mr D Walker

Respondent: Asda Stores Limited

Heard at: Liverpool

On: 9, 10, 11 December 2020 and 10, 11 and 12 March 2021

Before: Employment Judge Horne

Members: Miss A Ross-Sercombe
Mr W K Partington

Representatives
For the claimant: Mr R Walker, claimant's brother
For the respondent: Ms J Duane, counsel

Judgment was sent to the parties on 18 March 2021. The claimant has requested written reasons in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. Accordingly the following reasons are provided.

REASONS

Complaints and issues

The claim

1. By a claim form presented on 8 March 2019, the claimant raised the following complaints:
   1.1. Failure to make adjustments**,** within the meaning of sections 20 and 21 of the Equality Act 2010 ("EqA") and in contravention of section 39(2) of EqA;
   1.2. Discrimination arising from disability, as defined in section 15 of EqA and in contravention of section 39(2) of EqA; and
   1.3. Direct discrimination because of disability, as defined in section 13 of EqA and contrary to section 39(2) of EqA.

Disability

2. It is common ground that at all relevant times the claimant had a disability within the meaning of section 6 of EqA. His disability stemmed from the mental impairment of dyslexia.

Duty to make adjustments

3. The claimant contends that the respondent had two similar, but distinct, provisions, criteria or practices (PCPs).

   3.1. PCP1 – managers would write information onto an absence form and present it to the employee to sign.

   3.2. PCP2 – in conversation with the employee, the manager completing the form would inaccurately describe its purpose and/or its content.

4. His case that each PCP on its own, and both of them together, put him at a substantial disadvantage in comparison with persons who were not disabled. The disadvantage was that his dyslexia made it difficult for him to read and understand the forms and to check them for inaccuracies, and made him more dependent on them being correctly explained to him in conversation. The claimant contends that the disadvantage was more than minor or trivial, because the respondent subsequently relied on the forms in forming the belief that he had had excessive levels of absence.

5. The occasions when he was put at a disadvantage by these PCPs are each occasion when he was required to sign a form stating that he had been absent from work through illness or injury. This happened at or around the times when the claimant was allegedly absent from work. These times were:

   5.1. 11 October 2018

   5.2. 6 November 2018

   5.3. 26 November 2018

   5.4. 2-4 December 2018 and

   5.5. 12-18 December 2018.

6. The claimant says that, by way of an adjustment, the manager completing the form should have accurately described its purpose and its content in an oral conversation.

Jurisdiction issues

7. There is one issue that affects the tribunal's legal power to hear part of the claim. It relates to the alleged failure to make adjustments on 11 October 2018. The questions for the tribunal will be:

   7.1. Was this alleged failure part of an act extending over a period which ended on or after 24 October 2018?

   7.2. If not, would it be just and equitable to extend the time limit?

Knowledge of disability

8. A further issue arises in relation to alleged failures prior to 12 December 2018. The tribunal must decide:

   8.1. Whether or not the respondent can prove that it did not know that the claimant had a disability; and

8.2. Whether or not the respondent can prove that it could not reasonably have been expected to know that the claimant had a disability.

Merits

9. For all the alleged failures to make adjustments, the tribunal must go on to consider the following questions:

9.1. Did PCP1 exist?

9.2. Did PCP2 exist?

9.3. Did they separately or cumulatively put the claimant at the alleged disadvantage?

9.4. Was that disadvantage more than minor or trivial? (This issue was not specifically listed in the previous case management order, but it forms part of the statutory definition, and was not conceded by the respondent.)

9.5. Can the respondent prove that it did not know that the claimant was likely to be put to the alleged substantial disadvantage?

9.6. Can the respondent prove that it could not reasonably have been expected to know of that likely substantial disadvantage?

9.7. Would it be reasonable for the respondent to have to take the step of accurately describing the form's purpose and content in an oral conversation?

9.8. Was that step in fact taken?

<u>Discrimination arising from disability</u>

10. There is a substantial amount of common ground underpinning this part of the claim. The respondent dismissed the claimant. In reaching the decision, the respondent was materially influenced by the belief that the claimant had unsatisfactory levels of absence. That belief arose in consequence of the information on the absence forms.

11. It is the claimant's case that the information on the absence forms was inaccurate. For example, some forms recorded him as being absent when he had actually been sent home at the end of a day's work with the approval of the respondent's managers. One absence form recorded him as being absent on a day when, on his case, he had actually been in work. The claimant says that the inaccuracies arose in consequence of his dyslexia: had he properly understood the forms he would have refused to sign them until they were corrected.

12. During closing submissions, the respondent's counsel tried to argue that the dismissal was not unfavourable treatment. This appeared to be an attempt to withdraw a concession made at the preliminary hearing when the issues were listed. As it turned out, we did not need to consider this procedural point. We rejected the argument on its merits, as appears below.

13. The claimant also sought to expand the issues in his closing submissions. He put forward a different route by which the reason for dismissal had arisen in consequence of his disability. His case, as he wished to argue it, was that his dyslexia, and his consequent confusion over paperwork, had caused him to become unwell, resulting in his absence from work with depression from 11 to 17 December 2018.

14. The other issues are:

    14.1. Did the respondent's belief in the claimant's levels of absence arise in consequence of the claimant's disability in the manner alleged?

    14.2. Was the dismissal a proportionate means of achieving a legitimate aim?

15. By e-mail dated 17 February 2021, the respondent clarified the allegedly-legitimate aims on which it relies. These are:

    15.1. Requiring its employees to attend their contractual role on a regular basis

    15.2. Managing long term and short-term intermittent absences so as to save costs and achieve the efficient management of time.

    15.3. Allowing the respondent to plan its workforce and operational needs with certainty.

Direct discrimination

16. The final strand to the claim is an allegation of direct discrimination. The less favourable treatment is said to have occurred not in the dismissal itself, but in the way in which the respondent set about achieving it. The claimant contends that the respondent decided at an early stage not to continue with the claimant's employment. Having made that decision, the respondent deliberately sought to take advantage of the claimant's dyslexia in order to give them a pretext for dismissal. Managers deliberately mis-reported his absences, thinking that, because of his dyslexia, he would not notice. (The way in which they went about mis-reporting the forms is described in PCP1 and PCP2.) Those absences could then be used to justify a dismissal on attendance grounds. Similarly, he was deliberately given an occupational health report for the first time at his probation review meeting on 20 December 2018. This was done because he had dyslexia, as a way of preventing him from having sufficient opportunity to digest the document during the meeting.

17. The less favourable treatment allegedly took place on each of the dates listed in paragraph 5 and on 20 December 2018.

Jurisdiction

18. There is a time limit issue in respect of the alleged absence on 11 October 2018. The questions for the tribunal are the same as above.

Merits

19. The issues for the tribunal are as follows:

    19.1. Did the various managers treat the claimant less favourably than others:

        (a) in the way in which they went about completing and explaining the absence forms on the occasions listed in paragraph 5; and

        (b) by giving the claimant the occupational health report for the first time at the probation review meeting?

    19.2. If so, what was the reason why they treated him in that way? Was it because the claimant had dyslexia or for some other reason?

Evidence

20. We considered documents in a 369-page bundle, concentrating chiefly on those pages to which the parties had drawn our attention, either in witness statements or orally during the course of the hearing.

21. During the gap between the two hearings, the respondent disclosed a further 145 pages of documents. It was agreed that we could consider them.

22. At a late stage in the hearing, the respondent disclosed labour sheets for the afternoon shift on 2 December 2018 which we considered.

23. The following people confirmed the truth of their statements under oath and answered questions:

    23.1. The claimant

    23.2. Mr Greg McCloskey for the respondent; and

    23.3. Mr Darren Pettener, also for the respondent.

24. Two other witnesses were called by the claimant, having connected to the video platform in obedience to a witness order. The bulk of their evidence came in the form of answers to Mr Walker's questions in-chief. These witnesses were Ms Margaret Lawton and Mr Paul Mundey.

25. As the hearing progressed, we made a number of disputed case management decisions. In particular:

    25.1. The claimant applied for a witness order requiring Mr Paul Benfold to give evidence. We refused that application.

    25.2. The claimant applied for an order requiring the respondent to identify the individual within the respondent's organisation who had been responsible for providing documents to the respondent's solicitors for the purpose of disclosure. We refused that application, too.

    25.3. Following disclosure of labour sheets in redacted form, the claimant applied for disclosure of the unredacted version. We refused that application.

    25.4. The claimant applied in writing for an order for disclosure of electronic swipe-card information. The employment judge caused a letter to be written to the parties, requiring the respondent to make a reasonable search for the swipe card data. At the start of the resumed hearing, respondent confirmed that it would not be able to retrieve that information. Accordingly we decided not to make any order requiring that the information be disclosed.

    25.5. At the start of the part-heard hearing, the claimant applied for an order for disclosure of e-mails sent and received by Ms Lawton "around the claimant's disability". The respondent's position was that it had searched for such e-mails, but they did not exist at the time of search. In those circumstances we did not make any order.

    25.6. During Mr McCloskey's evidence, the claimant applied for an order requiring disclosure of the afternoon labour sheet for 2 December 2018. We asked the respondent to consider disclosing that sheet voluntarily in a redacted form. This was done.

Facts

<u>Parties</u>

26. The respondent operates a large national chain of supermarkets, supported by a network of distribution centres, sometimes called depots. One of its depots is the Chilled Distribution Centre in Skelmersdale, Lancashire.

27. At the time with which this claim is concerned, the depot's General Manager was Mr Darren Pettener. One of Mr Pettener's direct reports was Mr Greg McCloskey, the Warehouse Operations Manager. Reporting to Mr McCloskey were a number of Shift Managers, including the Day Shift Manager, Mr Paul Mundey. The depot was split into nine departments, each with its own Department Manager, who reported to the relevant Shift Manager. One of the Department Managers was Miss Margaret (Maggie or Mags) Lawton. Another was Mr Alan Carsley.

28. Training for Skelmersdale distribution workers was provided on site at the Skelmersdale Depot. It was overseen by the North West Regional Training Coordinator, Mr Paul Benfold, who was based off-site.

29. The claimant has a lifelong condition of dyslexia. His condition affects his ability to read and understand documents. As is well known, the effects of dyslexia are not limited to reading difficulties, but this claim is specifically about the effect of the claimant's dyslexia on his reading ability.

The claimant's job application

30. In 2018 the claimant applied for a role on what he understood to be a management apprenticeship scheme with the respondent.

31. The selection process began with an online test. With some help from his mother, the claimant completed the test successfully. He was invited to an assessment centre.

32. The assessment centre was held at the Skelmersdale Depot from 9 to 11 August 2018. The event was led by Mr Gary Jones. Mr Benfold assisted with the assessment exercises. One such exercise involved the candidates forming small groups who were given a hypothetical desert island scenario to discuss. Whilst Mr Benfold was handing out the paperwork for the exercise, the claimant told Mr Benfold about his dyslexia. Mr Benfold explained the instructions to the claimant, who then performed well in the exercise.

33. In September 2018, the claimant was given an application form for an apprenticeship with a partner organisation known as Babcock. The claimant completed the form. The application form included an equal opportunities monitoring section. In that section the claimant declared his dyslexia. The information in the monitoring section was separated from the rest of the application form and passed to a part of the organisation that was not concerned with the claimant's day-to-day management. The monitoring information was retained by Babcock, but was kept confidential from the claimant's managers at the Skelmersdale Depot.

Terms and policies

34. The claimant's application was successful. By letter dated 9 September 2018, the claimant was offered the role of Warehouse Colleague. We do not know whether or not Mr Benfold was informed that the claimant was successful.

35. The letter enclosed a written statement of terms of employment. The statement of terms described the first 13 weeks of the claimant's employment as a "probationary period".

36. The letter also referred to a number of other documents. One of these was the Absence & Sickness Policy Booklet.

37. The Absence & Sickness Policy contained a section specifically aimed at employees on their probationary period. The section stated,

> "Good attendance during a colleague's probationary period is very important. Colleagues in their probationary period will be monitored and managed as follows:
>
> - First sickness absence – Return to Work Interview (RTWI) and potential issue of formal caution for improvement required
> - Second sickness absence – potential termination of employment
>
> NB Asda has listened to and worked with [the trade union] to improve the sickness benefit provision. In doing so, it is recognised that the associated increase in cost could have a detrimental effect on Asda and job security."

38. Appendix 4 to the Absence & Sickness Policy contained a table showing the kinds of absence that were included and excluded in the respondent's calculation of percentage absence. One of the excluded absences was "part-shift absence". Though this table was not strictly applicable to the probationary period, managers proceeded on the footing that it was. Thus Mr Mundey believed that a part-shift absence would not be taken into account in deciding whether a person's probationary employment would be terminated.

39. The Absence & Sickness Policy contained a section headed, "Return to Work Interviews (RTWI)". Under that heading, the Policy stated:

> "A RTWI will be held after each occasion of sickness absence. The RTWI must only take place prior to commencement of work/shift. The purpose of this interview is colleague welfare and to establish facts.
>
> Discussions should include:
>
> - ascertaining the reason for the sickness absence/nature of the illness
> - ensuring that the colleague is not fit to return to work
> - understanding whether there may be any reasonable adjustments required in support of that return
> - either party may request a review of fitness to resume normal duties by OHS
> - the manager must be aware of the colleague's attendance record before holding the interview including reviewing patterns of sickness absence
> - if the manager is not satisfied with the explanation of any period of sickness absence, then the circumstances must be fully investigated "

<u>Record keeping</u>

40. A Warehouse Colleague's performance was assessed according to his or her "pick rate". The pick rate was calculated according to the number of items "picked" on shift, divided by the number of hours in that shift. The claimant's target rate varied from day to day. A daily record was kept of a colleague's pick rate.

41. Staffing levels were planned and monitored using a spreadsheet known as a labour sheet. For each shift, the labour sheet listed names of each Warehouse Colleague on shift, under the heading of the department in which they were due to be working. The number of items picked by each colleague were entered into the labour sheet for each colleague. Absences were also recorded on the labour sheet, as they affected the total headcount in each department.

42. Unexpected absences, whether for a whole shift, or part of a shift, were liable to cause disruption in the warehouse. Staffing levels were planned in advance to try and cover the anticipated volume of picking that would be needed for a shift. If a Warehouse Colleague did not attend for their shift, or had to leave part-way through it, there was a risk that the required number of items would not be picked in time.

43. Each time a Warehouse Colleague used their electronic swipe card to pass through a door, the time and date of the entry was recorded on the respondent's security system. This information was deleted once an employee had left the organisation.

44. A Warehouse Colleague would clock in and out at the beginning and end of each shift. Clock-in data was kept and monitored.

45. The respondent had a computerised attendance monitoring system. If an employee who was expected on shift did not clock in or out, the computer would raise a query colloquially known as an "absence ticket". The manager would then use the computer portal to provide the administration function with an explanation for the absence. The administrators, who were based off-site, would then enter the details from the absence ticket into their PeopleSoft human resources database, which would then be able to generate a record of an employee's non-attendance at work and the reasons for it.

The claimant's induction

46. On 10 and 11 September 2018, the claimant attended the depot for his induction. Much of the induction was classroom based. The instructor talked the new cohort through various policies and procedures. Afterwards, they signed a form to indicate that they had read the documents.

47. On 10 September 2018, the claimant completed and signed a Health Screening Record. The form contained a long list of medical conditions, with a tick-box for each. Dyslexia was not on the list. The claimant ticked boxes to indicate two conditions unrelated to his dyslexia, but did not mention his dyslexia anywhere on the form.

The claimant starts work

48. The claimant's first day of actual work was 12 September 2018. Owing to a misunderstanding between him and the instructor the previous day, he arrived late for his shift. He had thought his shift would begin at 8am when in fact it started at 6am.

49. Because the claimant had arrived late, Miss Lawton, the Department Manager, had a documented conversation with him. He explained the mix-up. Miss Lawton checked that the claimant properly understood his shift pattern going forward. The next day, Miss Lawton showed the claimant her notes of the conversation and asked him to sign them. He did not sign straight away. Instead, he told Miss

Lawton that he was dyslexic and asked her to read the notes out loud to him. She did so.

50. This is not a wholly uncontroversial finding. The respondent contends that it did not know about the claimant's disability until December 2018. We nevertheless find that the claimant did mention his dyslexia to Miss Lawton on 13 September 2018. The claimant specifically recalled the conversation and would have had a good reason for wanting to point out his dyslexia on that occasion. Miss Lawton did not rule out having been told of the claimant's dyslexia in September 2018. She accepted that the claimant did mention his dyslexia to her in one of three conversations. Whilst she thought it was more likely to have happened in the 27 November 2018 conversation, she told us that she could not be sure which conversation it was.

Part-shift absences

51. On 11 October 2018, the claimant was working on shift when he developed back pain. He left work at 2pm. A self-certification form was completed recording that the claimant had back pain. His pick rate was 97% of his target for the time he had been working. The claimant was not shown the self-certification form and he did not sign it. Nobody fed any absence information into the portal and no absence was registered on PeopleSoft.

52. The following day, the claimant had a 10-minute review meeting with his Manager, Mr Marc Davies. It was noted that his productivity was much improved. He also had a documented discussion with another manager, Mr Gary Jones. In that discussion he mentioned a history of back spasms since childhood for which he took intermittent medication. Mr Jones took a handwritten note of the conversation which he and the claimant both signed. The note made no mention of the part-shift absence the previous day. No RTWI form was completed or offered to the claimant to sign.

53. Our findings about what happened during the conversation with Mr Jones are based on the documents. The claimant has no recollection of the conversation at all. From the documents there is no evidence that Mr Jones spoke confusingly to the claimant in any way about the purpose of the recorded conversation. There is no evidence about whether or not Mr Jones read the note back to the claimant before he signed it.

54. On 19 October 2018 the claimant had a further 10-minute review. His attendance was marked as "very good". The following week, at his 10-minute review, his productivity had greatly improved. Although there was no comment about his attendance at that particular review, it is common ground that it was 100% for those two weeks.

55. On 6 November 2018, the claimant arrived at work just before 10am. He was working on what were known as "heavy grids". After approximately an hour's work, the claimant started feeling dizzy. By that time, he had picked 250 cases. An absence self-certification form was completed by a manager, Ms Victoria Murray. The form certified that the claimant had been absent from work since 10am on 6 November 2018. The claimant went to the nearby NHS Walk-in Centre.

56. On his return to the depot, he signed an absence self-certification form. He was then told that he could take the rest of the day off as holiday. Nobody suggested to

the claimant that the absence self-certification form was anything other than an acknowledgment that he had not been at work during his shift.

57. There was nothing written on the absence self-certification form to suggest that the absence would be taken into account for attendance management under the Sickness & Absence Policy, or for deciding whether or not a probationary employee should be dismissed, or for any similar purpose. Nor did anybody explain that this was a purpose for which the form could be used.

58. The following day, 7 November 2018, the claimant and Miss Lawton had another meeting. Miss Lawton made handwritten notes of the conversation, which the claimant signed. She noted, accurately, that the claimant felt that working on "heavy grids" the previous week had taken its toll on him. She noted the claimant's request to work on lighter grids and agreed to try to accommodate his request operationally. He did not say, at this stage, that he had been told that he could take the previous day's missed hours as holiday.

59. Miss Lawton read her notes out loud to the claimant before he signed them.

60. Miss Lawton also completed a RTWI form and asked the claimant to sign it, which he did.

61. The RTWI form contained a number of boxes containing written information. One of these was a summary of the absence trigger points for non-probationary employees. It also contained a checklist of points for the manager to discuss with the returning employee. Further down the form there was another set of tick-boxes for different kinds of management action, such as a disciplinary investigation or Poor Attendance Review. Miss Lawton did not tick any of these boxes.

62. Miss Lawton explained the parts of the form that they had specifically discussed. This included telling the claimant that the Absence & Sickness Policy require that a RTWI form be completed every time a colleague was absent from work. She did not tell the claimant specifically that the RTWI form would be used as a record of his absences for attendance management purposes. Had she done so, the claimant might well have insisted that the form record that he had been told that he could take the rest of his shift off as holiday. Alternatively, he might well have refused to sign it.

63. On 26 November 2018, the claimant was sent home early because he reported symptoms of a stomach bug. He had been picking for approximately 11 minutes and had picked 40 cases. His absence was recorded on PeopleSoft as "Holiday". It is probable that this entry correctly reflected something that he was told by his Department Manager as he left.

64. The next day, Miss Lawton had another documented conversation with him. She took him through the RTWI form, including explaining that it was required under the Absence & Sickness Policy because he had returned to work following absence. She gave him the form to sign, but he would not sign it. His reason for not signing the form, he told us, was because he did not believe that he had been absent. He believed, reasonably, that he had taken the time as holiday, not as sickness absence. This indicates to us that, by 27 November 2018, the claimant was aware that a RTWI form was not just for the purpose of ensuring that he was fit to work, but was also a record of a whole-shift or part-shift sickness absence.

65. They then had a separately-documented conversation which was more wide ranging. The claimant did not sign the note of this conversation either.

66. At some point during their discussion, the claimant told Ms Lawton again that he had dyslexia. The claimant was reminded of the Absence & Sickness Policy. Miss Lawton explained to the claimant that the company would view the three occasions of part shift of absence as "support". Should the claimant need to be absent again due to illness, this would be "deemed as sickness".

67. In one sense, this was an inaccurate statement for Miss Lawton to make. The only occasions of absence that the claimant had had up to that point had been part-shift absences. He would have understood Miss Lawton's phrase, "absent again due to illness" to be a reference to those previous occasions. Here was Miss Lawton telling him that such occasions would, in future, be treated as sickness absence for absence management purposes. This was an incorrect application of the Absence and Sickness Policy, which provided that part-shift absences were not regarded as occasions of sickness absence.

68. On the other hand, the claimant could have been left in no doubt that the respondent was contemplating formal absence management action if his attendance did not improve. It must also have been clear to him that, in the event of future absences, whether for a whole shift or a part shift, the respondent would go through the same procedure of a self-certificate and a RTWI form, and that those documents would then be used as records of his absence in that formal attendance management process.

69. Mr Mundey told us that, around this time (approximately two months after the claimant's started work), he overheard a conversation between the claimant and Ms Lawton during which he mentioned his dyslexia. Our finding on balance is that this is likely to have been the same documented conversation that took place on 27 November 2018. The claimant asked for a copy of his contract on different-coloured paper. Mr Mundey obtained the copy.

<u>Absences in December and occupational health referral</u>

70. On 4 December 2018, the claimant arrived at work with a sore leg. He left work and went almost straight away to the Walk-in Centre. He returned to the depot at 1pm and had a return-to-work interview with Miss Lawton. Again, she used a standard template RTWI form. By the time Miss Lawton started the interview, someone else had already pre-populated the form with the claimant's absence dates. The first day of absence was stated to be 2 December 2018. According to the form, the last day's absence was 4 December 2018.

71. He told Miss Lawton that he felt fit to return to work. We are satisfied that Miss Lawton read the notes of the interview back to the claimant before he signed them.

72. The claimant also signed a self-certification form. This had also been partially pre-written, with the first day of absence stated to be 2 December 2018 and the date of return being 4 December 2018 at 1pm.

73. He started picking at 1.22pm on 4 December. By the end of his shift, he had picked 1,246 cases and his pick rate was 107%.

74. The absence date of 2 December 2018 has turned out to be highly significant to this case. It is the claimant's contention that the RTWI form and self-certification form were inaccurate, because the claimant was not actually absent on 2

December 2018. We do not accept this part of the claimant's case. Our finding is that the claimant was in fact absent from work that day. Here are our reasons:

74.1. We believed Ms Lawton's evidence that she read the RTWI form back to the claimant before he signed it. This included the reference to the claimant being absent on 2 December 2018.

74.2. On the clock-in records for 2 December 2018, the claimant was marked as "sick".

74.3. The claimant worked a "mid-shift", meaning that his working day spanned the morning and late shifts. Four hours of his working day were expected to be worked during the morning shift. The labour sheet for the morning shift indicates that the claimant was absent for four hours.

74.4. The labour sheet for the late shift also shows the claimant marked as "absent".

74.5. Neither labour sheet shows the claimant having picked any items on 2 December 2018.

74.6. The claimant points to a discrepancy in the records as to the reason for the claimant's absence. The PeopleSoft record attributes the absence to a "virus", whereas the Return to Work form states the reason as "sore legs". We do find the PeopleSoft record to be odd, and inconsistent with the RTWI form, but we are satisfied that this discrepancy is not suspicious. The PeopleSoft entry was populated from the absence ticket, which would have been raised on 2 December; the RTWI form may well have been filled in at a different time, for example, when the claimant returned to work and complained of a sore leg.

74.7. In his occupational health consultation, the claimant told Ms Wilson something that led her to believe that he had been absent with leg pain.

74.8. When later asked by Mr McCloskey about 2 December, the claimant said that he had pulled his leg some two days previously. That suggested to us that his leg symptoms had not suddenly started on 4 December.

74.9. The claimant's witness statement did not say what if any work he did on 2 December 2018. In his oral evidence, the claimant was not sure whether or not he was meant to be in work on that day. He did not say that he had been at work.

75. By the end of 4 December 2018, someone within the respondent's organisation had decided to escalate the management response to the claimant's absences. We know this because, on 4 December 2018, a print-out of the PeopleSoft attendance data had been placed on the claimant's personal file together with the claimant's RTWI forms.

76. On 11 December 2018 the claimant did not report to work. He self-referred to occupational health.

77. On 12 December 2018, the claimant attended a consultation with an occupational health nurse called Ms Angela Wilson. It is not clear what the claimant's exact words were during this consultation, but he said something to give Ms Wilson the impression that he had been absent from work on four occasions, with the last two absences being due to leg pain.

78. In her report the same day, Ms Wilson described the claimant's dyslexia and its effects on his learning ability. According to her report, the claimant struggled with paperwork and believed that he was not being adequately supported in this aspect of his role. She also noted that the claimant appeared to be anxious, in particular in relation to work issues. Some of these related to his dyslexia and paperwork. Others included a sense of injustice at working the heavier grids, not receiving adequate training, and being criticised for not picking enough in the afternoon. made recommendations to support the claimant's mental health.

79. Unfortunately, the claimant felt no better after seeing Ms Wilson and, if anything, felt worse. He went to see his general practitioner on 14 December 2018. The doctor formed the opinion that the claimant was unfit for work due to depression and prescribed Fluoxetine. The claimant was also given a fit note declaring him unfit for the period 10 to 17 December 2018.

80. We considered whether or not to make a finding about the extent to which, if at all, the claimant's depression was caused by his dyslexia and his problems with paperwork. In the end, we decided not to make a finding either way. The fairness of this exercise was severely affected by the fact that this factual issue was only raised for the first time during the claimant's closing submissions. Ms Duane had had no chance to ask him questions about it. There was no expert medical opinion. The issue was not clear cut, because there were clearly many things weighing on the claimant's mind at this time, as detailed by Ms Wilson in her report.

81. The claimant returned to work on 18 December 2018. On his return, he met with Mr Mundey. During that meeting, the claimant signed an absence self-certification form to indicate that he had been absent. The first day of absence was variously stated to be 11 or 12 December 2018. They also both signed a RTWI form. That form also appeared to specify two first dates of absence. On that form, Mr Mundey wrote that the claimant had been referred for a Probation Review Meeting with Mr McCloskey, due to take place on 20 December 2018. Substantially the same information was written onto a Record of Conversation form, which the claimant also signed.

82. We are satisfied that Mr Mundey read the contents of both documents back to the claimant before he signed them.

<u>Probation Review Meeting</u>

83. Mr McCloskey hand-delivered a letter to the claimant, inviting him to a Probation Review Meeting. The letter informed the claimant that one of the purposes of the meeting was to decide whether or not the claimant's employment should be terminated.

84. The meeting proceeded on 20 December 2018. The claimant was accompanied by a trade union representative, Mr McKay.

85. After a short general discussion about the claimant's feelings about the job, his performance whilst at work, and what medical conditions the claimant had declared at the start of his employment, Mr McCloskey turned to the subject of the claimant's attendance. He asked the claimant if he agreed that he had been absent on four occasions. The claimant said no. Mr McKay observed that there might be some confusion between sickness absence and absences that were classed as "support".

86. Mr McCloskey then took the claimant through each occasion where, as Mr McCloskey saw it, the claimant had been absent:

    86.1. They started with 12 October 2018. The claimant said that he had not been absent that day, but had been told by Ms Lawton that he could take the time as holiday.

    86.2. The claimant confirmed that he had signed a RTWI form for 6 November 2018. He explained, correctly, that he had fainted, been to the Walk-in Centre, and been told that he could take the rest of his shift as holiday.

    86.3. Mr McCloskey then put it to the claimant that he had also been absent on 2 December 2018. The claimant said that he had "pulled my leg 2 days prior". The next part of the conversation appears to have been rather confused. The claimant appears to have reverted to talking about his fainting episode on 6 November.

    86.4. The claimant confirmed that he had not been at work from 11 to 17 December, but stated that he was "covered by a doctor's note".

    86.5. There was no discussion of the claimant's early finish on 26 November 2018. This was due to Mr McCloskey overlooking the absence by mistake.

87. At this point in the meeting, Mr McCloskey brought out Ms Wilson's occupational health report. Up to that point the claimant had not been provided with a copy. Mr Closkey read the contents aloud. He asked the claimant about his dyslexia, his difficulties with paperwork and his perception of inadequate support. The claimant replied, "That's just to do with Babcock and apprenticeship; nothing to do with you." After a short break, the claimant confirmed that the lack of support was solely from Babcock.

88. The meeting then reverted to the subject of the claimant's absences. When Mr McKay's contended that some of the alleged absences were holidays, Mr McCloskey retorted that the claimant had signed three RTWIs to confirm that he had been absent. Shortly afterwards, Mr McCloskey adjourned the meeting.

89. Following the meeting, McCloskey made some enquiries of Babcock about whether they knew of the claimant's dyslexia. He received a reply from Mr Ellis confirming that the claimant's dyslexia was mentioned on the application form.

<u>Dismissal decision</u>

90. Mr McCloskey then set about making his decision. He applied the Absence & Sickness Policy as he understood it. According to Mr McCloskey's belief, the Policy, so far as it related to a probationary colleague, essentially involved a two-stage process. The first stage was a gateway. A probationary colleague would not be dismissed for absences unless they had reached the stipulated minimum of two occasions of sickness absence during the probationary period. If the colleague reached the gateway point of two sickness absences, they would not necessarily have their employment terminated, but Mr McCloskey would move to the second stage. This stage was discretionary and involved looking at the whole picture of the employee's attendance and reliability.

91. Mr McCloskey considered that the claimant had been absent on four occasions. These were the part-shift absences on 11 October 2018 and 6 November 2018 and the full-shift absences on 2 December and 11 to 17 December 2018. He

overlooked the 26 November part-shift absence as he had not spotted it in time to put it to the claimant.

92. Contrary to what Mr McCloskey told us in his witness statement, he did not entirely discount the part-shift absences. He took into account all the absences that had been recorded on the RTWI forms. Amongst these occasions, Mr McCloskey specifically had in mind the absence on 2 December and on 11 to 17 December 2018. Those absences were clear and were sufficient by themselves to trigger the discretion to dismiss. Mr McCloskey also considered the part-shift absences. In his view, they were relevant, because they added to a general impression of unreliable attendance. Before reaching that view, Mr McCloskey could have investigated whether or not the claimant had been allowed to take the time as holiday. He did not make that enquiry. As he saw it, it would not particularly matter whether the part-shift absences were supported by holiday or not. They had still been taken at short notice and prompted by a medical inability to work part of his shift. Whether formally recorded as annual leave or not, they still contributed towards an overall picture of unreliable attendance.

93. Having taken all the absences into account, Mr McCloskey decided that the claimant's contract should be terminated.

94. On 1 January 2019, the claimant telephoned Mr Mundey to say that he could not come to work that day. He said that he was suffering from the after-effects of a virus. Mr Mundey agreed that his absence would be supported as unpaid leave, rather than being recorded as an occasion of sickness absence.

95. We did not make a finding either way about whether or not Mr McCloskey had made up his mind prior to the 1 January 2019 absence.

96. The claimant's Probation Review Meeting reconvened on 2 January 2019. Mr McCloskey informed the claimant that he was being dismissed. The dismissal was confirmed by letter dated 8 January 2019.

<u>Appeal</u>

97. The claimant appealed against his dismissal. The appeal was heard by Mr Pettener on 1 March 2019. After some introductions, the claimant told Mr Pettener that managers had taken advantage of his dyslexia. When asked for more detail, the claimant first repeated an earlier complaint that late shift managers had unfairly criticised him for picking too much in the morning and not enough in the afternoon. He then explained that he had signed self-certification and RTWI forms following a two-minute conversation without having been given the opportunity to have a representative present. The claimant specifically mentioned the "dizzy spell", which was a reference to the claimant's part-shift absence on 6 November 2018. He said that the manager who had supported him with holiday was Mr Carsley. In answer to a specific question from Mr Pettener, the claimant denied that he had been told by managers that his absence was unacceptable. Mr Pettener said that he would need to investigate.

98. A few minutes later, the meeting took an unfortunate turn. Mr Pettener mentioned that his son had dyslexia and talked about the evidence they had obtained in order to assist his son at school. He then asked the claimant whether he had any evidence of his own dyslexia. We are sure that Mr Pettener meant well. He was trying to raise the subject of proof of dyslexia in a way that demonstrated some

empathy. The claimant did not take it that way. He thought that Mr Pettener did not really believe that he had dyslexia.

99. They continued to discuss the claimant's absences. Mr Pettener said he wd seek the managers' versions of events and provide the outcome in writing.

100. Following the meeting, Mr Pettener spoke to Mr Carsley and asked him whether or not he had authorised the claimant to take part of his shift as holiday. Mr Carsley told Mr Pettener that he would not do such a thing.

101. Mr Pettener also had discussions with the managers who had conducted the RTWIs. They confirmed to him that, from their point of view, the claimant appeared to understand what he was signing.

102. By letter dated 14 March 2019, Mr Pettener informed the claimant that his appeal was unsuccessful. He addressed each ground of appeal, and provided his reasons for dismissing each ground. He also expressed an overall conclusion that Mr McCloskey's dismissal decision had been correct. In coming to this view, he took into account three occasions of absence, without explaining which three they were.

Motivation

103. We are now in a position to record our positive findings of fact about the motivation of the various managers who are accused of having directly discriminated against the claimant.

104. We are satisfied that none of the managers who were involved in the claimant's absence management decided to take advantage of the claimant's dyslexia.

105. In each case, the reason why the claimant was presented with absence forms for signature was because he had been away from his place of work during his shift.

106. On 7 November 2018, when completing the self-certificate, RTWI form and documented conversation with the claimant, Miss Lawton did not explain these documents any less accurately than she would have explained them to a person who did not have dyslexia. She was aware of the claimant's dyslexia, but it did not motivate her, consciously or subconsciously, to treat him any less favourably than she would have treated others. We make the same finding about her treatment of the claimant on 27 November 2018 and 4 December 2018. We also make this finding in respect of Mr Mundey's completion of the RTWI form and self-certificaiton form with the claimant on 18 December 2018.

107. Mr McCloskey presented the claimant with the occupational health report for the first time at his Probation Review Meeting. We were able to make a positive finding that the timing of the release of this document to the claimant was not influenced by any conscious or subconscious consideration of the claimant's dyslexia. We also found that, in discussing the report with the claimant, Mr McCloskey was not treating the claimant any less favourably than he would treat others. He was highlighting those parts of the report that might work in the claimant's favour.

108. We approached the alleged direct discrimination on 12 October in a slightly different way. We did not hear any evidence from the claimant or Mr Jones about how Mr Jones explained the documented conversation to the claimant. Our finding was that there were no facts from which we could conclude that Mr Jones treated

the claimant any less favourably than he would treat others. There were no facts from which we could conclude that his treatment of the claimant was motivated by the fact that the claimant had dyslexia.

Relevant law

Direct discrimination

109. Section 13(1) of EqA provides:

> "(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."

110. When making comparisons between the treatment of the claimant and the treatment of others (sometimes called "comparators"), it is important to ensure that the circumstances of the claimant and the circumstances of the comparator are not materially different. Where the protected characteristic is disability, the abilities of the claimant and comparator are material circumstances: see section 24 of EqA and *Owen v. Amec Foster Wheeler Energy Ltd* [2019] EWCA 822.

111. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

112. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

113. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439

Duty to make adjustments

114. Section 39(2)(d) of EqA prohibits employers from discriminating against employees by subjecting them to detriment. Section 21 provides that a breach of the duty to make reasonable adjustments in relation to a disabled person amounts to discrimination against that person.

115. Section 39(5) of EqA provides that the duty to make adjustments applies to an employer. By section 20 of EqA, incorporating the relevant provisions of Schedule 8, the employer's duty comprises three requirements.

116. We are concerned only with the first requirement, which is contained in section 20(3). Where a provision, criterion or practice (PCP) of the employer's puts a disabled employee at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, the first requirement is to take such steps as it is reasonable to have to take to avoid the disadvantage.

117. In *Lamb v The Business Academy Bexley* UKEAT 0226/15 the EAT commented that the term "provision, criterion or practice" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

118. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

119. Schedule 8, paragraph 20, of EqA provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled employee is likely to be placed at the disadvantage referred to in the first requirement.

120. The Equality and Human Rights Commission's *Code of Practice on Employment* gives further content to the knowledge provisions in paragraph 20. In the context of knowledge of an employee's disability, paragraph 6.19 states that, to avail themselves of the knowledge defence, employers must "do all they can reasonably be expected to do to find out" about the disability. Tribunals should bear in mind the need for dignity and privacy. In our view, this guidance not only tells employers – quite rightly – to handle disability enquiries sensitively and confidentially, it also informs the extent to which an employer may be reasonably be expected to make an enquiry in the first place. Many employees would not welcome the intrusion of their employer making proactive enquiries about their mental health. We consider that the guidance is of equal relevance when examining the question of the employer's knowledge of a substantial disadvantage.

121. Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

121.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

121.2. The practicability of the step;

121.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

121.4. The extent of the employer's financial and other resources;

121.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

121.6. The type and size of employer.

122. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be a broad indication of what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

123. It may be reasonable for an employer to have to take a step that the employee never suggested whilst they were in employment. To put it another way, the employer may be under a duty to make an adjustment proactively, without waiting for the employee to ask for it. During the course of the parties' final submissions, the employment judge sought the parties' views on a slightly different point. Is it permissible for the tribunal to take into account that the employee never asked for a particular step as a relevant factor when considering whether or not it was reasonable for the employer to have to take that step? Both parties' representatives agreed that such an approach would be permissible, although the claimant's counsel asked us not to hold that factor against the claimant in the circumstances of this case.

124. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160:

> "So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

Discrimination arising from disability

125. Section 15(1) of EqA provides:

> (1) A person (A) discriminates against a disabled person (B) if-
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

126. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

127. Treatment is unfavourable if the claimant could reasonably understand it to put him to a disadvantage. When deciding whether or not treatment is unfavourable, it is important to be clear about what the treatment was. Treatment does not become unfavourable just because someone else was treated, or would have been treated, more favourably: *Williams v. Trustees of Swansea Pensions & Assurance Scheme* [2018] UKSC 65.

128. These principles have been affirmed in *Pnaiser v. NHS England* [2016] IRLR 174.

129. It is no defence to a complaint under section 15 that the employer did not know that the reason for the unfavourable treatment had arisen in consequence of the employee's disability: *City of York Council v. Grosset* [2018] EWCA Civ 1492.

130. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565, applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

131. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

132. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …"

133. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

Time limits

134. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—

> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

135. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

136. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

137. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

138. In *Matuszowicz v. Kingston on Hull City Council* [2009] EWCA Civ 22, the Court of Appeal held:

138.1. that an ongoing failure to make adjustments is not an act "extending over a period"; it is a "failure to do something", the date of which is to be determined according to the statutory provisions (now in section 123 EqA);

138.2. if the respondent does not assert that the time limit started to run from a date earlier than that put forward by the claimant, the tribunal should proceed on the basis of the claimant's alleged date; and

138.3. that where confusion over the time limit provisions causes an unwary claimant to delay presenting the claim, the confusion can be taken into account as a factor making it just and equitable to extend the time limit.

139. It follows from *Matuszowicz* and section 123(4) that, where an employer acts inconsistently with the duty to make adjustments, the time limit runs from the date of the inconsistent act. If there is no such act, time begins from when the date on which claimant contends a reasonable period of time expired for the making of the adjustment, unless the respondent argues – and the tribunal accepts - that the reasonable period in fact expired sooner.

140. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

141. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

141.1. the length of and reasons for the delay;

141.2. the effect of the delay on the cogency of the evidence;

141.3. the steps which the claimant took to obtain legal advice;

141.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

141.5. the extent to which the respondent has complied with requests for further information.

142. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

<u>Burden of proof</u>

143. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

144. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

145. We are bound by at least two Court of Appeal authorities to hold that the initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913 and *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18. The Supreme Court has recently heard an appeal against the Court of Appeal's decision in *Efobi.* Judgment on that appeal is currently awaited.

146. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Overriding objective

147. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing, saving expense, and dealing with cases in ways that are proportionate to the importance and complexity of the issues. Tribunals must seek to achieve the overriding objective in the exercise of any powers given to them under the rules.

Importance of amendments

148. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

149. In *Chandok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so

> that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

150. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

151. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

152. In relation to unrepresented claimants, tribunals must not be overly technical in their application of the *Chandok* approach. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14).

<u>Permission to amend</u>

153. Rule 29 gives the tribunal wide case management powers. These include the power to allow a party to amend their claim, although that power is not expressly included.

154. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

> 154.1. A careful balancing exercise is required.
>
> 154.2. The paramount consideration is that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

155. The following factors identified in *Selkent* may help the tribunal to conduct that balancing exercise:

> 155.1. The tribunal should consider whether the amendment is merely a re-labelling of facts already relied on in the claim form or whether it seeks to

introduce a wholly new claim. (Technical distinctions are not important here. What is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

155.2. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

155.3. The tribunal should have regard to the manner and timing of the amendment.

156. The factors identified in *Selkent* should not be used as a checklist. What is required in every case is an analysis of comparative disadvantage: *Vaughan v. Modality Partnership* UKEAT 0147/20.

157. When deciding whether or not to grant permission, the tribunal can take into account the merits of the proposed complaint. It is no disadvantage to a claimant to be deprived of the opportunity to bring a hopeless case. Where, however, the proposed complaint was raised within the original time limit for bringing it, perceived weaknesses in the merits of the complaint should not ordinarily be a ground for refusing permission unless they would justify a decision to strike out the claim. This is because the complaint could have been raised in a separate claim form, in which case the grounds for striking it out would have been limited to those contained in rule 37. See *Gillett v. Bridge 86 Ltd* UKEAT 0051/17.

Conclusions – duty to make adjustments

Knowledge of disability

158. We have found that the claimant told Miss Lawton that he was severely dyslexic on 13 September 2018. From that time onwards, the respondent knew, or could at least have been reasonably expected to know, that the claimant had a disability. Miss Lawton was a Department Manager and could reasonably have been expected to share that information with managerial colleagues unless the claimant specifically asked her to keep it confidential, which he did not do. We did not need to resort to the burden of proof in order to reach this conclusion.

159. The first occasion on which it is alleged that the respondent discriminated against the claimant is 11 October 2018. In the light of our finding that the respondent ought to have known of the claimant's disability by 13 September 2018, it is somewhat academic to debate whether the respondent should have known about the claimant's disability at any earlier point in time. Nevertheless, we briefly record here what our conclusions would have been:

159.1. Mr Lees' knowledge of the claimant's dyslexia in August 2018 would not mean that the respondent knew of the claimant's dyslexia. Nor would it mean that the respondent could reasonably have been expected to know. Mr Lees was employed by Babcock, which was a separate organisation. There is nothing to suggest that the respondent could reasonably have been expected to make enquiries of Babcock about the disabilities of the respondent's employees.

159.2. The disability information on the monitoring form was confidential. It was not intended to be disclosed to anyone with responsibility for the claimant's management. This includes Mr McCloskey, Mr Pettener, the Shift Managers,

the Department Managers, and anyone with responsibility for explaining absence forms to the claimant. None of these people could reasonably have been expected to know the contents of the monitoring form.

159.3. Those managers could not be reasonably expected to know what Mr Benfold knew of the claimant's disability. Mr Benfold was concerned with training and recruitment. He was not based at Skelmersdale depot and was not responsible for management decisions involving him.

11 October 2018

Approach

160. There is an issue relating to the tribunal's jurisdiction to consider the complaint of failure to make adjustments in October 2018. Our jurisdiction is potentially affected by the statutory time limit in section 123 of EqA. We decided to park that issue and first examine whether or not the complaint was well founded.

PCP1

161. The respondent did not present anything for the claimant to sign in respect of his absence on 11 October 2018. The claimant was not asked to read or sign the self-certification form.

162. The documented conversation with Mr Jones was not an "absence form" as alleged in PCP1. It made no mention of the claimant's part-shift absence.

PCP2

163. According to the claimant's own undisputed account, he never saw the self-certification form and nobody explained it to him, accurately or inaccurately. There is no evidence that Mr Jones said anything inaccurate about the purpose of the documented conversation.

No disadvantage

164. Neither PCP affected the claimant on 11 October 2018. They could not put the claimant to any disadvantage, let alone the alleged substantial disadvantage.

165. It follows that there was no duty to make adjustments on 11 October 2018.

Jurisdiction

166. Having dismissed this part of the claim on its merits, we do not think it is necessary to decide whether this part of the claim would also fall foul of the statutory time limit. To make the same point in the more technical language of EqA, we did not determine whether or not we had jurisdiction under section 123, because, even if we had jurisdiction, our conclusion would be that the respondent did not contravene section 39.

6 November 2018

PCP1

167. The respondent completed three documents purporting to show that the claimant had been absent for at least part of the shift on 6 November 2018. These documents were the self-certification form prepared by Ms Murray and the RTWI form and the documented conversation written by Miss Lawton. The claimant was asked to sign all three documents and did so.

PCP2

168. Miss Lawton did not inaccurately describe the purpose or content of the recorded conversation on 7 November 2018. She read the notes back to him.

169. In one small sense, Ms Murray inaccurately described the absence self-certification form. She did not positively mislead the claimant as to what the purpose or content was. It must have been obvious to the claimant in any event that he was signing to acknowledge that he had not been at work for at least part of his shift. But Ms Murray did not go further and explain that, by signing the form, the claimant would be acknowledging an absence that could be taken into account under the Absence & Sickness Policy.

170. Miss Lawton told the claimant that the Absence & Sickness Policy required that a RTWI form be completed every time a colleague was absent. This accurately conveyed the message to him that a RTWI was a record of an absence. She did not tell the claimant specifically that this record could be held against him for attendance management purposes.

Disadvantage

171. We now assess the combined effect of PCP1 and PCP2 in relation to each form.

172. The recorded conversation form did not put the claimant at a disadvantage. It was not inaccurately described and was fully read to the claimant before he signed it. The claimant was in no worse position than somebody who was able to get the same information by reading it.

173. PCP1 and PCP2, in relation to the absence self-certification form, did not put the claimant at any disadvantage. He must have known, without reading the form, that it was a declaration that he had been away from work for part of his shift for a medical reason. He did not know that the form would be used for attendance management purposes, but neither would a perfect reader have known that. The written contents of the form made no reference to the form being used for that purpose.

174. The RTWI form did put the claimant at a slight disadvantage in comparison to a non-disabled person. The claimant already knew that the RTWI form was a record of an absence. He did not know that it might be relied on in a formal absence management review. The written references to the Absence & Sickness Policy, trigger points for absence and Poor Attendance Review all signified clearly to an able reader that the RTWI was an attendance management tool and not just a record that he had been absent from work. Because of the claimant's difficulty in reading, he could not absorb that information for himself. Unless someone explained it to him, it would not be as clear to him as it was for others that the form would be referred to in a formal absence management process.

Was the disadvantage substantial?

175. Not every disadvantage triggers the duty to make adjustments. The disadvantage must be substantial. In other words, it must be more than minor or trivial.

176. We first assessed whether or not it would be fair to decide this question at all. As we have already indicated, the substantiality issue was not listed in the previous case management order in which the issues had been formulated. Should we take the respondent to have conceded, if any disadvantage existed at all, that such

disadvantage would be substantial? We did not think that this was a fair interpretation of the case management order. The formulation of the issues began, at paragraph 4 above, with a recitation of the claimant's case as to how the disadvantage was more than minor or trivial. It is clear from that formulation that the claimant was making a point that would not necessarily be accepted by the respondent. In our view it is open to us to consider whether or not the disadvantage was substantial.

177. We have concluded that the disadvantage was not more than minor or trivial. That is not to say that the claimant's difficulties with reading forms are not substantial – they clearly are. In this case, the disadvantage was not that he could not understand the whole RTWI form. Most of it had been explained to him. The disadvantage was that his dyslexia caused him to miss a specific piece of information about what the purpose of the form was. In particular, he was less able than others to understand that it could be used for formal absence management purposes. In our view, it was not particularly important for him to know this piece of information. He already knew that the form was a record of an absence. Had he fully understood the purpose of the form, he might have refused to sign it, but the refusal would not make any difference. The form would still have been placed on his file. It would still have been a record of a part-shift absence.

Knowledge of disadvantage

178. In the light of what Miss Lawton herself knew of the claimant's severe dyslexia and his wish to have documents read out loud to him, Miss Lawton could reasonably have been expected to know that the claimant would be likely to be placed at this disadvantage.

179. She did not know, however, that the disadvantage was likely to be substantial. For the reasons we have given, she could not reasonably have been expected to know that either.

Reasonable steps

180. In case we are wrong in our analysis of the disadvantage, we have considered whether or not it was reasonable for the respondent to have to take the step of accurately describing the form's purpose and content in an oral conversation. Here we must assume that the claimant was put at a substantial disadvantage in that he did not understand that the RTWI form could be used as a record of absence in future absence management decisions.

181. It would not have been an onerous step for Miss Lawton to have explained that the RTWI form could be taken into account for formal absence management purposes. Nevertheless, our conclusion is that it was not reasonable for Miss Lawton to have to take this step. For the reasons we have given, it was not a piece of information that he particularly needed to know. Communicating that information would not make any difference to how the claimant's absence would be treated for attendance management purposes.

<u>26 November 2018</u>

PCP1

182. On 27 November 2018, Miss Lawton presented an RTWI form and documented conversation for the claimant to sign. This was PCP1 in operation.

PCP2

183. There was nothing inaccurate about Miss Lawton's description of the documented conversation.

184. Miss Lawton did not inaccurately describe the RTWI form to the claimant either. On 27 November 2018, the claimant was in a different position than on 6 November 2018. For the reasons we have given at paragraph 68, he must have known by then that RTWI forms would be used as records of absence for the purpose of formal attendance management action.

No disadvantage

185. By 27 November 2018, the alleged disadvantage caused by PCP1 did not exist. He understood what the purpose of a RTWI was just as well as if he had been able to read the document perfectly. The documented conversation was read back to him. The claimant disagreed with the content of both documents. That is why he refused to sign. But he did not misunderstand them.

186. In case we are wrong about the existence of the alleged disadvantage, we would have concluded that it was not substantial and that the respondent could not reasonably have been expected to know that it was likely to be substantial.

Reasonable steps

187. We would, in any event, conclude that the duty to make adjustments was not breached. Miss Lawton accurately explained the RTWI form. The one piece of missing information – that it could be used for attendance management purposes - was supplied on 27 November 2018 when Miss Lawton gave the warning that she did.

<u>2-4 December 2018</u>

PCP1

188. The claimant was asked to sign an absence form and a RTWI form, each of which stated that he had been absent on 2 December 2018. PCP1 therefore affected the claimant on that occasion.

PCP2

189. The absence self-certification and RTWI forms were not inaccurately described to the claimant. It was obvious from the title of the absence self-certification form that it was a record that he had been absent from work. The claimant knew by 6 November 2018 that an RTWI form would be used as a record that he had been absent. From 27 November 2018 he knew that it might be relied on in a formal attendance management process.

190. The content was not inaccurately described. In particular, the reference to the 2 December 2018 absence was not hidden from him. Miss Lawton read the RTWI back to him before he signed it.

Disadvantage

191. In our view, PCP1 did not put the claimant to the alleged disadvantage on 4 December 2018. Had there been inaccuracies in the forms, the claimant would, of course, have been less able than a non-disabled person to spot them. But there were no inaccuracies. The only significance of the allegedly incorrect information is said to be that it was used to support a case that the claimant had been absent from work when, on the claimant's case, he had not been absent. But the claimant

had been absent on 2 December 2018. He must have known that he had been absent that day. If, because of his dyslexia, it was harder for him to read the reference to his absence on 2 December 2018, he was in no worse position than if he had been able to read the form perfectly. Had he seen the reference to the 2 December absence, he could not honestly have challenged it.

192. There was therefore no duty to make adjustments on 4 December 2018.

Reasonable steps

193. Another way of looking at the same problem is to say that Miss Lawton took all the steps that it was reasonable for her to have to take. She read the RTWI form back to the claimant.

11-18 December 2018

PCP1

194. PCP1 was also applied on 18 December 2018, when the claimant was asked to sign a RTWI form showing that he had been absent from 11-17 December 2018.

PCP2

195. The form was not inaccurately described to the claimant. He correctly understood its purpose and content.

No disadvantage

196. The claimant was not put at any disadvantage by PCP1 when the RTWI form was presented to him. He already knew its purpose. He knew what dates he had been absent, and these corresponded with the dates of absence on the RTWI form. The reason why he disagreed with the form was because he believed that non-attendance at work should not count as "absence" if it was supported by a GP fit note. But that was not because he misunderstood anything in the RTWI form. It was because he and the respondent had a fundamental difference of opinion about what "absence" meant.

197. There was therefore no duty to make adjustments on 18 December 2018.

Reasonable steps

198. We have also found that the documents were read back to the claimant before he signed them. It was not reasonable for Mr Mundey to have to tell the claimant anything more about what the purpose of the forms was. He already knew.

199. The respondent did not breach the duty to make adjustments and this complaint of discrimination therefore fails.

Conclusions – direct discrimination

200. Our findings at paragraphs 103 to 108 effectively dispose of the complaint of direct discrimination. The respondent did not treat the claimant any less favourably than it would have treated others. It was not trying to take advantage of his dyslexia. The reason why the claimant was presented with the forms for signature was because he had been away from work at times when he was rostered to be on shift. The forms were not explained to him any less favourably than they would have been explained to a person without dyslexia. In any case, the way the claimant was treated was not because of his disability.

201. The timing of the release of the occupational health report to the claimant was not because of his dyslexia. Mr McCloskey's decision to discuss the report with the claimant was not any less favourable than the way in which Mr McCloskey would treat others.

Conclusions – discrimination arising from disability

Unfavourable treatment

202. It is common ground that the claimant was dismissed.

203. The respondent argues that dismissal was not unfavourable, because any other probationary colleague in his position would also have been dismissed. We disagree. The respondent is confusing unfavourable treatment with less favourable treatment. The claimant wanted to keep his job. He could reasonably understand that dismissal put him a worse position than when he was employed. It is irrelevant that that another person with the same absence record would have been treated the same way.

Because of something arising in consequence of disability

Existing claim

204. There is no dispute that Mr McCloskey dismissed the claimant because of his belief that the claimant had been absent from work due to sickness on an excessive number of occasions.

205. Because of the way in which the issues have been framed, it is important to be clear about which perceived absences influenced Mr McCloskey's thinking.

206. At paragraphs 90 to 93, we have set out our findings about which absences Mr McCloskey took into account and how they weighed on his mind.

207. In reaching the conclusion that the claimant was liable to be dismissed under the Sickness & Absence Policy, Mr McCloskey had regard to the two clearest absences on 2 December and 11-17 December 2018. These did not arise in consequence of the claimant's disability.

208. Mr McCloskey also took account of the part-shift absence on 11 October 2018. His belief that the claimant had been absent on that occasion was based on the contents of the self-certification form. The contents of the form did not arise in consequence of the claimant's disability. As we have explained, the claimant never had a chance to read the self-certification form. His dyslexia did not in any way cause the form to be written in the way that it was.

209. Mr McCloskey believed that the claimant had been absent on 6 November 2018. His belief that he had been absent due to sickness, rather than absent on holiday, was based, in part, on the contents of the self-certification form and RTWI form which the claimant had signed. As we have found, the claimant might well have said that he could take the rest of his shift as holiday if he had properly understood that the RTWI form could be used as a record of absence for attendance management purposes. His failure to understand the full purpose of the RTWI form arose in consequence of his inability to read the parts of the RTWI form that dealt with attendance management. That inability was caused by his dyslexia.

210. We have therefore concluded that there was some causal link between the claimant's dyslexia and one of Mr McCloskey's reasons for dismissing the claimant

(namely Mr McCloskey's belief that the claimant had been absent due to sickness on 6 November 2018 and that this formed part of an overall pattern of unreliable attendance).

211. We must now decide whether or not that link was sufficiently strong as to enable us to say that that reason arose in consequence of the claimant's disability. In our view, the causal link is just about strong enough.

Proposed amendment

212. We now turn to the proposed amendment to the claim. The claimant wishes to introduce a further causal link between his dyslexia and the reason for dismissal. This is summarised at paragraph 13 above.

213. In our view, the balance of disadvantage weighs in favour of refusing the amendment. This will cause some hardship to the claimant, in that it deprives him of the opportunity to add a new limb to his complaint of discrimination arising from disability. This is a difficulty that he has brought on himself. His explanation for the delay in applying to amend is that the respondent had failed to disclose documents or was late in doing so. But the claimant did not need any disclosure from the respondent in order to be able to include this allegation as part of his case. He knew that his absence with depression was one of the absences that formed part of the reason for dismissing him. He was better placed than anyone to know why he had been depressed. He had the occupational health report which detailed the reasons he gave at the time. He had access to his own medical records if he wanted them. There was nothing to stop him including this allegation at a much earlier stage.

214. If we were to allow the amendment, the disadvantage to the respondent would be considerable. We explained in paragraph 80 above, our ability to make findings of fact is hampered by the fact that the allegation was only raised in the claimant's final closing submissions. This meant that Ms Duane had no chance to ask the claimant questions about it. We therefore have no way of knowing what the claimant would have said in answer to such questions. This is not just a technical point. As we also explained, the claimant himself gave a number of different reasons to occupational health as to why he was depressed. Some of these had nothing to do with his dyslexia. In order to identify his dyslexia, and his lack of support with documents, as a cause of his absence, there would need to be a detailed examination of the claimant's thinking, cross-referenced against the claimant's medical records. None of that was done during the evidence, because the respondent did not know it might have to deal with this issue. Moreover, it is possible that, had this allegation been included in the original claim, or identified at the preliminary hearing, the parties would have sought a medical report so that the tribunal might have the benefit of a doctor's opinion. Again, the late stage of the amendment application has meant that there was no opportunity for such evidence to be obtained.

<u>Legitimate aim</u>

215. Dismissing the claimant was a means of achieving all of the following aims:

215.1. Requiring its employees to attend their contractual role on a regular basis;

215.2. Managing long term and short-term intermittent absences so as to save costs and achieve the efficient management of time; and

215.3. Allowing the respondent to plan its workforce and operational needs with certainty.

216. The latter two of these aims were undoubtedly legitimate. Nobody sought to suggest otherwise.

217. The first aim, in our view, does not take the analysis any further. The aim is not legitimate of itself. It has a very significant discriminatory impact on disabled people whose disability makes them more likely to be absent from work. It also has a small discriminatory impact on people whose specific learning disabilities makes it harder to understand the significance of forms recording their absence. To make the aim of requiring reliable attendance legitimate, the aim would need to be justified by reference to some other aim.

Proportionality

218. When assessing proportionality, we must balance the importance of the aims against the discriminatory impact, and consider whether alternative measures (especially the making of adjustments) would have enabled the respondent to achieve those aims without treating the claimant unfavourably.

219. In our view, the discriminatory impact is slight. Mr McCloskey's decision that the claimant was liable to be dismissed was based on the two clearest absences. We have already found that his belief that he had been absent on those two occasions did not arise in consequence of the claimant's disability. His belief in an overall pattern of unreliable attendance was based partly on his thinking that the claimant had been absent 6 November 2018, but it was also based on belief in another absence on 11 October 2018. We have concluded that that belief did not arise in consequence of the claimant's disability.

220. The legitimate aims were important. At paragraph 42 we have explained, in broad terms, the difficulties in workforce planning and operational performance if Warehouse Colleagues did not attend reliably.

221. Making the adjustments of accurately explaining the 7 November 2018 RTWI form would not have helped the respondent achieve the legitimate aim. All it would have achieved would have been a RTWI form that indicated a part-shift absence, but which was unsigned. But unsigned forms were still taken into account, for example the self-certificate on 12 October 2018. Even if the making of an adjustment would have enabled the claimant to write on the form that he had taken part of his 6 November 2018 shift as holiday, that would provide any reassurance that the legitimate aims could be achieved by allowing the claimant to remain in employment. We agree with Mr McCloskey's opinion (recorded at paragraph 92 above) that short-notice part-shift absence helps to demonstrate a pattern of unreliable attendance whether or not that absence is formally taken as annual leave.

222. Having balanced the discriminatory impact against the legitimate aims, we are satisfied that the dismissal was proportionate. The respondent did not, therefore, discriminate against the claimant arising from his disability.

Employment Judge Horne
9 July 2021

SENT TO THE PARTIES ON
15 July 2021

FOR THE TRIBUNAL OFFICE