



EMPLOYMENT TRIBUNALS

Claimant: Mr D McGlynn

Respondent: City Facilities Management (UK) Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester (by video platform) **ON:** 8-11 March 2021,
and in chambers on
8 April + 10 August 2021

BEFORE: Employment Judge Batten
J King
C Titherington

Representation

For the Claimant: In person

For the Respondent: S O'Connor, Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claim of disability discrimination fails and is dismissed.

REASONS

1. By a claim form dated 22 August 2019, the claimant presented a claim of disability discrimination comprising complaints of direct discrimination, a failure to make reasonable adjustments, harassment and discrimination arising from disability together with a complaint of unfair dismissal. On 25 September 2019, the respondent submitted a response to the claim.

2. A case management preliminary hearing took place on 7 November 2019, before Employment Judge Sangster, following which the claimant filed further and better particulars of his claim on 24 November 2019. A further case management preliminary hearing took place on 14 August 2020, before Employment Judge Allen. By a Judgment dated 17 August 2020, sent to the parties on 4 September 2020, the unfair dismissal complaint and also the complaint of harassment related to disability were struck out for lack of jurisdiction due to being out of time. The claimant's other complaints, of direct discrimination, a failure to make reasonable adjustments and discrimination arising from disability were allowed to proceed to hearing, on a just and equitable basis.
3. Following the preliminary hearing on 14 August 2020, the claimant filed more further particulars of his claim and the respondent thereafter served an amended response.
4. The hearing of the evidence took place over 4 days. The oral evidence and submissions were completed on the fourth hearing day and so the Tribunal reserved its judgment, meeting in chambers on 2 later dates to deliberate further and reach its judgment.

Evidence

5. A bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing and a secondary bundle, largely consisting of documents in the main bundle was also provided. References to page numbers in these Reasons are references to the page numbers in the main bundle.
6. The claimant gave evidence and also called Martin Leahair, a former work colleague, to give evidence in support of his claim. The respondent called 3 witnesses, being: Lisa Banks – regional cleaning manager; Ian Leadbeater – regional facilities manager; and Nicola Draper – regional cleaning manager and the claimant's line manager. All of the witnesses gave evidence from written witness statements and were subject to cross-examination.

Issues to be determined

7. A draft list of issues had been prepared at the case management preliminary hearing on 14 August 2020, before Employment Judge Allen, but had not since then been finalised. At the outset of the hearing, the Tribunal discussed the draft list of issues with the parties. After amendments including the addition of a named comparator for the direct

discrimination complaint, the clarification of the “something arising from disability” and identification of the acts of unfavourable treatment and the respondent’s legitimate aim for the purposes of the claim under section 15 of the Equality Act 2010 (“EqA”), and the addition of the relevant Provisions, Criteria and Practices (“PCPs”) for the reasonable adjustments complaint, it was agreed that the issues to be determined by the Tribunal were as follows:

Disability

- (1) **The respondent has accepted that the claimant had a disability at the relevant time. The disability comprises of the effects of a stroke which the claimant suffered in 2015 and include susceptibility to a loss of vision in his left eye, headaches, dizziness, memory issues, a loss of balance and disorientation.**
- (2) **Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?**

Direct discrimination because of disability – section 13 EqA

1. **The claimant alleges that the respondent subjected him to the less favourable treatment of not allowing him to transfer from the Longsight store. He alleges that this occurred in, or around 2016, 2017, 2018, including in relation to a vacancy at the Altrincham store which was available in November 2018; and at a meeting on 10 January 2019. The Tribunal will need to determine whether the respondent subjected the claimant to this treatment.**
2. **Was the treatment “less favourable treatment”? That is, was the claimant treated less favourably by the respondent than it treated or would have treated others in not materially different circumstances?**
 - 2.1 **The claimant relies upon Christopher Finnan, another cleaning manager, who moved from Longsight to a store in Reddish and later moved to a store in Harpurhey as a comparator.**
 - 2.2 **The claimant also relies on the hypothetical comparator.**
3. **If so, was this because of the claimant's disability?**

Discrimination arising from disability - section 15 EqA

4. **Did the following things arise in consequence of the claimant's disability:**
 - (1) **The claimant having difficulties in coping with the manual and physical aspects of the role undertaken at the Longsight store, including using heavy floor-cleaning machinery;**

- (2) The requirement to take Warfarin which led to health problems and tiredness for the claimant?
5. Did the respondent treat the claimant unfavourably as follows:
 - (1) By not allowing him to transfer from the Longsight store. He alleges that this occurred in, or around 2016, 2017, 2018, including in relation to a vacancy at the Altrincham store which was available in November 2018; and at a meeting on 10 January 2019;
 - (2) By requiring the claimant in his role as Store Cleaning Manager to be part of the cleaning team;
 - (3) By requiring the claimant to spend 4 hours per day on his knees cleaning check outs and toilets;
 - (4) By requiring the claimant to use heavy floor-cleaning machinery;
 - (5) By requiring the claimant to work at a low level or at floor level;
 - (6) By not giving the claimant a choice about what he had to do;
 - (7) By providing fewer colleagues to undertake work within the framework of store cleaning hours;
 - (8) By requiring the claimant to cover and/or do all of the tasks of the cleaning team when there was insufficient staff?
6. Did the respondent treat the claimant unfavourably in any of those ways because of any of those things?
7. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim, being the delivery of a cleaning service to the respondent's client?
8. Alternatively, has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?

Reasonable Adjustments – sections 20 and 21 EqA

9. Did the respondent not know and could it not reasonably have been expected to know that the claimant was a disabled person?
10. A PCP is a provision, criterion or practice. Did the respondent have the following PCPs:
 - (1) Requiring the claimant in his role as Store Cleaning Manager to become part of the cleaning team;

- (2) The duties required of the cleaning team;
 - (3) A requirement to do all of the physical cleaning jobs;
 - (4) A requirement to use heavy floor-cleaning machinery;
 - (5) A requirement to work at a low level or at floor level;
 - (6) Requiring the claimant to spend 4 hours per day on his knees cleaning check outs and toilets;
 - (7) Providing fewer colleagues and/or reducing the number of colleagues provided within the framework of store cleaning hours and/or failing to recruit replacement staff;
 - (8) Requiring the claimant to cover for vacancies, absences and sickness absence of cleaning team members;
 - (9) The requirement to cover the janitor role for 20 hours per week?
11. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?
 12. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
 13. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The reasonable steps which the claimant alleges could have been made were as follows:
 - (1) Moving the claimant to an alternative store and/or allowing him to move;
 - (2) Not requiring the claimant to undertake specific identified cleaning duties;
 - (3) Providing alternative cover for the janitor role;
 - (4) Informing the ASDA management that the claimant was a disabled person so that they would understand that the claimant could not do everything all of the time and that he might become unwell.
 14. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Jurisdiction - time limits

15. **In the event that the Employment Tribunal concludes that any discrimination identified was not part of conduct extending over a period which concluded on 10 January 2019 and/or did not occur on that date, the Employment Tribunal may need to consider whether the complaint was brought within the time limit set out in section 123 of the Equality Act 2010 and/or whether it would be just and equitable to extend time.**

Remedy

16. **If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.**
17. **This will include whether the claimant took appropriate steps to mitigate his loss and/or what impact any earnings received have upon any award.**
18. **If the claimant succeeds, in whole or part, how much should be awarded as an injury to feelings award?**

Findings of fact

8. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal also considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination. The findings of fact relevant to the issues which have been determined are as follows.
9. The claimant was employed by the respondent from 3 July 2014 as a cleaning team leader at the ASDA store in Hazelgrove. In 2016, he was promoted to store cleaning manager at the ASDA store in Longsight.
10. The respondent has a contract with ASDA to provide cleaning and janitorial services in ASDA's stores. The standard of in-store cleaning is audited by an independent external company for contract compliance.
11. The respondent has a number of policies and procedures which are relevant to this claim as follows:

- 11.1 The Salaried Colleague Handbook: At page 19, under the heading 'Occupational Health' states "*You will be referred by your Line Manager either if you are suffering from an ongoing condition or are absent from work and in line with our absence policy.*";
 - 11.2 The Dignity at Work policy; This includes section on *Diversity Best Practice Guidance* which includes a subsection on reasonable adjustments, which states that "*Applicants [for employment] with a disability may need some help and are asked to indicate what, if any, assistance they might need. Help may include assistance with the application process, support throughout the interview process or some adjustments to the facilities for a candidate in a wheelchair*". It then goes on to say that "*If a manager is made aware that a colleague has a disability, then reasonable steps must be taken to accommodate them and bear in mind their specific concerns*";
 - 11.3 The "ABC" (which stands for "ASDA Be Clean") microfibre guide to cleaning: This sets out the cleaning contract specifications by size of store, including the nature of each cleaning task, the frequency by which tasks are to be undertaken, their duration in hours/minutes expected for completion, the time of day when a task is to be done and the tools and equipment to be used. The "How To Guides" include flow charts with step-by-step pictures showing how to complete a specific task in a particular area.
12. In June 2015, the claimant had a stroke arising from a blood clot on the brain, leading to him having open heart surgery in August 2015. The stroke has left the claimant with life-changing effects, amounting to a disability, including loss of sight in his left eye, loss of smell, dizziness and memory issues, and it has affected his balance and orientation. The claimant takes medication to control his disability and at the material time, on Friday mornings, the claimant had to attend the cardiac clinic at the local hospital for blood tests to monitor his intake of Warfarin. As a result of this requirement, the claimant did not work on Fridays and so worked on Saturdays instead.
 13. In October 2015, the claimant returned to work. He was working at that time as a cleaning team leader at the ASDA store in Hazelgrove. The claimant's line manager, Loraine Carter, discussed the claimant's health and work duties with the claimant and recorded his health issues and limitations, including the effect on the claimant of working at floor level and using heavy equipment. The claimant also put notes about his health issues in the respondent's internal HR record system, called 'Cascade'. As a result of their discussions, Ms Carter made reasonable adjustments to the claimant's duties, including not requiring the claimant to work at floor level, not lifting heavy objects and not using heavy machinery.

14. On 4 July 2016, the claimant was promoted to store cleaning manager and he moved to take up that post at the ASDA Longsight store. This was nearer to the claimant's home and more convenient for traveling to work. His new line manager was Ms Lisa Banks, the regional cleaning manager. The claimant had been introduced to Ms Banks by his previous manager, Ms Carter, who had told Ms Banks that the claimant was looking to progress to a store cleaning manager role.
15. On 29 June 2016, as part of the application process for the role of store cleaning manager, the claimant was interviewed by "Fit4Jobs", an employment health screening organisation engaged by the respondent. The resulting report on the claimant was sent to the respondent and appears in the bundle at page 69. It said under the heading 'DDA Predictor' that the claimant "*may be covered by the terms of the relevant disability and equality legislation*". The report also advised the respondent to comply with its duty of care by undertaking regular health surveillance of the claimant.
16. The Store cleaning manager role includes, amongst other things, managing a team of cleaners, allocating tasks between team members, undertaking cleaning each day between 6-10am with much work required at ground level, training the team of cleaners on morning shift, and covering absences. The ASDA Longsight store cleaning manager's work requirement comes under a 20/20 contract, that is to say that the claimant's working week as store cleaning manager comprised of 20 hours per week of management time and 20 hours per week of either cleaning work or janitor duties. The Longsight store cleaning team also had staffing retention issues, with many staff on 12 hours or 16 hours per week contracts and a high level of staff turnover. The Longsight store was seen as difficult to manage and required what witnesses described as a "hands-on" approach.
17. The reasonable adjustments which had been put in place by Ms Carter for the claimant were not discussed with Ms Banks and they are not formally recorded as continuing when the claimant moved to the Longsight store. Nevertheless, as store cleaning manager, the claimant was in a position to decide who did which cleaning tasks and so was not required to work at floor level, nor to handle heavy objects and did not have to use heavy machinery. At first, the claimant chose to undertake the janitor duties for his contribution to the cleaning team duties. At the time, janitor duties comprised largely of a paper exercise that the claimant could fit around his other work as cleaning manager.
18. In 2016, the claimant had an appraisal with his new line manager, Ms Banks. The appraisal was held in the canteen at the ASDA Eastlands

- store. The claimant said he was struggling with his workload and that it was affecting his health. He became distressed during the conversation.
19. On 27 December 2016, the claimant became ill with chest pains and breathing problems. He was taken by ambulance and admitted to hospital. The claimant was signed off work, sick, until 16 January 2017.
 20. On 27 January 2017, Ms Banks conducted a return-to-work interview with the claimant. It was agreed that the claimant would return on a phased return, working reduced hours for 2 weeks. Ms Banks recorded the reason for absence as *“Heart problems/flu/attack”* and in relation to action which the respondent could take, she wrote *“Monitor Danny on a weekly/monthly basis”*. She did not seek any medical advice on the claimant’s health or capability despite the provisions of the Salaried Colleague Handbook regarding occupational health referral or the respondent’s Dignity at Work policy. When challenged about this, Ms Banks said in evidence that *“there has to be an element of trust”*. The record of the return-to-work interview, in the bundle at page 206, records that the claimant was recovered enough to undertake a phased return to work which was described as working 40 hours but not doing strenuous tasks and starting late, with a reduction in hours for 2 weeks.
 21. At the end of February 2017, Mr Leadbeater, the respondent’s regional facilities manager, came to the Longsight store and spoke to the claimant. The claimant said he was struggling and Mr Leadbeater suggested that he could look at a possible transfer to another store. However, Mr Leadbeater never came back to the claimant on the possibility of a transfer and the claimant did not chase the matter.
 22. In July 2017, Ms Draper was promoted and became the claimant’s line manager. She met the claimant in the course of her induction into the region. They had a conversation in the office during which the claimant told Ms Draper about himself and his health issues. The conversation lasted about an hour and the claimant went into some detail about the history of his ill-health, his stroke and resulting heart condition. The claimant also told Ms Draper not to worry about him.
 23. In 2017, the respondent introduced an electronic recording system for the in-store janitor duties. Previously the janitor duties had been conducted as a paper-based, tick-box exercise, and this was changed to a system whereby the janitor had to log on and off at a number of points around the store, to show that they had toured the premises as required. The claimant had previously often taken on the janitorial duties himself, due to low staffing levels and an inability to delegate the janitor role. However, the new system meant that the claimant was required to be out and around the store and so was not then available in his office to attend to management duties when necessary. Such a situation led to increased

- pressure on the claimant and he struggled with the janitorial duties that he took on, opting on many occasions to undertake cleaning instead.
24. The claimant's 2017 appraisal was conducted by Ms Draper. In the course of discussions, the claimant asked about the possibility of a store move, because he had not heard back from Mr Leadbeater. Following the appraisal, Ms Draper never came back to the claimant about a store move.
 25. The claimant's 2018 appraisal was again conducted by Ms Draper. She recognised the claimant's hard work and improvements at the Longsight store. However, she also recorded that the claimant "*needs to consolidate [his] performance before considering future moves*" and that she felt that the claimant was "*in the middle of a blip but just needs longer to pull round the stats*".
 26. In the months of September and October 2018, the ASDA Longsight store cleaning was audited twice, on each occasion on days when the claimant was away from work, on a day off. The store failed both audits, resulting in a visit from Ms Draper. Ms Draper proceeded to conduct a tour of the store, with the claimant, pointing out areas that needed attention. For example, the floor was not clean under the bump bars in one area and Ms Draper asked for this to be attended to immediately. The claimant therefore got down on his hands and knees to clean under the bump bars which were difficult to get under. Ms Draper did not prevent the claimant from doing so, even though this was outside of the respondent's cleaning procedures. Ms Draper then called the claimant into the office and the job was finished off by another member of the cleaning team because the claimant was feeling unwell.
 27. On 20 November 2018, Mr Leadbeater emailed Ms Draper questioning whether the claimant needed every Friday off work and commenting that the ASDA store manager was "*not convinced [the claimant]'s really pulling his weight on cleaning contribution*". Ms Draper responded by email to confirm that the claimant's cardiac appointments were on a Friday. She said that she felt she had done everything she could to support the claimant and ends her email by suggesting that "*2019 I think we will have to move into PIP territory*".
 28. On 30 November 2018, the claimant was taken ill and signed off work until the end of December 2018. His fit note, in the bundle at page 209, states that the reason for absence was "*Chronic chest wall pain following cardiac surgery. Stroke related visual disturbance, headaches and dizziness. Work-related stress.*" In the GP's comments section of the fit note, it states "*Please refer for assessment with occupational health doctor. Please consider adjustment/changes to role – particularly struggling with physical aspects of job at current site and high burden of physical work.*"

29. On 10 Jan 2019, Ms Draper conducted a welfare meeting with the claimant, to discuss his absence and how he was feeling. The claimant described how he had been very ill, mentioning his previous stroke and heart attack, that eyesight problems had led to his driving licence being suspended, and how stressed he was with work. The claimant said that he had asked previously about moving stores and said he felt that his requests had not been taken seriously. The claimant declared that he had every intention of coming back to work and that he had been advised by occupational health that he would be "*protected under the disability act*". Ms Draper said very little in the meeting but did not, at any point in the meeting, suggest that what the claimant was telling her about his health was news to her. In evidence, Ms Draper said she expected the claimant would be taking them to a Tribunal and she took no immediate action after the meeting. Ms Draper's notes, written at the meeting, are on pages 212-214.
30. On 23 January 2019, having heard nothing further from the respondent, the claimant resigned by email, giving 4 weeks' notice. He sent the email to Ms Draper and also to the respondent's people team. The claimant's email at page 215 grieves about a number of issues arising during his employment.
31. On 1 February 2019, Ms Draper filed her notes of the welfare meeting with HR.
32. On 21 February 2019, the claimant's resignation was acknowledged by the respondent which confirmed that his last day of employment would be 20 February 2019, based on the claimant having given 4 weeks' notice.
33. On 1 March 2019, the respondent's people team wrote to the claimant to ask if he wished to raise a "post-resignation grievance" and if so to put it in writing (Bundle page 218). The claimant replied on 4 March 2019 confirming that he was raising a post-termination grievance. He said this was not just about the cleaning aspects of the store cleaning manager's job but also about disability discrimination and how the respondent treats disabled people more widely.
34. On 26 April 2019, a grievance meeting took place, the notes of which are in the bundle at pages B222 onwards. The respondent investigated the claimant's concerns and interviewed Ms Banks, Ms Draper and Mr Leadbeater about the claimant and his disability. Each of them said that they were aware that the claimant had health issues, which they described, but said that they were not aware that he was or might be disabled and that he had not asked them to transfer store beyond enquiring of Ms Draper about a vacancy at Altrincham.

35. On 20 June 2019, the respondent sent the claimant a grievance outcome letter. This letter does not mention the claimant's stroke or the effects of it although there is reference to the claimant having suffered a heart attack. The letter says that there was no record of the claimant requesting reasonable adjustments but that an occupational health report should have been obtained to assess the claimant's suitability to carry out his role (Bundle page 233). As a result, the claimant's grievance was partially upheld and he was invited to apply for vacancies with the respondent which told him that he would be considered for re-employment. The claimant did not apply to work for the respondent again and found alternative employment.

The Law

36. A concise statement of the applicable law is as follows.
37. The complaint of disability discrimination was brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in section 6 and schedule 1 EqA.
38. Section 39(2) EqA prohibits discrimination by an employer against an employee by dismissing him or by subjecting him to any other detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.
39. The EqA provides for a shifting burden of proof. Section 136 so far as is material provides as follows:
- (2) *If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*
40. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.
41. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v*

Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

42. Section 13 EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include disability.
43. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case, and that the circumstances relating to a case includes that person's abilities if the protected characteristic is disability. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.
44. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, that in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Reasonable adjustments

45. The duty to make reasonable adjustments, in section 20 EqA, arises where:
 - (a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

- (b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.
46. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".
47. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of *Griffiths v DWP [2015] EWCA Civ 1265* it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.
48. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.
49. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Discrimination arising from disability

50. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) 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.*
51. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of *Pnaiser v NHS England and Coventry City Council EAT /0137/15* as follows:

- (a) *A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
- (b) *The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
- (c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant*
- (d) *The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is “something arising in consequence of B’s disability”. That expression ‘arising in consequence of’ could describe a range of causal links ...[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
- (e) *..... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*
- (f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*
- (g) *.....*
- (h) *Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the ‘something’ leading*

to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.

52. In *City of York Council v Grosset* [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from *Pnaiser*: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the “something” arises in consequence of the disability. That is an objective test.
53. The EHRC Code contains provisions of relevance to the justification defence. In paragraph 4.27, the EHRC Code considers the phrase “*a proportionate means of achieving a legitimate aim*” (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-
- (1) is the aim legal and non-discriminatory, and one that represents a real, objective consideration?
- (2) if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?
54. As to that second question, the EHRC Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

although not defined by the Act, the term “proportionate” is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an “appropriate and necessary” means of achieving a legitimate aim. But “necessary” does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

Time limits

55. The time limit for complaints of unlawful discrimination is found in section 123 EqA, which provides that such complaints may not be brought after the end of: -
- (a) *the period of three 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.”*

56. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it, *or does an act inconsistent with doing it*, or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.
57. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the application of the “just and equitable” extension and the extent of the discretion and concluded that the Employment Tribunal has a “wide ambit”.
58. In the course of submissions, the Tribunal was referred to a number of cases by the Solicitor for the respondent, in addition to those mentioned above, as follows:
- Smiths Detection - Watford Limited v Berriman UKEAT/0712/04
 - Hartman v South Essex Mental Health and Community Care NHS Trust [2005] EWCA Civ 6
 - Baldwin v Brighton & Hove Council [2007] IRLR 232
 - Environment Agency v Rowan [2008] IRLR 20
 - Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288 CA
 - Wilcox v Birmingham CAB Services Ltd [2011] UKEAT/0293/10
 - Burke v The College of Law [2012] EWCA Civ 87
 - IPC Media Ltd v Miller [2013] UKEAT/0395/12
 - Hensman v Ministry of Defence [2014] UKEAT/0067/14
 - Land Registry v Houghton and others [2014] UKEAT/0149/14
 - Home Office v Kuranchie [2017] UKEAT/0202/16
 - Naeem v Secretary of State for Justice [2017] UKSC 27
 - Williams v Trustees of Swansea University Pension Scheme [2018] UKSC 65 and UKEAT/0415/14
 - Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640
59. The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

60. The claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the respondent knew of the claimant’s disability ever since his return to work after his stroke; that it was less favourable

treatment not to consider him for a transfer to a store that had fewer issues when he requested this and when others had moved stores; that the respondent had a duty to make reasonable adjustments for him and that, after his manager changed, they failed to consider their duty; when his role changed because of the change in janitorial duties, the respondent should have realised that it was not possible to do the store cleaning manager role and the janitorial duties due to the technology required and that this had affected his ability to cope with his job; he wanted to do the job to the best of his abilities; the respondent should have sent him to occupational health for an assessment to understand his needs; that he had been left with no choice but to undertake cleaning duties due to staff shortages at Longsight; and the final act of discrimination was the handling of his grievance, which was investigated poorly.

61. The Solicitor for the respondent made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the claimant's version of events was contradictory and the evidence of his witness, Mr Leahair, was unreliable because he had a personal animosity to the respondent, having been dismissed for gross misconduct; that much of the claimant's case relied upon events long out of time and the claimant had been absent from work, sick, from 30 November 2018; that the respondent's managers were not aware of the claimant's disability; that there was no evidence the claimant had requested a transfer as he alleged and that, like any other employee, he would have been eligible once he had consolidated his performance at Longsight and the claimant had not shown less favourable treatment in this regard; that the claimant's allegations of unfavourable treatment for the section 15 EqA claim were not made out in particular because the claimant was in charge of his working pattern and could delegate tasks to his team; if the respondent's management had treated the claimant unfavourably, which was denied, such treatment was a proportionate means of achieving the legitimate aim of delivering cleaning services to its client in accordance with the contract; that the PCPs contended for were not made out and were not PCPs employed by the respondent; and that the duty to make reasonable adjustments did not arise in the circumstances relied upon, alternatively the claimant was not put at a substantial disadvantage by those PCPs and was in control of the adjustments contended for.

Conclusions (including where appropriate any additional findings of fact)

62. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Knowledge of disability

63. The respondent has accepted that the claimant had a disability at the relevant time, being the effects of a stroke which the claimant suffered in 2015, including susceptibility to a loss of vision in his left eye, headaches, dizziness, memory issues, a loss of balance and disorientation. The Tribunal therefore first considered whether the respondent had shown that it did not know and could not reasonably have been expected to know that the claimant had the disability. The Tribunal took account of the fact that, in 2015, when the claimant suffered a stroke, Ms Carter was the claimant's line manager. She was aware and she discussed his health and limitations when he returned to work, leading to reasonable adjustments being put in place and recorded – see bundle page 203. In 2016, when the claimant applied for the Longsight store cleaning manager post, he was interviewed and 'Fit4Jobs' undertook health screening, as part of the application process, at the respondent's request. The report which was sent to the respondent clearly states that the claimant "*may be covered by the terms of the relevant disability and equality legislation*" and it advised the respondent to comply with its duty of care by undertaking regular health surveillance of the claimant. The respondent presumably read the report but the respondent's managers who gave evidence to the Tribunal could not explain either the purpose of the health screening nor what action followed. Even if the report was merely filed away, the claimant's unchallenged evidence was that he had put information about his disability onto the HR cascade system. Given the report and the information on cascade, the Tribunal considered that the respondent was on notice of the claimant's disability.
64. The Tribunal heard evidence that, when Ms Banks became the manager responsible for the Longsight store, there had apparently been no handover between Ms Carter and Ms Banks and Ms Banks had not been told by Ms Carter about the claimant's stroke. The Tribunal was told that a change of managers would often involve no handover. This was particularly surprising as the Tribunal was told that the ASDA store cleaning contract was the respondent's biggest contract and witnesses stated that ASDA was a very important client to the respondent. In her witness statement, Ms Banks confirmed that she knew that the claimant had issues with his heart although she was unable to explain how she knew this or where from. In January 2017, Ms Banks recorded the reason for the claimant's absence as "*Heart problems/flu/attack*" and in relation to action which the respondent could take, she wrote "*Monitor Danny on a weekly/monthly basis*". Despite this, Ms Banks did not seek medical advice on the claimant and his capabilities even though the Salaried Colleague Handbook states that such action would be taken in those circumstances, and it was also not clear whether any monitoring had, in fact, taken place. In the bundle, there were a number of sick notes tendered by the claimant, including one dated 30 November 2018, at page 209, in which the GP requests an occupational health assessment and

reasonable adjustments. The respondent's managers sought to suggest that they did not see the claimant's sick notes and that they were not advised of the contents. Given the GP comments on various sick notes, the Tribunal considered it was not credible that the respondent's 'people team' who received the sick notes would not have alerted the relevant managers to this information, particularly when a GP has advised the respondent to "consider adjustments to [the claimant's] role".

65. The respondent's regional manager, Mr Leadbeater insisted that he had no knowledge of the claimant's health conditions because the claimant had not raised it at his interview for the Longsight store cleaning manager role and he contended that the claimant should have raised the matter in his appraisals. Mr Leadbeater's evidence was that he never discussed health or absences with the claimant. He denied all knowledge of the Fit4Jobs report and despite being involved in the recruitment process for Longsight; he suggested that he did not even know it had been requisitioned or why. The Tribunal therefore considered that the request for an assessment was either a formality and in effect of no use because nobody read it or had regard to what it said; alternatively, it was done especially for the claimant, in the knowledge of his stroke and previous issues in accordance with the policy in the Salaried Colleague Handbook. Mr Leadbeater sought to paint a picture of managers who never shared information on or discussed staff health absences including during the claimant's 5 months' absence, even though it was the long-term absence of a store manager in a particularly challenging store about which there had been numerous concerns. The Tribunal found this to be incredible and rejected his evidence on the matter, particular because Mr Leadbeater admitted he had been aware that the claimant attended a health clinic every Friday and the claimant had changed his day off for that purpose. At the very least, if Mr Leadbeater had not known the details of the claimant's condition, it was inconceivable that a manager below him did not know anything. In light of this, the Tribunal concluded on a balance of probabilities that the respondent's managers were aware of the claimant's health condition and could reasonably have been expected to know that it amounted to a disability.
66. From the evidence presented, the respondent's approach to its employees and its people management caused the Tribunal concern. There was a refusal by the respondent's witnesses to acknowledge the claimant's disability under cross-examination or even the possibility of such, even though he had suffered a stroke and had ongoing heart monitoring and consequent health issues leading to significant ill health absence. The respondent's store cleaning contract involves much physically demanding manual work, Yet there was an absence of any referral of the claimant to occupational health, save for the screening undertaken upon the claimant's promotion in 2016, and therefore no input from occupational

health which might have assisted the respondent's managers to understand the claimant's position and disability. Of particular concern was the fact that, despite the claimant undergoing screening by Fit4Jobs, Mr Leadbeater, a senior and experienced manager, was not able to say who instigated the referral or why, and he maintained that he had not seen the report even though he was involved in the recruitment process which generated it and which led to the claimant's promotion.

67. Further, the respondent maintains an HR information system, called the 'cascade' system, to which employees have access. The name "cascade" suggests that one of its purposes is the sharing of information but no manager seemed to have consulted 'cascade' to check what information it held, when managing the claimant. In addition, if the evidence of the respondent's managers is to be believed, the role of the respondent's HR 'people team' is merely to file things away and they either never read the information/documents they receive or do not alert any, or any responsible manager to potential issues arising or warnings of such. The picture painted by the respondent's witnesses was of working in the field without any or any effective support from the respondent's people team and without access to the cascade system which contains important information which they would need in order to manage employees effectively and to ensure compliance with the respondent's legal obligations to employees who have disabilities.

Direct discrimination because of disability

68. The claimant contended that the respondent had subjected him to less favourable treatment by not allowing him to transfer from the Longsight store to another store and that this occurred in the period from 2016 to 2018. The claimant relied on a store manager vacancy which was available in November 2018 at the ASDA store in Altrincham. The Tribunal found that the claimant had not applied for the Altrincham vacancy when it arose, even though it was brought to his attention. He first complained about not being transferred to Altrincham at his grievance meeting in 2019. The grievance outcome letter states that the claimant had known of the vacancy in late 2018 and had enquired about it but had not put in an application to the respondent in order to be considered for Altrincham. The claimant did not challenge this assertion.
69. The respondent's policy was to move staff upon application(s) for vacancies and through an interview process. The parties agreed that Longsight was a difficult store to manage and Ms Banks's evidence was that the claimant had been doing a good job; she said that he "sorted Longsight for me". In those circumstances, the Tribunal considered that the respondent would not be inclined to move a manager from difficult store to elsewhere, thus necessitating recruitment into a store with known

issues, unless there was some good reason to do so. The Tribunal found no evidence that the claimant had ever specified where he wished to transfer to nor, importantly, why he sought a transfer. His case was simply that he had asked managers about a store transfer on occasion and nothing had happened. However, the records of meetings and appraisals did not show that the claimant had made informal transfer requests, and he accepted under cross-examination that he had never made a formal application for a vacancy nor had he asked the respondent, formally, for a transfer.

70. The claimant relied upon Christopher Finnan, as a named comparator. Mr Finnan was another store cleaning manager, who moved from Longsight to a store in Reddish and later moved to a store in Harpurhey. The respondent's unchallenged evidence was that Mr Finnan had shown potential and moved stores as the result of application(s) for a vacancy. His move from Longsight had, at the time, created an opportunity for the claimant to be promoted to store cleaning manager. The claimant's case was that he had been treated less favourably than Mr Finnan because Mr Finnan had transferred stores whilst he had not. However, the claimant accepted that, unlike Mr Finnan, he had not made any or any formal application for a vacancy or transfer.
71. The claimant also relied on a hypothetical comparator. From the evidence provided, the Tribunal concluded that any employee who asked about a transfer would have been told by the respondent that they needed to apply for vacancies, as the claimant was told in respect of the Altrincham vacancy. The Tribunal considered that the respondent did not transfer the claimant because he had not in fact requested to transfer as he contended, and had not made an application to transfer to a vacancy and further, on the balance of probabilities, the Tribunal concluded that the claimant had not made his reasons plain to the respondent, namely that he sought a transfer to what he hoped would be an easier store either because he was struggling with his role at Longsight or because of his health or disability. The Tribunal concluded that the respondent's failure to transfer the claimant was not therefore because of his disability. In the circumstances, the claim of direct discrimination, less favourable treatment, cannot succeed.

Discrimination arising from disability

72. The Tribunal first considered whether the respondent had treated the claimant unfavourably as set out in section 5 of the list of issues above.
73. The claimant contended that the respondent had repeatedly not allowed him to transfer stores, in 2016, 2017 and 2018, including in relation to the vacancy at the Altrincham store which was available in November 2018. The Tribunal found that, throughout the relevant period, opportunities to

apply for vacancies had arisen but the claimant had not applied for other stores when he could have done so, including the Altrincham vacancy which was mentioned to him. There was also no evidence that the claimant had asked to transfer nor stated the reason why he sought a transfer, until the meeting in January 2019, when he said that he had asked Ms Banks and Mr Leadbeater in 2016 and 2017 about this (Bundle page 213). He did not then suggest to Ms Draper that he had asked her for a transfer although he said he did not feel his situation had been taken seriously. On a balance of probabilities, the Tribunal concluded that the claimant had expected to be transferred regardless of any vacancies and without due process. There was no unfavourable treatment - in reality, the claimant expected more favourable treatment than other employees because of his disability – see also paragraph 83 below in relation to the reasonable adjustments complaint.

74. The claimant agreed that he was required to contribute to the work of the cleaning team as part of his store manager role and that the Longsight store was a 20/20 store, as described in paragraph 16 above. The claimant had a choice about what tasks or duties he undertook for his 20 hours per week of non-managerial duties. The respondent's evidence, confirmed by the contents of an email from the claimant to Ms Draper in the bundle at page 166, was that the claimant chose to undertake cleaning when he was in a position to allocate such to his team and when he could have undertaken the janitor duties instead. The Tribunal has found that the claimant had undertaken janitorial duties when this was a paper exercise, before the electronic janitorial system was introduced. In those circumstances, the Tribunal considered that there was no evidence of a requirement placed on the claimant specifically to undertake cleaning; he was in a position to allocate and manage cleaning duties and to choose what he did in that regard.
75. Likewise, the claimant contended that there were a number of requirements placed upon him which amounted to unfavourable treatment. The Tribunal found no evidence of any requirement on the claimant to spend 4 hours per day on his knees cleaning check-outs and toilets, nor was there a requirement that the claimant use heavy floor-cleaning machinery, nor a requirement to work at a low level or at floor level. The respondent's detailed "How To Guides" show in pictures what each cleaning task requires and do not support the claimant's contentions. In any event, the claimant, as store cleaning manager, had a choice about what he did each day and the tasks which he undertook.
76. The Tribunal has found that the Longsight store suffered from staffing issues – see paragraph 16 above. However, the claimant's contention that the respondent had provided fewer colleagues to undertake work within the framework of store cleaning hours was not made out – it implies that

the respondent had somehow deliberately withheld staff from Longsight when there was no evidence that this was the case. The Tribunal accepted that the claimant could be expected to do some extra cleaning work or be diverted from his managerial duties in the event of understaffing. The Tribunal considered that the fact that the claimant was having to do extra work arguably amounted to unfavourable treatment. Nevertheless, the Tribunal heard evidence that recruitment was a matter for the store cleaning manager. When the store had vacancies, the claimant had a responsibility to prioritise recruitment and conduct interviews from a pool of applicants to the respondent, in an effort to maintain the store cleaning team at a level to meet the cleaning standards. The claimant could and did liaise with his manager in the event of difficulties. The Tribunal heard evidence from the respondent's witnesses, unchallenged by the claimant, that in fact additional colleagues were sent to Longsight from time to time to ensure cleaning standards were maintained.

77. The claimant contended that a number of things arose in consequence of his disability for the purpose of his claim under section 15 EqA. First, the claimant contended that he had difficulties in coping with the manual and physical aspects of his role at the Longsight store, including using heavy floor-cleaning machinery. The respondent did not dispute this and the Tribunal accepted that the claimant would likely struggle with heavy machinery given his health condition and history. The claimant also relied upon the requirement to take Warfarin which he said led to him experiencing further health problems and tiredness. The claimant's unchallenged evidence was that Warfarin was prescribed because of his stroke and heart surgery to manage the effects of such.
78. The Tribunal considered that the staffing situation at Longsight led to an expectation by the respondent's managers that the claimant, as store cleaning manager, would either take on extra work in the event of staff shortages or arrange cover through members of the team working additional hours. Arguably, an expectation that the claimant himself would work extra hours and/or take on extra duties as cover amounted to unfavourable treatment because of something arising from his disability (difficulties in coping with the manual and physical aspects of his role) if the claimant was required to do tasks such as working at floor level, heavy lifting, or using heavy machinery on a regular basis. However, there was no evidence as to when or how the claimant had been subject to such less favourable treatment, if at all. It was not suggested by the claimant that the staffing difficulties were either regular or sustained nor were any dates or periods provided and there was no evidence that the claimant himself had covered gaps in staffing as opposed to others in the team doing so. The Tribunal was mindful of the fact that the claimant was in charge of the team day-to-day and could have reallocated any tasks he could not do, at

a time when cover or extra work was necessary, and further he could have reported difficulties in arranging cover or his difficulties with covering, to management. However, the claimant brought no evidence to support his contention that he had in fact been subject to the unfavourable treatment contended for, at the material time. What the evidence showed was that the claimant was in fact struggling with his normal duties, both managerial and cleaning, regardless of any additional work that arose, but that he did not make this plain to his managers until the meeting in January 2019, when he was on sick leave, and following which he resigned. In those circumstances, the Tribunal did not find that the complaint of discrimination because of something arising in consequence of disability was made out.

79. The Tribunal also considered, if there had been unfavourable treatment, whether the respondent had shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim contended for was that of delivering a cleaning service to the respondent's client, ASDA. The Tribunal considered this to be a legitimate aim, to meet the needs of the respondent's business, in accordance with its contractual obligations. The respondent argued and the Tribunal agreed that it was proportionate for a store cleaning manager to make a contribution to the cleaning service and to take on extra work, from time to time, to ensure effective service delivery. Longsight was a 20/20 store and a contribution to the work of the cleaning team was part of the store manager's role in any event. The claimant did not dispute this. The Tribunal considered, from the evidence before it, that there was no lesser measure that the respondent could have implemented in circumstances where the claimant had a choice about what he did and was in charge of recruitment and the allocation of tasks, and when he had not said he had limitations and also not raised issues about cover to management or colleagues over many years.

Reasonable Adjustments

80. The Tribunal considered that the respondent had the PCPs of: (a) requiring the claimant in his role as store cleaning manager to become part of the cleaning team; (b) the duties required of the cleaning team; and (c) requiring the claimant to cover for vacancies, absences and sickness absence of cleaning team members.
81. The Tribunal has found that there was no PCP which required any employee, or the claimant, to do all of the physical cleaning jobs; nor a requirement to use heavy floor-cleaning machinery; nor a requirement to work at a low level or at floor level. No employees were required to spend 4 hours per day on their knees cleaning check-outs and toilets, and the respondent did not provide fewer colleagues nor reduce the number of

colleagues provided within the framework of store cleaning hours nor did it fail to recruit replacement staff.

82. In respect of the first 2 PCPs: requiring the claimant in his role as store cleaning manager to become part of the cleaning team; and the duties required of the cleaning team; these amounted to the requirements of claimant's role, to be part of the cleaning team and to undertake cleaning duties. It was agreed that Longsight was a 20/20 store, as described in paragraph 16 above, and the claimant had accepted the job of store cleaning manager on that basis. In arguing that these 2 PCPs put him at a substantial disadvantage, the Tribunal considered that the claimant was effectively saying that he was unable to fulfil the demands of his role as store cleaning manager or that his role should have been reduced in some way. However, the Tribunal did not consider, from the evidence, that these PCPs in fact put the claimant at a substantial disadvantage because, as store cleaning manager, the claimant could choose which cleaning duties he undertook and allocate those duties he could not undertake to others in the team. He was in control of his cleaning duties day-to-day. Alternatively, he could choose to undertake the janitorial duties as his contribution to the cleaning team duties.
83. The cleaning team at the ASDA store at Longsight had particular problems with staffing retention. It was regularly understaffed. There was therefore a need to cover for vacancies, absences and sickness absence of cleaning team members. The claimant's job was to ensure the delivery of the respondent's contract for cleaning and, in the absence of sufficient employees, the claimant had felt obliged to step in and help the team. The Tribunal considered that such was an expectation placed upon him which amounted to a requirement when staffing shortages arose and which put the claimant at a substantial disadvantage in relation to that matter in comparison with persons who are not disabled. Given the claimant's particular disability and limitations, the claimant was not able to cover or work extra hours without risking a recurrence of ill-health. There was a limit to what he could do and therefore he was placed at a substantial disadvantage.
84. Given what the respondent knew of the claimant's health and history of illness – see paragraphs 63-65 above – the Tribunal considered that the respondent could reasonably have been expected to know that the claimant was likely to be placed at such disadvantage by a requirement to take on extra work.
85. The Tribunal then considered whether there were steps that were not taken which could have been taken by the respondent to avoid the disadvantage. The first step which the claimant alleged could reasonably have been made was to transfer the claimant to an alternative store and/or allow him to transfer. The respondent's submission was that the claimant

was not at substantial disadvantage by being placed at Longsight as a number of other stores serviced by the respondent in the Manchester area were 20/20 stores and also had staffing issues and/or presented challenges. Longsight was accepted to be a difficult store to manage. The Tribunal was mindful of the fact that, as store cleaning manager, the claimant was responsible for recruitment and the allocation of tasks and hours to the team, whatever the store, such that he was able to choose what he did as his 20 hours' contribution and manage his workload. There was no evidence to support the claimant's contention that a move to another store would have alleviated the disadvantage he suffered from the requirement to take on cover or extra duties from time to time. The Tribunal considered that the claimant was in fact struggling with his duties, both managerial and cleaning, regardless of any additional work that arose and that, on a balance of probabilities, he would have been in the same position whatever store he was working in. In light of the above, the Tribunal did not find evidence that a transfer of store would have been a reasonable adjustment and/or that it would not have alleviated the disadvantage.

86. The claimant also contended that he should not have been required to undertake specific identified cleaning duties or that alternative cover should have been provided for the janitor role. The Tribunal did not consider these to be reasonable adjustments in the circumstances of the case. These were matters that the claimant was in control of as store cleaning manager and a reduction in duties quite possibly would have led to the claimant doing less than his job, which may have impacted on the delivery of the store cleaning service. The Tribunal noted that the claimant said, in the meeting of January 2019 (Bundle page 213) that he realised that he had probably not been fit enough to move from Hazel Grove to Longsight. The Tribunal took this to be an acknowledgement by the claimant that he was simply struggling to fulfil the store cleaning manager role in any event. In the course of his evidence, the claimant was asked whether it might have been a reasonable adjustment for him to go back to being a team leader, as he was at Hazel Grove, and the claimant's response was that he could not have afforded to do so. The Tribunal considered that the prospect of adjustments such as reducing the claimant's role/duties or removing certain cleaning duties or providing alternative cover for the janitorial role, may well have resulted in a reduction in pay for the claimant, which he would not have accepted.
87. Lastly, the claimant contended that it would have been a reasonable adjustment for the respondent to have informed the ASDA management that he was a disabled person so that they would understand that the claimant could not do everything all of the time and that he might become unwell. The Tribunal did not consider this to be a reasonable adjustment in the circumstances. It was not something ever suggested by the claimant

at the material time, the respondent could not have told ASDA without the claimant's permission and, given that the claimant was in communication with the store management day-to-day, it was not something he had ever thought to do himself despite having every opportunity to do so.

88. In light of the above, the Tribunal considered that the complaint of a failure to make reasonable adjustments fails, as do the complaints of direct discrimination and discrimination arising from disability.

Employment Judge Batten
17 September 2021

JUDGMENT SENT TO THE PARTIES ON
21 September 2021

FOR THE TRIBUNAL OFFICE