Case No: 2201981/2019V

EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR J REMMER	V	PRIMARK STORES LIMITED

HELD AT: LONDON CENTRAL **ON:** 9-12 & 15 MARCH 2021

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MR P DE CHAUMONT-RAMBERT
MR DAVID CARTER

REPRESENTATION:
FOR THE CLAIMANT MR O TAHZIB (COUNSEL)
FOR THE RESPONDENT Mr S NICHOLLS (COUNSEL)

JUDGMENT

1. The claim of a failure to make reasonable adjustments succeeds in part.
2. The claim of discrimination arising from disability fails and is dismissed.

RESERVED REASONS

The Issues

1. The claimant remains employed by the respondent as a Trainee Manager. His claims arise from what he contends are failures of the respondent to make reasonable adjustments and by discriminating against him for reasons which arise from his medical conditions of Autism Spectrum Disorder (ASD) and sciatica. These arise from failures to implement Access to Work recommendations and from what the claimant considers are consequential issues, including an attempt to extend his probation.

2. The respondent denies all acts of alleged discrimination. The respondent admits the claimant is disabled as defined in s.6 of the EqA 2010 by reason of sciatica and autism spectrum disorder.

The Issues

Discrimination arising from disability (s.15 EqA 2010)

3. Did the Respondent fail to respond in a timely or adequate manner to the Claimant’s grievance concerning the failure to implement the Access to Work recommendations?

4. In November 2018, did the Respondent decide that the Claimant would not pass his probation, and decide to extend the probationary period for six months, before subsequently retracting that decision and confirming his employment?

5. During the period 6 July 2018 to 16 January 2019, did the Respondent fail to provide the Claimant with full pay and/or company sick pay during absences relating to his disability?

6. In relation to paragraphs 3-5, did this amount to unfavourable treatment?

7. If so, was the unfavourable treatment because of something arising in consequence of the Claimant’s physical and/or mental disability? The "something arising" relied upon by the Claimant is the Claimant's sickness absence and/or his requirement for, and because he was requesting, reasonable adjustments.

8. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant had the relevant disability/disabilities?

9. If so, was the treatment a proportionate means of achieving a legitimate aim?

    a. No legitimate aim is relied upon with regard to paragraph 3 above.
    b. The legitimate aim relied upon by the Respondent with regard to paragraph 4 above is the need to sustain a capable and suitable

workforce.

c. The legitimate aim relied upon by the Respondent with regard to paragraph 5 above is the need to only offer enhanced benefits to employees that have over six months' service.

The Reasonable Adjustments claim

10. The Claimant relies on the following alleged substantial disadvantages:

    a. The Claimant's sciatica was exacerbated
    b. The Claimant was unable to work and was absent with pain for the periods set out in the agreed chronology
    c. The Claimant suffered a loss of earnings. He was only paid statutory sick pay during periods of absence during his first 6 months of work
    d. The Claimant was required to share a keyboard and mouse with other employees in circumstances where doing so was difficult for him as a result of his ASD
    e. The Claimant's managers and/or other staff did not treat the Claimant with an adequate understanding of his disabilities
    f. The Claimant lacked support in managing the impact of his ASD at work
    g. Until the Access to Work funding was approved, the Claimant was required to pay for the cost of taxis to and from work using his own money
    h. The Claimant was put through the distress of having to repeatedly chase his employer to make adjustments

11. Was the Claimant put at a substantial disadvantage (as set out at para 10) in relation to a relevant matter in comparison with persons who are not disabled due to the lack of provision of auxiliary aids? The auxiliary aids relied upon by the Claimant are:

    a. An ergonomic chair with armrests
    b. A medical grade keyboard
    c. A computer mouse

12. Did the Respondent know, or could it reasonably be expected to know, that the Claimant was likely to be placed at a substantial disadvantage? If not then the duty did not arise.

13. If so, did the Respondent take reasonable steps to provide the auxiliary aids? The Claimant's position is that the Respondent failed to provide the auxiliary aids until November/December 2018.

14. Did the Respondent:

    a. Fail to respond to the Claimant's May 2018 Health Review Meeting in a timely manner?
    b. Fail to respond to the Claimant's June 2018 Access to Work report from June 2018 in a timely manner?
    c. Fail to provide the Claimant with workplace 'Coping Strategy Training' until March 2019?

d. Fail to provide its managers and/or staff with adequate disability awareness training until July 2019?
e. Require staff doing the Claimant's role or similar roles to stay on their feet for extended periods of time, up to 20 November 2018?
f. Require staff doing the Claimant's role or similar roles to undertake significant manual handling tasks?
g. Require the Claimant to travel to attend work in person at the Respondent's Westfield store?
h. Fail to respond in a timely or adequate manner to the Claimant's grievance?
i. Not provide full pay and/or company sick pay to employees who are on sick absence and who are within their first six months' of employment?

15. If and in so far as the answer to the questions set out in 14 a-i above is yes, did such act or omission constitute a provision, criterion or practice (PCP) for the purposes of s.20 EqA?

16. If so (and in each case, if more than one), did such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant relies on the substantial disadvantages as set out above at para 10 (a) to (h).

17. Did the Respondent know, or could they be reasonably expected to know, that the Claimant was likely to be placed at a substantial disadvantage (as set out at para 10) (Schedule 8, para 20, EqA 2010)? If not then the duty did not arise.

18. If so (and in each case, if more than one), did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

19. The reasonable adjustments relied upon by the Claimant include, but are not limited to:

a. Responding in a timely manner to the Claimant's Access to Work Report;
b. Responding fully to the Claimant's Access to Work Report;
c. Providing the Claimant with workplace 'Coping Strategy Training' soon after June 2018 and/or at some point prior to March 2019;
d. Providing staff with adequate disability awareness training soon after June 2018 and/or at some point prior to July 2019
e. Reducing the amount of time the Claimant had to stay on his feet (to 18 September 2018)
f. Reducing the manual handling tasks which the Claimant was required to do;
g. Arranging taxis for the Claimant to get to work and/or paying for taxis arranged by the Claimant to attend work;
h. Providing the Claimant with full pay and/or company sick pay in relation to periods when he was absent at work due to his disability during his first six months' of employment.

Jurisdiction

20. Did any of the acts of disability discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted his claim to an Employment Tribunal (extended, as appropriate, by ACAS conciliation)?

    a. The Claimant's EC Notification was received by ACAS on 08.11.18.

    b. The Claimant's ACAS Certificate was issued on 08.12.18.

    c. The Claimant's ET1 was issued on 13.03.2019.

21. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of the Equality Act 2010, and was the claim brought within three months of the end of that period?

22. If not, would it be just and equitable to extend time for any reason?

The Relevant Law

23. Equality Act 2010

6 Disability

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

a. P has a physical or mental impairment, and
b. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

15 Discrimination arising from disability

(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.

20 Duty to make adjustments

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

(2) ...

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) …

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

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

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

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.*

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …

(b) than an employee has a disability and is likely to be placed at the disadvantage…

Relevant case law

24. Discrimination arising from disability

a. There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

i. did A treat B unfavourably because of an (identified) something? and
ii. did that something arise in consequence of B's disability?

"The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

b. If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

c. *Trustees of Swansea University Pension and Assurance Scheme (2) Swansea University v Williams* [2015] IRLR 885. unfavourable treatment is a hurdle, or creating a particularly difficulty or disadvantaging the claimant.

d. There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

e. The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

i. 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. 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, and there may be more than one reason in a s.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.

ii. 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 irrelevant.

iii. 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. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

f. The fact that an employer has a mistaken belief in misconduct as a motivation for a particular act is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment'.' (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

g. **Justification:** *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must 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. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be

proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

25. Reasonable adjustments

a. A failure to make reasonable adjustment involves considering:
    i. the provision, criteria or practice applied by or on behalf of an employer;
    ii. the identity of non-disabled comparators (where appropriate); and
    iii. the nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

''the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

b. *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'*. Ishola v Transport for London [2020] EWCA Civ 112:*

    i. 'PCP' – consider the statutory code of practice para 6.10: the phrase "*should be construed widely so as to include, for example, any formal or informal policies, rules, practices…including one-off decisions and actions*";

    ii. The function of the PCP in a reasonable adjustment context is to identify what it was about the employer's management of the employee of its operation that caused substantial disadvantage to the employee.

    iii. To test whether the PCP was discriminatory, it had to be capable of being applied to others. The comparator could be a hypothetical comparator to whom the alleged PCP could or would apply.

iv. A one-off act can amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in the future.

c. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

d. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

e. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

f. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. It is for the tribunal to decide what is reasonable. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

g. *RBS v Ashton* [2011] ICR 632: The tribunal must have consideration of the potential effect of the adjustment – it does not matter what the employer may or may not have thought, the question is what effect the adjustment may have had, if it had been made

h. *Latif v Project Management Institute* [2007] IRLR 579: establishing that a provision, criterion or practice placed the disabled person at a substantial disadvantage was not sufficient to shift the burden of proof. To draw such an inference there must be evidence of an adjustment which appears reasonable, and which would mitigate or eliminate the disadvantage.

i. *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

j. Employment Code of Practice paragraph 6.28: the kind of factors which a tribunal might take into account in deciding whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include:

   1. whether taking any particular steps would be effective in preventing the substantial disadvantage;

   2. the practicability of the step;

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

   4. the extent of the employer's financial or other resources;

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

   6. the type and size of the employer.

<u>The Hearing and the Witnesses</u>

26. The Hearing was held by CVP. The Tribunal carefully monitored the Hearing during the evidence to make sure there was no unfairness to the parties. The claimant's representative advised that the claimant's disability means it more difficult to undertake a hearing on-line, and we considered reasonable adjustments to the hearing in consultation with the claimants rep and consideration of the Equal Treatment Bench Book.

27. The Tribunal was reading all of day one, and on day 2 of the hearing we agreed the following adjustments: regular breaks, with a maximum of one hour's evidence (less if needed) followed by a 15 minute break; that when he was not

giving evidence the claimant could participate with his camera off. We monitored the proceedings throughout.

28. While there were some inevitable difficulties caused by connection issues, there were no significant issues during the evidence and submissions. All witnesses were able to answer questions put to them without any difficulty and the claimant was able to ask questions appropriately to the respondent's witnesses.

29. We heard evidence from the claimant. For the respondent we heard from:

    a. Ms N Gul, People & Culture Manager
    b. Mr M Dewar, Area Manager
    c. Mr D Bhatia, People and Culture Manager
    d. Mr G Denham-Smith, Assistant Store Manager

30. Prior to hearing evidence we read all witness statements and the documents referred to in the statements; this took the rest of day one after the initial discussion with the parties.

31. This judgment does not recite all of the evidence the Tribunal heard, instead it confine the findings to the evidence relevant to the issues in this case.

32. This judgment incorporates quotes from the EJ's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

<u>Findings of fact</u>

33. The claimant started his employment as Trainee Manager in the respondent's White City store 21 May 2018. As part of the onboarding process he completed a 'further information' document which asked questions about disability, and he stated his conditions were autism spectrum disorder, sciatica and dyslexia (53).

34. His contract referred to the sick pay and company sick pay provisions. The company sick pay policy states that he will be eligible for company sick pay after employed for 3 months; his entitlement was two weeks company sick pay after 6 months to 3 years' employment, payable from day 4 of absence (44). The company handbook states there is a probation period of 3 months. There is no suggestion that this period may be amended (45).

35. From his start date there were email discussions between managers and HR about adjustments which may be required, and that a meeting was required with the claimant to address these. Ms Gul, P&C Manager at White City, emailed HR asking for advice; in response she is told *"the main thing"* to discuss was whether any adjustments are required, that the meeting with the claimant should be *"a very sensitive conversation …. A supporting conversation…",* that he should be asked if he collaborated with Access to Work *"… and if yes is there anything the Store can do to work with them as*

further support…" (62).

36. There was a dispute about whether the notes of *the "Summary of Health Review Meeting"* of 25 May 2018 are accurate. There are not signed by the claimant or Ms Gul. On the issue of sciatica, this states that it *"… is not weight based but due to movement. Too much movement can bring on the pain but then can also ease the pain. [The claimant] does not feel that the sciatica will restrict him from his work now or in the future."* (64-5).

37. The claimant says in his evidence that these notes are wrong, that what he in fact said was *"I am not sure how each of the conditions will affect me";* because at this time he was not sure of the nature of all his duties. His evidence is that *"I mentioned that the main problem was posture, not weight, it was constant standing…"* . The claimant's evidence was that he discussed his conditions *"one by one"* with Ms Gul at this meeting. We accepted the evidence in his witness statement, which is that at this meeting he referenced the need for simple clear instructions (Autism Spectrum Disorder) and the need to be allowed to sit down and take breaks when he was in pain (sciatica).

38. We also accept that at this 25 May 2018 meeting he discussed ATW, saying he had this with his old employer and Ms Gul *"…told me that this would not be an issue and told me to pass on her contact number to [ATW]…"* (189).

39. The claimant applied for assistance from Access to Work, providing the name of Ms Gul as the respondent's point of contact. On 25 June 2018 this application was successful, and he was told that the Scheme would fund 100% of the costs set out in the letter for an ergonomic chair, a medical grade waterproof wipe-clean keyboard, a mouse, 12 hours of workplace coping strategy training, and that disability awareness training would be provided to relevant individuals in the workforce. These items would be paid for by the respondent, and claimed back from ATW.

40. The claimant also received an entitlement for travel to work costs by taxi, less his contribution of £1.50. In the 'what to do next' section he was told to discuss the agreed support with his manager and to sign and return the declaration within 4 weeks (69-71).

41. A letter in similar form was sent to the White City store, addressed to Ms Gul (76-79). There was dispute as to whether this was received at the store. The Tribunal noted that in subsequent correspondence with ATW on 29 October 2018, HR say that *"the letter we've received has been dated 25th June 2018"* (294). This is the date of the letter received by the claimant, and we accepted that the 29 October email referenced the similar letter sent to the store. We concluded that this letter was received by the Store but was not actioned.

42. We also accepted the claimant's account that the reason why he did not sign and return his firm was that the documents the respondent received needed to be processed and signed off and returned to ATW before he could receive his entitlements.

43. Because the White City store was new and shortly to open, all trainee managers including the claimant were required to often work 6 days a week, 12 hours a day, as stated by Ms Gul in a witness statement she wrote as part of a disciplinary investigation (93).

44. On 6 July 2018 the claimant left work at around 7.30 that evening. The next day he called in sick. In a series of texts on 8 July he referenced leaving work *"as my left leg was in crippling pain. I was at the hospital until about 3.30 am after having an MRI… She also sent a letter to my GP recommending I be referred to the chronic pain team."*

45. In the return to work meeting the claimant stated that he needed *"a balance between being able to stand and sit down as standing for too long causes problems*" (86).

46. On 24 July 2018 the claimant forward to Ms Gul the 26 June Access to Work approval email. We accepted the claimant's evidence that Ms Gul was *"ignoring my request to have meetings … to discuss ATW"*, that he had told her about the ATW provisions and the need for this to be approved, and that she had told him she would look into it. Ms Gul then told him that she had not received the paperwork. And this is why he forwarded this email to Ms Gul.

47. The claimant was asked questions about the need for these items; the respondent's position, put to the claimant, was that it only became aware of the reason why these items were needed following an absence in September 2018. We accepted the claimant's evidence *"…this is why I needed a meeting [earlier] to approve these items - so this discussion would happen as to why I needed this equipment."*

48. At his 10 week review the claimant was told that his *"level of absences needs to improve…"*, that he needed to *"prioritise, plan and organise work"*. One of the claimant's comments was that he needed to learn how to say no and not to take on too much work (104-5).

49. The claimant had 5 days absence from 6-10 August 2018. A referral to Occupational Health was completed on 13 August 2018 because he had had 8 days absence at this date; the referral it stated that he used a walking stick at work, that he is *"assigned tasks to complete but are taking too long or are not completed at all. … [the claimant] has stated that he is struggling to manage his department and oversee the tills…".* It says that the claimant says he was "*fine in doing his job role and did not need additional support/adjustments".* The referral stated that the claimant had difficulty with aspects of his role which took too long or were not completed at all. The referral asked how his conditions would affect his work, the medication he was taking, the support required and the possibility of further absences, whether he will be in a position to fulfil his contract/job role (107-8).

50. At a return to work interview on 14 August 2018, the claimant stated that he does not feel the he can fulfil normal duties, that he spends a lot of time on his feet which aggravated his pain, that he *"Needs support, ability to sit down when*

needed" (117-9). At a subsequent 'counselling' meeting, he stated that he needed a *"reduced workload, ability to sit down when needed; a reduced department coverage, more support from management and colleagues."*

51. On 24 August 2018 the claimant forwarded the 24 June 2018 Access to Work email to a Store Manager (Ms Fitzgerald) who discussed with HR and forwarded the email to a Regional Manager (125-6).

52. The claimant had 2 days off work with sciatica pain from 22 August 2018, on 24 August 2018, he attended his GP who said that amended duties should be considered *"Please consider an 8 hour working day, with rest periods included, and variety of work from standing to sitting"* (130).

53. The claimant was required to attend a capability meeting on 27 August 2018 undertaken by Ms Gul and he discussed his condition. He stated that it is not practicable to sit down when on late shift, that *"Access to Work needs sorting…"* (134-9).

54. The earlier referral to OH was not made, the form was again completed on 29 August 2018 (140-141) and an appointment booked.

55. On 20 August 2018 the claimant asked to speak to a manager, Ms Pierce, about some private and confidential issues, in a subsequent email he asked if Ms Gul had forwarde*d "… my access to work paperwork. She said she wasn't sure if she had to sign it or her boss which I imagine is you?"*

56. On 24 August the claimant sent a further email to Ms Pierce saying *"Sorry to pester you about this but has [Ms Gul] spoken to you about this? This is causing me a lot of financial difficulty as well as being harmful to my physical and mental health.".* In response Ms Pierce said *"I'm not aware of the details … as this would need to be dealt with in-store".* On 4 September 2018 the claimant responded, saying *"If I wished to raise a grievance regarding senior manager would have to raise it through yourself or … my area manager…?"* (145-7).

57. On 6 September 2018 the claimant discussed his concerns with a respondent's HR manager following a management workshop; the manager emailed Ms Pierce outlining the claimant's concerns, which included that he had not been provided with assistance or guidance, that he had approached HR about working conditions relating to sciatica *"… and he has not any support with this."* He stated that there was no one in store he could speak to *"… that he felt would 'do' anything regarding his concerns."* (148).

58. The claimant's evidence was that he raised a grievance when he contacted Mike Dewar on 14 September 2018 by email, saying he wanted a meeting to *"air some concerns regarding the environment at White City and my personal experiences that is making it hard to work there. I would prefer to meet face to face before this turns into a formal grievance"* (161).

59. The claimant had a brief meeting with Mr Dewar on 17 September 2018, he

mentioned the Access to Work issue, that he had tried to pursue this with Ms Gul, that it was not being processed. The claimant was told by Mr Dewar that he would speak to Ms Gul.

60. The Tribunal accepted that the context of the 14 September email and then the statement at the 17 September 2018 meeting was clear: the claimant was raising a concern about the lack of progress with ATW, and that he hoped the issues of concern could be sorted by Mr Dewar. This was, we concluded, the claimant raising an informal grievance.

61. The OH report dated 17 September 2018 states that the following adjustments should be considered: sedentary duties, minimal manual handling, avoiding bending, a shortened working day. It states that the claimant is being referred for possible surgery and this would be a complete cure, that if he cannot have surgery *"it is likely that he will continue to suffer from chronic back pain which will have a significant impact on his ability to carry out the intrinsic duties of the job."*

62. The OH report summary states that "*there has been a deterioration of his symptoms … due to the very physical nature of the intrinsic duties of his job description. Until he has definitive treatment he will struggle to carry out his job role and will need significantly adjusted duties".* (148/152).

63. The claimant's evidence was that the issues with his back were exacerbated because of a lack of balance between standing and sitting in his role. *"So this was causing me time off, and I was not paid, so I had to force myself into work. And I would bring up putting things in place and was told 'we'll look into it' but that did not happen … Eventually the pain so bad that I went off work."*

64. On 25 September 2018, the claimant was told that he would be having surgery on 1 October 2018 and he texted Ms Gul saying so.

65. On 28 September 2018 the claimant texted Ms Gul asking *".. have you managed to check where we are with my ATW? I need it sported asap before I come back to work please…";* Ms Gul's response was that she would *"follow-up"* when she was back at work (167).

66. By 11 October 2018 the Access to Work had not been sorted. The claimant emailed Mr Dewar saying he had conversations with Ms Gul and the store manager regarding this *"but have been ignored again".* He attached screenshots of his conversations on this issue. The email states that he has never worked *"… in such a fractured careless environment it is disgusting the amount of harm, pain and effort they have caused me"*. He wondered whether there was a view he was making up his disabilities, or whether there was a motive to force him to resigning. He stated he had to have time off work as a consequence, "*… not only have they caused me financial loss with ATW travel but it has also caused by disability to worsen … and now to actually have major spinal surgery which wasn't on the table before joining Primark."*

67. Mr Dewar forwarded the claimant's email to Mr Devang Bhatia, People and

Culture Manager, saying that he had spoken to Ms Gul who had said she would deal *"clearly she has not",* that Ms Gul had referenced awaiting an OH report which was *"assessing [the claimant's] eligibility for payment.*"

68. We noted that Ms Gul had not completed the OH referral and so may not have been best placed to say what questions were asked of OH. We noted that the OH referral did not ask about the Access to Work items, in fact the referral stated that the claimant had said he did not need any adjustments. This comment made by Ms Gul to Mr Dewar was therefore factually wrong.

69. Mr Bhatia replied to the claimant's email about ATW, *".. to see what best we can do to support you on this."* (185-6).

70. At the 16 October meeting with Mr Bhatia and Mr Denham-Smith (who was undertaking a back to work capability meeting), the claimant set out the history of the ATW issue up to his contact with Mr Dewar, he referenced his surgery which he said was only partially successful, maybe requiring a further operation, and that there was the prospect of ongoing work-related issues in the meantime. He referenced a financial loss because of his work-related time off work (187-92).

71. In summary. Mr Denham-Smith stated there were the following issues to sort: Access to work, a based return to work and his "pay situation".

72. Mr Bhatia contacted HR on 16 October 2018 about the Access to Work provisions, and was told that the involvement of the Environment Health and Safety Team (EHS) was required as a chair has been recommended; that HR could not assess how all the other recommendations were relevant to his role, such as training (197-8).

73. The claimant was told about the EHS assessment requirement; he responded saying that there was *"no excuses for the months of delay. .. .nobody can answer why it's taken so long… It feels as if Primark is doing everything in its power to avoid signing it, causing me physical and psychological pain…"* (200-201).

74. Mr Bhatia was informed by Ms Pierce that before the Access to Work request could be dealt with a *"case summary and proposal"* needed to be made, including when and where did the request originate, what is the money for. Mr Bhatia responded saying ATW would pay 100% *"… if this is the case .. his ATW can be agreed?"* (205-6).

75. An EHS assessment was undertaken which referred to the history of the ATW issue, the apparent lack of contact between the store and ATW, the fact that *"the very physical nature of the intrinsic duties of his job description"* appear to have contributed to the deterioration of his back, there was a need for direct discussions with the claimant about this report, the need for significantly adjusted duties and likely medical treatment and prognosis (209).

76. On 26 October 2018 the claimant was querying a lack of pay slips and whether

he had been paid correctly: his view was he should be receiving full pay because his absence had been caused by the respondent's *"continued issues with support regarding my disabilities…"* (255).

77. On 30 October 2018 the claimant emailed Mr Dewar saying he had *"… made every effort to work with others to get his situation resolved. .. I feel the only way to go forward now to resolve this is to formally raise a grievance. So can we arrange a meeting so I can officially raise a grievance. I'm currently off work but I am willing to come into work to have a meeting."* (238).

78. On 6 November 2018 a draft email was prepared by HR to be sent to the claimant. It stated *"It is apparent that there had been a breaches in communication and the process for ATW has not been followed in line with Primark best practice. … ATW … have confirmed that your grant has not yet been closed … At this stage we would like to have your case resolved… On behalf of Primark we would like to express our sincerest apologies for the way in which your request has been handled…"* (243). It appears that this email was never sent to the claimant.

79. On 9 November 2018 an internal 'pop-up meeting' was arranged to discuss ATW, including the updates received from both the claimant and ATW (251).

80. On 10 November 2018 the claimant informed Mr Bhatia that he had *"commenced legal action against Primark"* by contacting ACAS via the early conciliation process.

81. On 12 November 2018 the claimant was told that the respondent was in the process of arranging for the grant to be actioned for all items – equipment, training and travel reimbursement, that he would be having a discussion on his return to work to discuss *"interim adjustments"* while the equipment was being organised and there would be a EHS assessment as a precursor to the ATW order, but that this should not affect the ATW grant (274). The ATW declaration was signed and sent back to ATW on 14 November 2018 (282).

82. On 14 November 2018 the claimant was informed that his role was subject to a six month probation period, that he had not completed the necessary training or validations, and that his probation would be extended for a further 6 months (299). He was written to the next day stating that this letter should be ignored *"…this was sent incorrectly"* (306).

83. We accepted the claimant's evidence that he was the only Trainee Manager on probation to receive this letter – this was not disputed by the respondent's witnesses.

84. During this period there was an internal conversation about cost centres and other administrative processes, as the respondent was required to purchase the items and then claim reimbursement from ATW (e.g. email 13 November, page 278). An internal timeline on the process to date was prepared (14 November, 281).

85. On 15 November the claimant was told that a ATW declaration form was being sent to him to sign and return to ATW (297).

86. The claimant contacted Mr Bhatia on 18 November 2018, raising concerns about the probation letter – asking whether this had been sent to other managers; whether he would be getting a pay rise; also stating that he was now going down the ACAS and legal route because he believed that the harm had been done to him *"purposefully"* (318-9).

87. By 25 November 2018 the claimant emailed saying that his GP was suggesting 4 hours a day 2 days a week return to work; on 28 November 2018 he had a return to work interview which stated that a phased return/reduced hours return was required (330).

88. From 27 November 2018 the claimant was able to claim his travel costs, and apart from what the claimant described as one error in payment, this has proceeded smoothly since.

89. On 29 November 2018 ATW emailed the claimant saying authorisation was now in place for the respondent to order the equipment (338-9); the claimant forwarded this the same day to Mr Bhatia for the respondent to action (340). Ms Shelley confirmed the same day that all equipment had now been ordered (333).

90. The claimant confirmed in his evidence that, in relation to the equipment, the respondent could not be responsible for any delay in its delivery after this date – 29 November 2019. The claimant's view was that there was a delay of 6 weeks between 16 October and 29 November, that *"6 weeks to order equipment is a long time. This should have been done in June, not October. So not done in a reasonable time."*

91. In evidence it was put to the claimant that it was "*just your view"* that the claimant needed approval from the respondent before returning the ATW form. We accepted the claimant's evidence that he was required to discuss this with the relevant managers, not least because, as seen above, pre-authorisation was required from within Primark before the items could be ordered.

92. We concluded that even if the claimant had returned the form without seeking authorisation, this would not have accelerated receipt of any items, because of the requirement for the respondent to get to grips with the application and return the ATW form before ATW to grant the funding.

93. On 3 December 2018 the claimant was referred again to OH report: the referral discussed the history since surgery, and that the claimant had returned on reduced hours and amended duties with no concerns about his performance. OH was asked to recommend *"specific amendments"* required, and *" and what he can and can't do in light of his role";* that while the claimant was in pain he was starting physiotherapy treatment, and that there was the prospect of a second operation to treat the 2nd prolapsed disk in 6 months' time (344).

94. A meeting on 3 December 2018 between the claimant and Mr Denham-Smith discussed the claimant's symptoms and what he could or could not do; the claimant said "*it's hard to say"* that he may be able to bend/lift *"but it's just about not consistently doing".* It was agreed that he would not undertake heavy lifting or breaking boxes, instead *"light work .. without bending but you can do more people job, tills, Digi, top sellers so less physical"* (345-6).

95. On 5 December 2018 an email from Mr Bhatia to Mr Dewar related to the extension of probation of *"one of the management…"* i.e. the claimant, that *"… the proposal was to pass everyone's probation in the store due to issues in the store – not down to them."* A redacted list appears in the bundle – it appears that the claimant was one of several who were now to be regarded as passing their probation by receiving *"standard/trained trainee pay"* (351); it was agreed by management that the proposal to make this rise to all managers who had been on probation (354).

96. On 13 December 2018 the claimant informed Mr Dewar that he was withdrawing his grievance and was *"going to purse the ACAS route."* (359).

97. It was put to the claimant that there was no delay in delaying with the finance and that in any event there was no link between any delay and his disabilities, the claimant's evidence was that there was link, that his ADS means he needed clarity, that the delay made him feel that they did not believe his disabilities were real, that *"I felt I was being pushed out"*.

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98. On 7 December 2018 Mr Dewar authorised a change of status (and therefore salary) for several Trainee Managers, including the claimant (382).

99. The OH report of 21 December 2018 states that the claimant is still in pain because of continued sciatica, that his Oswestry pain score is *"fairly high"*, that he has *"coped with what has been asked of him"* avoiding manual handling of more than 5kg, and reduced hours being beneficial.

100. In his evidence the claimant accepted that things did go better*: "things did improve once I came back to work - but it was not perfect - but they did improve".*

101. The OH report's prognosis said that there was a continuing medical issue, that he would *"struggle"* to reach full time working in his current role which requires him to be on his feet, he should avoid all non-sedentary duties, not to work for more than four hours a week until end January at least, be subject to a 5kg manual handling limit (384-88).

102. ATW items were received on an ad-hoc basis; the chair arrived in mid-December, but there was then a delay getting it set-up via the supplier until 11 January 2019 (396-8); there was some delay receiving the docking station and laptop into January 2019. There was an initial 'decline' on an internal request for the laptop, until Ms Shelley made it clear it was a reasonable adjustment request; after this there was another delay until 2 January until Ms Shelley again chased, for the laptop request to be 'reopened'. This was built and

dispatched to the store on 11 January 2019 (389 & 405-8). It was delivered by 21 January 2019, and the claimant had a meeting shortly after this to receive the laptop and have advice and training on its use (xxx).

103. It was put to the claimant in evidence that the laptop/mouse was not a reasonable adjustment, that he did not need it for extended periods of time in his role. Also, that the chair was not required for his role, that this was not a reasonable adjustment. The claimant's evidence was that (i) there were times he needed to use it for rest breaks, and (ii) he was required to use a laptop/tablet, sometimes for over an hour a day. We accepted the claimant's evidence.

104. We also accepted the claimant's evidence that these items (laptop, chair, mouse) were not just for sciatica; one of the significant issues which arises from the claimants disability of Autism Spectrum Disorder is the requirement for equipment which is hygienic and not been used recently by others. This is set out in his impact statement, the contents of which were not challenged by the respondent.

105. It was put to the claimant that the respondent was unaware of the reasons why the claimant needed the ATW equipment; the claimant's evidence was that this was because the respondent did not meet with him to discuss, as set out in the 24 June 2014 letter. We again accepted that the reason why the respondent may have been unaware of the need for this equipment, until he raised it with Mr Dewar on 17 September 2018 was because it had not engaged with the claimant on his ATW requirements. However we also concluded that the respondent should have been aware that there was a need for this equipment and that it was for a reasonable adjustment as it was listed in the ATW report on 25 June 2018, was being funded by ATW.

106. The capability meeting of 6 February 2019, notes of meeting, show the claimant saying that the pain comes and goes that he can sit down and is "currently happy" (431).

107. The ATW training (for the claimant and for key staff) was a little slower in being provided; after enquiring with training providers Mr Bhatia initiated an internal purchase request on 21 January 2019 (412). Mr Bhatia's evidence, which we accepted, was that there were several reasons for this delay, in part the need to get authorisation, also delays because of sheer weight of work

108. The Workplace Strategy Coping training – to be undertaken by the claimant – was ordered via a 3rd party company Genius Within, and a purchase order was raised on 15 February 2019 (447), the order form was sent on 22 February and following a call between Mr Bhatia and Genius Within on 26 February, and 2 March 2019 Genius Within said they would assign a coach. Mr Bhatia chased this company on 11 March; the training was not undertaken by the claimant by the date be submitted his ET1.

109. Disability Awareness Training for managers was not arranged until April 2019 and the training provided in July 2019, both dates being after submission of

the ET1 in this claim (475).

110. The claimant accepted in his evidence that the Access to Work matters have been implemented in full.

Submissions

111. The parties handed up written submissions which the Tribunal read in advance of oral submissions.

112. Mr Nicholls for the respondent disputed that the respondent had knowledge of substantial disadvantages at any time during the events in issue in this claim. He argued that any knowledge it had was far too vague, an inadequate understanding - *"we do not know what we were meant to do".*

113. He argued that there was no properly argued PCP, apart from arguably (e) and (f), but in any event (e) and (f) are not applicable, as the claimant was told to have breaks at work.

114. Mr Nicholls argued that the issue of travel to work is answered by *Kenny*. The employer did not pass on forms for funding, there is no evidence that this failure can amount to a PCP *"Incompetence is not a PCP. 15(b) is not a PCP."*

115. If there is any failure to deal with the ATW issue earlier in the process *"it is a one-off failure to deal"*.

116. On the issue of exacerbation of sciatica and an increase in pain, Mr Nicholls questioned whether pain *"which does not prevent the work being done"* amounts to a substantial disadvantage.

117. On the issue of whether there was a potential continuing act to the date of proceedings, Mr Nicholls argued that *"after a reasonable period of time of the claimant asking about ATW and nothing happening … they are not doing what they have been asked to do, or they have decided not to do it…"*; this is when time starts to run - see para 81(a)-(e).

118. On discrimination arising from disability, and a failure to respond to the grievance — there was no grievance raised by the claimant; there was always an intention to raise one, but there was no detail in his emails. He wanted a meeting to raise a grievance, but this never happened as he decided to go down the ACAS route.

119. On the probation letter: this was resolved within 24 hours - it happens. It is a "minor" act, a temporary issue, which was quickly resolved.

120. On the claimant's submissions: there is no evidence that adjustments would have made any difference. The ATW assessment was not for Primark to action; and on the difficulties the claimant encountered, it was limited - see his impact statement paragraph 21.

121. And on his return to work there no evidence of the claimant having issues at work. He was not handling significant weights; see the wording of the 2nd OH report page 286 – the claimant has coped with his work duties.

122. What was the claimant asking for – to avoid manual handling. A key piece of evidence therefore is after his return to work when he has a balance of roles involving standing and sitting. So after the 2nd OH report in December 2018 report, there is a lack of evidence of detriment after this date.

123. Mr Tahzib for the claimant argued that the Access to Work items are *"paradigm reasonable adjustments*" – a chair, a computer, etc.

124. The PCPs – decisions or actions – can amount to a PCP – see paragraph 12a Closing and the reference to the Statutory Code.

125. The 15(b) PCP – "Failing to respond to ATW requests": throughout there was a proactive failure to respond to ATW requests; for example even after the purchases were approved, there was an insistence on repeated assessments.

126. Mr Tahzib argued that *Kenny* is not relevant on the issue of travel to work; the claimant is not seeking funds from his employer, he is requesting them to progress the ATW application which will subsidise his travel to work.

127. The respondent argues that there is no medical evidence on whether the adjustments sought would have alleviated the disadvantage. In fact there is evidence - page 150 OH report – which says that the physical nature of work *"is exacerbating his condition...".* And page 152 - deterioration in symptoms since he started employment. And the claimant said from the outset of his employment that he needs a 'balance'. *"So there is evidence on what would have happened had adjustments been put in place."*

128. The respondent had actual knowledge from 25 May 2018; on Ms Gul's evidence she knew in June 2018 that the claimant had the medical conditions.

129. On the grievance – the claimant exhausted the informal process and he sent an email on 13 October 2018 "*It is a grievance – he's not asking to raise one - he should have responded and arranged a meeting."*

130. In fact, there was a material impact from the probation letter. The claimant chased his employer, he lodged complaints. The *"evidence suggests only he received this."*

131. On auxiliary aids: the respondent's closing para 32 – states that no steps can be taken to action ATW until 27 November. But it was clear that the respondent had to sign a declaration – Mr Bhatia accepted this. The declaration should have been sent in June 2018.

132. There is a factual dispute about what happened at the Health Review meeting at the outset of employment: the issue of 'balance' of duties is mentioned in his account in October 2018 of the May meeting. This matches what he has said

elsewhere. The issue he mentioned was not breaks, but a balance of sitting and standing.

133. On concrete steps which could have been taken: firstly advance the ATW; (ii) put in place steps to facilitate a balance of sitting and standing - *"A meeting to explore his needs and make a plan to achieve a balance"*. There is an office based element to his role; "so different possibilities could have been explored, not just left to the claimant.

134. The failure to provide the training earlier placed the claimant at a substantial disadvantage - this was designed to enable the claimant to cope with ASD at work.

135. On the management training, Mr Denham-Smith accepted it helps and he changed his management approach and he accepted it would have helped to have it earlier.

136. On jurisdiction and a continuing act, Mr Tahzib argued that all the of the issues in the claim are interconnected, and this this conduct continues into 2019: the failure to address manual handling, the failure to pay sick pay, to January 2019; the failure to provide the training until July 2019.

137. If the duty to make adjustments relates only to the chair and computer equipment: the chair was provided on 11 January and the laptop 21 January 2019.

138. Mr Tahzib also argued that if any part of the claim is out of time, it would be just and equitable to extend time for the reasons set out in his Closing.

139. Mr Nicolls in response on issues of law: *Kenny:* the detriment must arise from the workplace - and travel to work is not the workplace. Having training to change a mindset is not a reasonable adjustment.

Discussion and conclusions

The reasonable adjustments claim:

Did the claimant suffer the following 'substantial disadvantages'?

140. *The claimant's sciatica was exacerbated:* The medical evidence from Occupational Health states that the intrinsic nature of the claimant's role exacerbated his sciatica. The claimants evidence was that the sciatica got worse during his employment, particularly in the period before his operation. During this period he was working long hours – up to 12 hour a day - with little balance of sitting and standing in his role. We concluded that the role the claimant was performing exacerbated his sciatica.

141. *The Claimant was unable to work and was absent with pain for the periods set out in the agreed chronology:* The Tribunal accepted that the claimant was

unable to work for reasons connected with his increased symptoms of sciatica, leading to his absence from work.

142. *The Claimant suffered a loss of earnings:* The claimant was paid statutory sick pay during periods of absence during his first 6 months of work: This is accepted evidence.

143. *The Claimant was required to share a keyboard and mouse with other employees in circumstances where doing so was difficult for him as a result of his ASD:* The Tribunal accepted that, as a result of his ASD, it was a substantial disadvantage to the claimant to have to share a keyboard and mouse for his role, because of the significant exacerbation of anxiety related to the claimant's perceptions of issues relating to bacteria and germs.

144. *The Claimant's managers and/or other staff did not treat the Claimant with an adequate understanding of his disabilities:* The Tribunal accepted that up until receipt of the first OH report there was a lack of understanding of the claimant's disabilities and their impact on him. This can be shown in Ms Gul's summary of the claimant's disabilities and the effect on him following the 25 July 2018 meeting; also the OH referral dated 13 August 2018, in which it is stated that the claimant does not need any adjustments. It was not until Mr Bhatia became involved that the respondent started to get to grips with the ATW in early November 2018, that the respondent started to gain an understanding of why the claimant needed adjustments to his role and auxiliary aids.

145. *The Claimant lacked support in managing the impact of his ASD at work:* The Tribunal noted the respondent's comments at 25 June and 13 August 2018. At this stage the respondent did not understand that the claimant required support and potential reasonable adjustments – both auxiliary aids (chair, keyboard, mouse) and potentially changes to some aspects of his role, to enable him to manage the impact of ASD at work. the claimant had made this clear in June and into July/August – the reasons why he needed adjustments including issues of hygiene. These were effectively ignored until mid-November 2018 when there was a start to progress adjustments for ASD.

146. *Until the Access to Work funding was approved, the Claimant was required to pay for the cost of taxis to and from work using his own money:* this is undisputed. Was this a substantial disadvantage? We concluded yes; because of his disability the claimant needed to take taxis, and he now had to do so out of his own money to get to work, causing him debt.

147. *The Claimant was put through the distress of having to repeatedly chase his employer to make adjustments:* We accepted that, because of the respondent's lack of action on the ATW process, from 24 July 2018 to end November 2018, the claimant repeatedly chased his employer. He also did so after this date because of delays which occurred – for example in relation to his training. He was evidently frustrated to the extent to making a complaint in which he sets out his distress at the lack of action. This was a substantial disadvantage?

Did the following occur, and if so are they PCPs? Did the respondent:

148. *Fail to respond to the 25 May 2018 Health Review Meeting in a timely manner?* We first asked whether this could amount to a PCP. We noted that a PCP can include a one-off act, if there is some indication it would be repeated in similar circumstances; we noted also that the function of a PCP is to identify what it is about the management of the employee that caused the substantial disadvantage. We concluded that this PCP may well have occurred again in similar circumstances, of an employee presenting at a health review meeting a complex set of issues and a potential requirement for adjustments.

149. We concluded that two issues had been identified. One was potential adjustments to the work the claimant was undertaking, particularly given the hours he was working and the physical nature of the role; in the May health review meeting the claimant had said he was unsure of the duties, but he required a balance of sitting and standing, to ensure his sciatica did not cause him significant pain. But an agreement to allow him to take regular breaks from the shop floor was not progressed until November 2018. The second was the need to progress the requirement for auxiliary aids, included in the ATW package, which was not progressed until 15 November 2018.

150. We concluded that this delay – from 25 May to 15 November, constituted a failure to respond to the Health Review meeting in a timely manner.

151. *Fail to respond to the Claimant's June 2018 Access to Work report from June 2018 in a timely manner?* We concluded that the ATW form was received at the White City Branch but was not acted on. Again, we noted that a PCP can be a one off act, and we concluded that the failure to deal with such issues appeared to be the case at the White City store, at least until Mr Bhatia and others got involved. For example the respondent also failed to deal with other health-related issues involving the claimant during this period – see the above paragraphs. We concluded that this was a generalised failure at White City involving employee-related health concerns at least in the months after opening, which specifically affected the claimant, and would have likely affected other staff in a similar position. In short, there appeared to be no one in post who was able or willing to deal with such a complex matter and no-one who the claimant approached was able to deal, until the claimant escalated via the informal grievance. This, we concluded, was likely to be repeated in a similar situation.

152. We also accepted that there were the delays once the ATW application was known about, and after was being progressed. For example there was the delay awaiting the outcome of the OH referral which in fact included no information about ATW – Mr Dewar's 11 October 2018 email to Mr Bhatia. Mr Bhatia accepted that there were delays in his evidence. We concluded that this delay in progressing the ATW application lasted until the workplace training for the claimant was actioned – i.e. to March 2019.

153. *Fail to provide the Claimant with workplace 'Coping Strategy Training' until March 2019?* It is an undisputed fact. Does this amount to a PCP? There

were two failures to provide training – the training for the respondent's management team and the training for the claimant. Neither were actioned, and we concluded that this is evidence that the failure to provided disability-related training to a disabled employee would more likely than not reoccur in a similar situation. We noted that as a result of the learnings from the claimant's case the respondent appears to have commenced training on ATW and related matters. Prior to this action by the respondent, we concluded that there would have been a significant delay in providing training, that it would not have been provided in similar circumstances to other disabled employees of the White City store. We concluded that this failure can amount to a PCP. This PCP is also, of course, relates to the failure to progress the ATW application.

154. *Fail to provide its managers and/or staff with adequate disability awareness training until July 2019?* Again, this is an undisputed fact. We concluded that it was a PCP for the same reasons in the paragraph above.

155. *To 18 September 2018, require staff doing the Claimant's role or similar roles to stay on their feet for extended periods of time?* Again, it is common ground that the majority of the claimant's shop floor work involved standing, and that the majority of his role involved being on the shop floor. The Tribunal concluded that this amounted to a PCP – in fact it was a requirement of the role that the claimant undertake most of his role standing.

156. *Require staff doing the Claimant's role or similar roles to undertake significant manual handling tasks?* It was common ground that the role required manual handling. This was a requirement for all Trainee Managers employed by the respondent and this was a fundamental part of the role. It amounted to a PCP.

157. *Require the claimant to attend work in person at the Respondent's Westfield store?* It is common ground that the claimant's role required his attendance in the workplace, that this was the respondent's practice for Trainee Managers as this is where the role needed to be performed. This was a provision/practice.

158. *Fail to respond in a timely or adequate manner to the Claimant's grievance?* We noted that there were two periods – the informal grievance period from 14 September to the claimant's email to Mr Dewar on 14 October in which he set out in writing his complaints. The initial period was characterised by Mr Drear attempting to get Ms Gul's input. When this did not work, the Tribunal considered that Mr Dewar acted appropriately by escalating the matter to Mr Bhatia who then attempted to take the necessary practical steps to get the ATW sorted. Throughout Mr Bhatia communicated with the claimant no progress of the ATW application. He worked to get it sorted.

159. We accepted that this process did not involve sitting down and consider his grievance complaint via a grievance process. But we consider that it did respond in a timely and adequate manner to the grievance, in that Mr Dewar and Mr Bhatia attempted to practically resolve the ATW issue once they got involved. Accordingly, we did not consider that this was a PCP that applied to the claimant.

160. *Not provide full pay and/or company sick pay to employees who are on sick absence and who are within their first six months' of employment?* This is the respondent's policy, and agreed evidence. It clearly amounts to a policy of the respondent.

Did the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? And, did the respondent know, or could reasonably be expected to know, that the claimant was disadvantaged?

161. We concluded that the failure to respond to the issues arising from the 25 May 2018 Health Review Meeting had the effect of exacerbating the claimant's sciatica and led to him being off work and suffering a loss of earnings. The reason: as a consequence of the failure to respond there was no consideration of reasonable adjustments that may (or may not) have been possible to the role. A comparator would not have been disadvantaged because there would have been no liklihood of a health review meeting to consider complex mental and physical conditions for such an employee.

162. At this point, 25 May 2018 the claimant outlined his health conditions and the need for a balance of sitting and standing in his role. The respondent should reasonably have been expected to know that the claimant was substantially disadvantaged by its failure to respond to what was in effect a request for an adjustment to the role – a balance of sitting and standing – to lessen the effects of his sciatica.

163. Did the failure to respond to the Claimant's June 2018 Access to Work report from June 2018 in a timely manner put the claimant at a substantial disadvantage? We concluded yes: this meant that his ATW items were not progressed, there was a significant delay in providing the auxiliary aids and transport costs. The respondent knew that there was an ATW application which needed progressing from the date of receipt of the 24 June 2018 ATW documentation by the store – say 26 June 2018. At this date, the respondent knew that these items were being funded because of the claimant's disability. It knew (or should have known) that these items were to address a disability and work-related need, that delaying their provision would place the claimant at a substantial disadvantage in his role. A comparator would not have been disadvantaged – they would not have required ATW items.

164. Did the failure to provide the Claimant with workplace 'Coping Strategy Training' until March 2019 put the claimant at a substantial disadvantage? Yes – the claimant's evidence was that he found it easier to cope after he had this training; this was not disputed in evidence by the respondent. We concluded that the respondent, once it received the ATW form on/around 26 June 2018 should reasonably have been aware that the claimant would have been placed at a disadvantage by not receiving this training. If it had any concerns about its relevance, it did not ask the claimant why this training was needed. It instead embarked on an OH process (without asking any questions of OH about the ATW items). We concluded that a comparator would not have been

disadvantaged as this employee would not have required coping strategy training.

165. Did the failure to provide managers with adequate disability awareness training until July 2019 cause the claimant substantial disadvantage? We carefully considered this issue, noting that there is little law on the issue of training being provided to others may be a reasonable adjustment for an employee. We concluded however that such training provided earlier may have assisted managers to understand the claimant's health issues and the need for both workplace adjustments and auxiliary aids. This was why the training was being paid for by ATW. Mr Denham-Smith said in his evidence that it changed the way he managed the claimant, and it would have been helpful to have had the training earlier. We concluded that the failure to provide this training amounted to a substantial disadvantage. It is one that the respondent would have known about once it received the ATW application, 24 June 2018, as this is the date that this need was identified in relation to the claimant's disabilities. A non-disabled comparator would not have been disadvantaged by the failure to provide this training to managers.

166. Did the practice of requiring Assistant Managers to stay on their feet for extended periods of time put the claimant to a substantial disadvantage? We concluded yes – it exacerbated his sciatica. We concluded that the respondent would have known this from the May Health Review meeting. Thereafter the claimant sent texts saying he was in crippling pain from his leg, the respondent was on actual notice of the harm that this requirement was causing. He referenced *"A balance between being able to stand and sit down as standing for long periods cases problems"* 11 July 2018 (86). A non-disabled comparator would not have been disadvantaged by this requirement.

167. Did the practice of requiring AMs to undertake significant manual handling tasks put the claimant at a substantial disadvantage? Again, the OH report makes clear that the intrinsic nature of the role exacerbated the claimant's sciatica. The respondent would have known this from the first health review meeting in which the claimant outlined the effects of his sciatica. A non-disabled comparator would not have been disadvantaged as there would have been no serious medical condition to exacerbate by manual handling.

168. It is common ground that the claimant's role required his attendance in the workplace: we concluded that this requirement did not put the claimant at a substantial disadvantage until his back started deteriorating and he needed to take time off work, and it did not do so after his operation. In the normal course of his role, reasonably adjusted, his attendance at work would not cause him a disadvantage. We also concluded that the respondent would not have known this: the claimant did not mention homeworking at the Heath review meetings, and he accepted the role was one which in the main required his attendance in the store. If we are wrong on this point, we accept that a non-disabled comparator would not be disadvantaged by being required to attend the store.

169. If (contrary to the position above that this was not a PCP) did the failure to respond in a timely or adequate manner to the Claimant's grievance cause him

a disadvantage? We concluded no – because the respondent did respond in a timely and adequate manner to the ATW request by attempting to progress this. Accordingly there was no disadvantage to the claimant after the grievance was submitted.

170. Did the failure to provide full pay and/or company sick pay to employees who are on sick absence and who are within their first six months' of employment cause him a disadvantage? Yes – the claimant was not paid. The respondent knew this. A non-disabled employee would not have had a disability related absence and would not be so disadvantaged.

If so (and in each case, if more than one), did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

171. *Responding in a timely manner to the Claimant's Access to Work Report:* it is clear on the evidence that the respondent failed to respond to the ATW report when it was received at White City store on/around 26 June 2018. It took until 12 November 2018 for the process to be commenced via Mr Bhatia's contact with ATW and the forms being sent to the claimant a few days later. This was a near six-month delay, during which time the claimant's back condition deteriorated seriously. It could have taken such steps in early July 2018 by progressing the ATW application. This was a reasonable adjustment which the respondent failed to make.

172. *Responding fully to the Claimant's Access to Work Report:* the Tribunal repeats the remarks above – it failed to respond at all until 12 November 2018 and this was a failure to make a reasonable adjustment to this date.

173. Thereafter, the Tribunal concluded that the respondent via Mr Bhatia's involvement did take steps to respond fully to the report. There were some delays, for example with engaging training providers/ However we considered that this kind of delay would have occurred had the ATW report been progressed in early July 2018 – procurement delays inevitably occur. It was not a failure to make a reasonable adjustment when delays occurred after 12 November 2018.

174. *Providing the Claimant with workplace 'Coping Strategy Training' soon after June 2018 and/or at some point prior to March 2019:* We concluded that had this been progressed in a reasonable timescale after progression of the ATW application in early June 2019, it would have been provided by September 2018. The failure to provide the training by this date is a failure to make a reasonable adjustment, and we concluded that this was a continuing failure to make this adjustment to the date of the Employment Tribunal claim.

175. *Providing staff with adequate disability awareness training soon after June 2018 and/or at some point prior to July 2019:* As stated above, this would have been helpful to the claimant and to those managing him. We concluded that had this been progressed such training would have been provided by September 2019. The failure to progress this training prior to this is a failure to make a reasonable adjustment which continued to the date of this claim.

176. *Reducing the amount of time the Claimant had to stay on his feet (this allegation only applies to the period before the Claimant went on LT sick leave on 18/09/18):* the role of Assistant manager is predominantly a shop-floor role. However, there are parts of the role that can be done off the shop floor at a computer or tablet (and it was for this purpose as well as rest breaks that the chair was required). We noted that Mr Denham-Smith agreed in his evidence that the role is shop-floor but that adjustments could be made to give a balance between sitting and standing. We concluded that with some planning it would be possible for the claimant to spend set times on the shop floor – say 45 minutes in an hour, with the claimant undertaking work (including required training and work that needed doing via laptop/tablet) in the 15 minutes off the shop floor; that shop floor staff could be made aware of this and work around it. The claimant would be close by and available if needed during the breaks off the shop floor. This was, we concluded, what the respondent was saying was potentially practicable as an adjustment.

177. *Reducing the manual handling tasks which the Claimant was required to do;* we concluded that the claimant was able to undertake his role with an agreement that the claimant reduce the manual handing to smaller boxes under 5kg. Mr Denham-Smith said the claimant could ask staff to assist with any manual handling tasks. At the 21 December 2018 OH report the claimant is saying that manual handling is not an issue anymore as this adjustment was effectively in place. There is no evidence that this adjustment impacted operationally on the respondent. It appeared that other staff were able to assist with this activity. We concluded that this is an adjustment which could have been considered and implemented with management input shortly after the 25 May 2018 Health Review meeting.

178. *Arranging taxis for the Claimant to get to work and/or paying for taxis arranged by the Claimant to attend work:* we concluded that it was not a reasonable adjustment for the respondent to pay for taxis or to arrange for taxis for him to get to work. We noted that save for £175, the claimant did receive his backdated taxi fares. He did get into debt also. The tribunal concluded that this loss was a potential consequence of the failure to progress the ATW application, which may be an issue for remedy. But it was not, we concluded, a reasonable adjustment to pay for taxis or arrange taxis while this application was being progressed. In so concluded we noted the case of *Kenny v Hampshire Constabulary [1999] ICR 27, EAT* "the provision of transport for getting to and fro from the employers' premises is outwith the [Act]"

179. *Providing the Claimant with full pay and/or company sick pay in relation to periods when he was absent at work due to his disability during his first six months' of employment:* We considered whether as a matter of law it could be a reasonable adjustment to pay company sick pay: we considered the cases of *O'Hanlon v Comrs for HM Revenue & Customs [2007] EWCA Civ 283, and Meikle v Nottingham County Council[2004] EWCA Civ 859: that while extending sick pay for a disabled employee was not precluded as a reasonable adjustment, it would be a rare and exceptional case that it would amount to a reasonable adjustment. We also noted the wording of the PCP -*

it does not say that that the employer should consider whether it has caused harm to the employee and if so pay sick pay.

180. We concluded that there was no breach of a duty to make a reasonable adjustment in not paying company sick pay during this absence. This was not a clear case for the employer that it had, for example, caused an accident at work which had caused injury. The respondent had instead, potentially, through its failures to make adjustments, caused injury (according to its own OH report). But it would have been uncertain in the respondent's SMT team that its actions had caused what was an exacerbation of a pre-existing injury.

181. We concluded that at best the respondent may have had a belief or a suspicion that it may have caused some harm to the claimant. But this, we considered, is not enough for an employer to then decide that it is a reasonable adjustment to pay company sick pay, we concluded that this was not a step which was reasonable to take to avoid the disadvantage of a loss of salary.

182. Accordingly, the following claims of a failure to make reasonable adjustments are well founded and succeed:

    a. Responding in a timely manner to the Claimant's Access to Work Report;
    b. Responding fully to the Claimant's Access to Work Report;
    c. Providing the Claimant with workplace 'Coping Strategy Training' soon after June 2018 and/or at some point prior to March 2019;
    d. Providing staff with adequate disability awareness training soon after June 2018 and/or at some point prior to July 2019
    e. Reducing the amount of time the Claimant had to stay on his feet (to 18 September 2018)
    f. Reducing the manual handling tasks which the Claimant was required to do

Auxiliary aids claim

Was the Claimant put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled due to the lack of provision of auxiliary aids?

183. The auxiliary aids relied upon by the Claimant are:

    a. An ergonomic chair with armrests:
    b. A medical grade keyboard;
    c. A computer mouse.

184. *Ergonomic chair with armrests:* The claimant's evidence was that he had been told he could have breaks from the shop floor, but in practice he had nowhere he could go to sit down; on one occasion he sat in a fire escape stairwell. We heard no evidence that there was any chairs suitable for the claimant, apart from the one eventually ordered under ATW. We noted the evidence of Mr Denham-Smith that some of the job could be done sitting down on a tablet.

185. We concluded that the claimant was put under a substantial disadvantage, as the chair would have assisted the claimant to alleviate his sciatica in his breaks from the shop floor. It would also have assisted with the issue of hygiene caused by the condition of ASD; this led to a need for hygienic surfaces, and the claimant suffered alarm and concern if he was required to use items which he considered to be unhygienic. This was a reason why he needed his own chair.

186. *Medical grade keyboard/computer mouse:* for reasons of the claimant's ASD, and as for the chair, the claimant was caused concern and alarm if required to use computer items he considered to be unhygienic. This was a substantial disadvantage.

Did the Respondent know, or could they be reasonably expected to know, that the Claimant was likely to be placed at a substantial disadvantage by a failure to provide the auxiliary aids?

187. We concluded that the respondent knew, or should reasonably have known, following the Heath Review meeting that some auxiliary aids may be required. We concluded that it was not until the ATW form was received by the respondent on around 26 June 2018 that the respondent would or should reasonably have known that the specific auxiliary aids of a chair, keyboard and mouse were required for a disability-related reason. The two pieces of information – the health review meeting and the ATW form would have, or should reasonably have led. The respondent concluded that the claimant would be placed at a substantial disadvantage by a failure to provide them. The respondent knew that the chair was required for sciatica and the balance of standing/sitting/ the keyboard and mouse for reasons of hygiene connected to ASD.

188. We also concluded that the respondent did not take reasonable steps to provide the auxiliary aids from early July to 14 November 2018, for the reasons set out above. It should have progressed this in early July. At the very latest Ms Gul had been given the forms again by the claimant on 24 July 2018. The failure to progress was acknowledged by the respondent, who apologised to the claimant for the breakdown in its processes.

189. The failure to progress the ATW auxiliary aids request to November 2018 meant that there was a failure to progress this application timely. Had this been progressed as it should have been from early July 2018 onwards, we considered that the chair would have been provided and set up by mid-August 2018 and the keyboard and mouse by early September 2018. This is based on the timescale from authorisation of the ATW to the delivery of the items; we assumed that there would not be a disruptive break (as there was for the claimant at Christmas 2018) in delaying set-up of the chair.

190. All claims of a failure to make reasonable adjustments in respect of the provision of auxiliary aids are well founded and succeed.

Discrimination arising from disability

Did the Respondent fail to respond in a timely or adequate manner to the Claimant's grievance concerning the failure to implement the Access to Work recommendations?

191. For the reasons set out above, we concluded that there was no failure to respond in a timely or adequate manner to the grievance, that this did not amount to unfavourable treatment. While the respondent did not hold a formal grievance hearing at the time, its focus was on securing the ATW items for the claimant – i.e. it was attempting to address the root cause of the claimant's complaint, the delay in providing these items.

192. We concluded that this was not unfavourable treatment, because the focus was on getting ATW sorted for the claimant that there was no significant delay caused once the respondent got to grips with the issue in early November 2018.

193. There was a delay from the claimant submitting his grievance informally in mid-September 2018 and the respondent getting to grips with the issues in early November 2018, but we considered that this was not a failure to responding a timely or adequate manner – it was instead the respondent attempting to find what had gone wrong, and then getting Mr Bhatia to put it right.

In November 2018, did the Respondent decide that the Claimant would not pass his probation, and decide to extend the probationary period for six months, before subsequently retracting that decision and confirming his employment?

194. This is factually undisputed. It was unfavourable treatment – it caused the claimant alarm and distress and after it had been retracted, the claimant had very legitimate questions why this letter had been given to him and these questions showed his continuing concern.

During the period 6 July 2018 to 16 January 2019, did the Respondent fail to provide the Claimant with full pay and/or company sick pay during absences relating to his disability?

195. This is undisputed. Again it is unfavourable treatment as the claimant lost salary.

If so, was the unfavourable treatment because of something arising in consequence of the Claimant's physical and/or mental disability?

196. The "something arising" relied upon by the Claimant is the Claimant's sickness absence and/or his requirement for, and because he was requesting, reasonable adjustments.

197. We considered first the question of the failure to respond to the grievance in a

timely manner or adequately, on the basis that we may be wrong in our arguments on answer to this issue.

198. We first considered the issue of the grievance: if we are wrong and there was a failure to respond timely or adequately to the grievance, was this arising from the claimants sickness absence and/or his requirement for and because he was requesting reasonable adjustments?

199. We concluded not. If there was a failure to respond quickly or adequately, it was because there as a delay in obtaining the information from Ms Gul who believed that an OH report may assist. When Mr Bhatia became involved and met with the claimant at the 16 October return to work meeting it inevitably took him two – three weeks to get to grips and find out what had happened, discuss with management and HR and put in place a plan of action. The claimant was written to with an apology at the same time, recognising that the ATW issue had not been progressed. We concluded that any delay or failure to progress adequately the grievance was as a result because of the need to ask questions and start to progress the ATW application. It was not because of or in any way connected to his sickness absence and requirement and request for adjustments.

200. We concluded that the probation letter was not because of something arising in consequence of the claimant's disabilities– i.e. his sickness absence and requirement for/request for reasonable adjustments. It appeared that a decision was made for all probation Assistant Managers that they had not undertaken required work or training to pass probation. Then this decision was overturned because it was accepted this was not the AMs fault. We accepted that the claimant appeared to be the only AM to receive this letter. However, there was no evidence it was sent to the claimant because he had been sick or because he was requiring/requesting adjustments. We concluded that this was an error which was quickly recognised and rectified. We did not conclude that there was any causal link between the 'something arising' (sick leave/ requirement/request for adjustments) and the probation letter.

201. We concluded that the failure to pay sick leave was because of something arising in consequence of his disability. There was a direct causal link between his disability of sciatica, and his time off work, and his loss of pay.

If so, did the Respondent know or could it reasonably have been expected to know that the Claimant had the relevant disability/disabilities?

202. We concluded that the respondent knew at all times from the date of the earliest act of alleged unfavourable treatment – the failure to pay sick pay – that the claimant was disabled with ASD and sciatica.

If so, was the treatment a proportionate means of achieving a legitimate aim?

203. We considered first the grievance issue, and noted that no legitimate aim is relied on. Accordingly, if we are wrong on the points above (i.e. if the grievance was not timely or adequate and this arose in consequence in disability), it

follows that this claim would otherwise succeed.

204. The legitimate aim relied upon by the Respondent with regard to the probation issue is the need to sustain a capable and suitable workforce. This is a legitimate aim. Was the letter a proportionate means of achieving this legitimate aim? If we are wrong, and the letter was issued in consequence of the claimant's disability (his sick leave/his grievance) we considered that it was not a proportionate means of achieving this legitimate aim. The reason – it was sent in mistake, it caused alarm, it should never have been sent.

205. On payment for sickness absence, the legitimate aim relied upon by the Respondent was the need to only offer enhanced benefits to employees that have over six months' service. We agreed that there is a legitimate aim in not providing enhanced benefits to new employees whilst assessing suitability for the role. Whilst it is a circular argument, it follows that it is not a proportionate means of achieving the legitimate aim to pay enhanced benefits to employees in their early months of service.

206. Accordingly the claims for discrimination arising from disability fail and are dismissed.

<u>Jurisdiction</u>

207. Did any of the acts of disability discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted his claim to an Employment Tribunal (extended, as appropriate, by ACAS conciliation)?

208. We noted that the EC notification was received on 8 November 2018. The claimant issued his claim on 13 March 2019 while in employment. Accordingly unless there is a series of acts prior to this date within 3 months of each other, or unless there is a continuing act, any act prior to 14 December 2018 is out of time

209. We concluded that there was a continuing failure to progress the ATW application from 25 June to 14 November 2018, the date Mr Bhatia progressed the ATW application and sent the claimant a copy to sign. Prior to this date the claimant had been continually pressing managers for this to be progressed. He was not told this was not going to be dealt with (at which time may start to run). Instead he was left with the impression that it would be dealt with (Ms Gul) or that the failure to deal with it would be investigated, and it would be dealt with (Mr Dewar).

210. We also concluded that there was a failure to make reasonable adjustments in the provision of auxiliary aids. While the ATW was being progressed by md-November 2018, there was at this stage a failure to provide reasonable adjustments which we concluded could have been provided by early September 2018. We concluded that the failure to provide the auxiliary aids was a continuing failure up to the date of the claim. We concluded the same with the training of the claimant and management: this was a continuing failure to make a reasonable adjustment which was continuing at the date of

the claim. Accordingly, the claims brought by the claimant are made in time.

Telephone case management conference

211. A hearing will be listed for a 1 hour private case management conference by CVP for Directions to be made for a Remedy hearing.

Judgment sent to the parties
On22/09/2021

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For the staff of the Tribunal office

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EMPLOYMENT JUDGE M EMERY

Dated: 20th September 2021