



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Stefan Clarke

**Respondent:** Tesco Stores Limited

**Heard at:** Bristol

**On:** 18-21 October 2020

**Before:** Employment Judge Oliver  
Ms L Eden  
Mr E Beese

## Representation

Claimant: In person

Respondent: Mr H Zovidavi, counsel

# RESERVED JUDGMENT

The claims for disability discrimination fail and are dismissed.

# REASONS

## Issues

1. This is a claim for disability discrimination, which is based on direct discrimination, failure to make reasonable adjustments and harassment. Judgment was reserved.

2. There was a Case Management Preliminary Hearing with Employment Judge Rayner on 4 February 2021 which dealt with various preliminary matters and set out a list of issues for the final hearing. The respondent subsequently proposed some amendments to the list of issues. The Tribunal took the parties through the original list of issues at the start of the hearing and agreed the following.

### 3. Time limits

3.1 Given the date the claim form was presented and the dates of early

conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

- 3.2 The claimant contacted ACAS on the 5 May 2020 and received the ACAS early conciliation certificate on 3 June 2020.
- 3.3 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
  - 3.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
  - 3.3.2 If not, was there conduct extending over a period?
  - 3.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
  - 3.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide why were the complaints not made to the Tribunal in time, and, in any event, is it just and equitable in all the circumstances to extend time?

4. **Constructive dismissal (for remedy only).** This was included in the original list of issues. The respondent disputes that it is correct to include constructive dismissal in a case which is based on discrimination only and the claimant does not have two years' service. The Tribunal clarified with the claimant that he is saying he resigned in response to the alleged discrimination, and so he is claiming for lost earnings caused by losing his job.

5. **Disability.** The respondent has now conceded that the claimant is disabled by reason of depression, stress and anxiety, dyslexia and asthma, which are all of the disabilities relied on by the claimant.

6. **Direct disability discrimination (Equality Act 2010 section 13)**

- 6.1 Did the respondent do the following things:
  - 6.1.1 tell the claimant to chase his wages up through the store himself whilst he was signed off on sickness absence;
  - 6.1.2 fail to investigate the claimant's grievance adequately or at all;
  - 6.1.3 fail to refer the claimant to occupational health appointments;
  - 6.1.4 fail to provide the claimant with access to employment policies and procedures;
  - 6.1.5 fail to pay the claimant his correct wages on time on more than one occasion.
- 6.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant says he was treated worse than other people who he was aware been referred to occupational health more quickly and he did not have the same disability. The claimant relies upon a hypothetical comparator in respect of other allegations and in the

alternative.

6.3 If so, was it because of disability?

**7. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)**

7.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

7.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

7.2.1 a practice of asking employees to chase their place of work regarding pay errors;

7.2.2 a practice of not investigating grievances quickly or in full;

7.2.3 a practice of only providing access to policies and procedures in online electronic format.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

7.3.1 the claimant suffered additional stress when paid late or incorrectly

7.3.2 the claimant suffered additional stress when his enquiries regarding pay were not resolved

7.3.3 being told to resolve the problem by chasing store caused him stress

7.3.4 the claimant found it harder to access policies online

7.3.5 not having access to policies and procedures caused the claimant stress and anxiety.

And/or

7.4 Did the lack of an auxiliary aid, namely the lack of a hard copy or alternative method of accessing policies and procedures, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he needed to have a different format, and suffered distress at not being able to access the policies and procedures?

7.5 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

7.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

7.6.1 providing access by an alternative means;

7.6.2 providing a hard copy of the policies and procedures.

7.7 Was it reasonable for the respondent to have to take those steps and when?

7.8 Did the respondent fail to take those steps?

**8. Harassment related to disability (Equality Act 2010 s. 26)**

8.1 Did the respondent do the following things:

8.1.1 fail to pay the claimant's wages on the 1 May 2020;

8.1.2 blame the claimant for the non-payment of his wages;

8.1.3 refuse initially to pay the claimant by CHAPS;

8.1.4 fail to deal with the claimant's grievance of 4 May 2020 adequately or at all;

8.1.5 fail to ensure that the claimant knew what to do if his wages were paid late again;

- 8.1.6 fail to refer the claimant to occupational health for 5 months;
  - 8.1.7 fail to ensure the claimant had access to his employer's employment policies and procedures;
  - 8.1.8 pay the claimant incorrect wages, missing a quarter of the pay due to him in July 2020;
  - 8.1.9 tell the claimant that he should contact the store himself to chase up wages as the people manager was not able to do it.
- 8.2 If so, was that unwanted conduct?
  - 8.3 Did it relate to the claimant's protected characteristic, namely disability?
  - 8.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
  - 8.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **Evidence**

9. We had an agreed bundle of documents, which we have read and taken into account to the extent referred to by the parties in witness statements and during evidence.

10. We took witnesses statements as read. For the claimant we heard evidence from him, and from Alison Clarke (his mother). For the respondent we heard evidence from Claire Ramsay (store manager) and Gemma Holt (people partner). Ms Holt gave evidence by video link.

11. We heard oral closing submissions from both parties.

## **Facts**

12. We have considered all of the evidence and submissions, and find the facts that are necessary to decide the issues in the case.

13. The claimant was employed by the respondent as a shift leader in the Boulevard Tesco Express store from 16 March 2019. His manager was Claire Ramsay, the store manager. The claimant was interviewed under the respondent's disability scheme.

14. The claimant worked 22.5 hours a week. He always worked the late shift. He says this was an adjustment agreed for him due to his mental health and sleep issues which meant he was awake until the early hours of the morning. He says the respondent was aware of his disabilities from the interview. Ms Ramsay says she was aware the claimant had dyslexia, but he said he didn't require any adjustments. She says that she was aware of his sleep issues, but not that this was due to anxiety or depression. We accept Ms Ramsay's evidence on this point. The claimant did not have an adjustment passport with the respondent and did not ask for any reasonable adjustments during the interview process.

15. The claimant worked overtime on 22 September 2019. He was not paid correctly for this. He raised the issue with Ms Ramsay, but was not correctly paid

until April 2020.

16. The claimant was off work in February 2020 due to mental health issues, with a fit note stating low mood and depression. Ms Ramsay says this is the first time she was aware of the claimant's mental health issues, which we accept.

17. On 12 March 2020 the claimant messaged Ms Ramsay to inform her he would be off work long term for at least the next month. He asked her "*do I need to see occupational health or anyone or what happens now going forward*". Ms Ramsay replied saying they refer to occupational health after 4 weeks, we will need to do a meeting and then refer, they do provide counselling before the 4 weeks, and the people manager had said she could organise that if he wanted. The claimant said he would be up for counselling. Ms Ramsay said she would contact the people manager to start the process rolling. The claimant chased Ms Ramsay on 16 March. She apologised and explained they were up against it due to COVID-19, she hadn't been able to contact the people manager. She said that she would try again tomorrow, but with COVID-19 she was unsure when occupational health would happen. Ms Ramsay said in evidence that she wasn't sure what occupational health was able to do at that time due to the pandemic.

18. On 19 March 2021 the claimant messaged Ms Ramsay to say his fit note ran out the next day, but as he had at least two conditions for vulnerable colleagues he would be off for the next 12 weeks to protect his health. The claimant was then off work shielding and received full pay.

19. A new people manager, Gemma Holt, took over in April 2020. Ms Holt says that if the claimant was still unwell he should have remained on sick leave rather than moving to shielding, but in fact he remained shielding on full pay.

20. On 13 April 2020 the claimant messaged Ms Ramsay to inform her that he had not heard from the people manager, and he needed to change his bank details. Ms Ramsay said she has spoken to the new people manager who had not had anything handed over, but she didn't need to speak to the claimant as he was off for 12 weeks, and it would be after this about the referral to occupational health.

21. The claimant also messaged that he was unable to get onto "Our Tescos" and he was unable to reset his password. Our Tesco is a system that all colleagues can access by using their Tesco email address and password, and it contains all the respondent's employment policies and procedures. Ms Ramsay attempted to get the claimant's login details reset but he was still unable to access the system. We accept his evidence that he was unable to access Our Tesco throughout his employment, and he made both Ms Ramsay and Ms Holt aware of this a number of times.

22. On Friday 1 May 2020 the claimant discovered he had not been paid. He messaged Ms Ramsay to say he should have been paid £927 but it hasn't gone in. We have seen an exchange of messages with Ms Ramsay. She spoke to Ms Holt. Payroll for the respondent is dealt with in India and was shut due to a bank holiday. She also called the claimant. He says she told him he would be paid within 1 to 2 days. Ms Ramsay says she told him it would be looked into within 1 to 2 days. It is unclear exactly what was said, but the claimant certainly

understood he would be paid in 1 to 2 days.

23. On Sunday 3 May the claimant messaged Ms Ramsay to say he still hadn't been paid and would be raising a grievance if he wasn't paid tomorrow. Ms Ramsay sent messages updating the claimant on Sunday and Monday, and provided him with Ms Holt's email address at his request. The claimant emailed Ms Holt on the afternoon of 4 May saying he is in urgent need of his wages as he will be charged if he goes overdrawn. Ms Holt replied explaining that she had contacted payroll to find out what happened, and Ms Ramsay had requested a BACS payment which takes 3-4 days, which was the respondent's process. The claimant replied saying *"I'm not satisfied with the reply and being made to wait another 3-4 days especially as companies can do CHAPS payments, yes it costs, but why shouldn't Tesco's be paying it"*.

24. The claimant sent a grievance at 17.31 on 4 May to Ms Holt and Ms Ramsay. The grievance states he was told he would be paid in 1-2 days, now he had been told to wait a further 3-4 days, and he had explained he has bills overdue and there is a high chance his credit score will be impacted. The grievance states, *"As Tesco's are aware I am a colleague that has a long history with mental health problems and the fact that they are unwilling to do a CHAPS payment goes to show they do not appreciate the effect this is having/has had on my mental health"*. He says he believes the respondent would have offered same day emergency payments or CHAPS payments to colleagues and he does not see why this has not happened for him. The claimant provided a list of what he would like, which covered: knowing why he had not been paid; reassurance he would not be paid late again and if he is it is processed via CHAPS; compensation for the hassle including the effect on his mental health and credit score; reimbursement for late charges; and confirmation the grievance will not negatively impact his future at Tesco's. Ms Holt says she was shocked to receive the grievance, as they had not had much time to resolve the issue first.

25. Ms Holt forwarded the grievance to the area manager Mike Hart. He replied, *"Tell him where to go and grow up"*. Ms Holt replied with seven crying with laughter emojis with "ok" in the middle. The claimant first saw this email in August as part of a response to a data subject access request, and it made him feel upset and physically unwell (although he did not know who the authors were until he received an unredacted copy during these proceedings). Ms Holt says that the word "ok" in her response does not mean she agreed with what Mr Hart said, it was just a reply to her area manager. She meant, "OK – as if I'm going to do that". The emojis are laughing at what Mr Hart said, but those are his words. She says she then went on to straightaway do what she could to make sure the claimant was paid.

26. Ms Holt says that she spoke to Mr Hart about the grievance, and he was also shocked as it had come in before they had a chance to sort the issue out. She had formed the view it should be dealt with informally. She also spoke to employee relations to obtain advice. They advised that she should treat the grievance informally. She says this is the respondent's usual process – the respondent can decide to treat a grievance informally if appropriate. We have seen the respondent's grievance policy. The policy encourages informal resolution. In the section on how to raise a formal grievance, the policy states, *"In some cases, we won't follow a formal process until informal approaches have*

*been exhausted and we may ask you to confirm the informal steps you have taken to try and resolve the concern.*" The policy also states that, if a grievance has been handled informally and the employee raises a formal grievance about the same matter, a different manager will deal with it. The formal process involves a written invitation to a meeting, an option to be accompanied at the meeting, a written outcome of the grievance investigation, and a right of appeal.

27. Ms Holt sent the claimant an email saying, *"Thank you for your email however hearing this grievance will not change how fast you get paid. I totally understand lets pick up a conversation over the phone once I found out today exactly when you get paid"*. Ms Holt's oral evidence was that this was her notifying the claimant that his grievance would be dealt with informally. We note this is not what she says in her written statement, where she says that she was trying to explain that she and Ms Ramsay were already doing everything in their power to sort out his pay.

28. We have seen a series of emails in which Ms Holt was chasing payroll for information about the missing payment between 4 and 7 May, including emails sent late at night and early in the morning. There is some confusion about whether they needed more details to pay into a building society account (which was not necessary). Ms Holt told the claimant by email on 6 May that she had been told he would be paid that day into his new bank account. The payment did not arrive that day. On 7 May Ms Holt emailed the claimant to explain that one form needing to change bank details was missed, which was a *"pure genuine mistake"*. She said, *"All I can do is apologise on behalf of Tesco and I'm doing everything I can to get this money to you."* Ms Holt offered the claimant a cash wage advance, which he said would not work as he was shielding so could not pick it up or pay it into the bank. The payment did arrive at the end of the day. The claimant says this payment was made by CHAPS. The respondent's witnesses did not think this was correct, but were not clear on how the payment was made.

29. On 11 May the claimant asked Ms Ramsay for a copy of the grievance policy/procedure, and she sent it to him the next day. The claimant did not receive any written response to the list of requested outcomes in his grievance, apart from the emailed confirmation as to why the pay error had occurred. Ms Holt says that they had resolved the main issue of his pay, and the other items were things that the respondent could not provide. She could not promise that no pay errors would be made in the future, and she had never known of a payment being made by CHAPS. She told the claimant that most banks would remove any charges if he explained what had happened, and says the respondent does not provide compensation. She thought the request for confirmation that the grievance would not negatively impact the claimant's career was slightly strange, as it would simply be on file and would not be looked at during any application process. There is no evidence that either Ms Holt or Ms Ramsay explained any of this to the claimant.

30. The claimant had an occupational health assessment for COVID-19 on 30 June 2020. This happened for all staff who had been shielding, including another colleague who the claimant has named as his comparator. The respondent's evidence, which we accept, is that this comparator did not have other occupational health referrals. The assessment gave him a "C" rating, meaning he

should shield at home. Ms Holt forwarded this to Mr Hart on 1 July. He replied, *"wow he must of put on quite a story"*. Ms Holt replied, *"exactly as we only had two c on the group including this one"*. Ms Holt says her reply was simply describing that only two colleagues in the area were classed as "C", and she thought there would be more. The word "exactly" was just a reply to Mr Hart, and she can't say what Mr Hart was thinking. A similar email was not sent about the other colleague who had been classed as "C".

31. Ms Ramsay called the claimant in early July. The claimant said she told him that if he returned to work he would not be doing his normal duties, and he understood that to mean he would be demoted. He says he was also told that if he stayed off they would go down the sickness route and he would eventually be dismissed. Alison Clarke gave evidence that she listened to this conversation on speakerphone, and Ms Ramsay told the claimant he would be in a different role in the store, and would be subject to a disciplinary leading to his employment being terminated if he continued to be sick. In oral evidence she corrected the reference to a "disciplinary" to the sickness policy being followed. Ms Ramsay says there was no mention of the claimant being demoted or stepping down, but there would have been a temporary period of work shadowing rather than putting someone who had been on long term absence straight back into the shift leader role. She agrees that she discussed the sickness absence process, including the possibility of termination of employment at the end of the process.

32. Shielding ended in July and the claimant was signed off sick again from 15 July until 31 August. On 16 July the claimant messaged Ms Ramsay asking about contact from occupational health and for a copy of the sickness policy. He also emailed Ms Holt about this on 17 July. The claimant was referred to occupational health on 21 July and Ms Holt sent him a copy of the sickness policy. Both Ms Holt and Ms Ramsay say that the usual process is for a colleague to be referred to occupational health after an absence of 4 or more weeks, and usually there will be a meeting first. The claimant was not referred to occupational health immediately in July 2020 because he had just returned from shielding, and so his period of sickness absence had restarted. Ms Ramsay also says that things were taking longer than due to the pandemic.

33. On 23 July the claimant was underpaid one week's wages. This was an administrative error which affected a number of staff who had been shielding and were then off sick, as they were incorrectly deducted three waiting days from their sick pay. Ms Ramsay messaged the claimant on 23 July to check he had received his pay, and the claimant said he had been docked a week's wages. Ms Ramsay messaged on 24 July to say Ms Holt was going to call her, and payroll had emailed that it was the *"3 day waiting thing"*.

34. The claimant resigned on 25 July, and his employment ended on 31 August 2020. His resignation letter gives a list of reasons, summarised at the end as, *"due to the multiple things Tesco's have and have not done over the past few months which have impacted my mental health, I have no choice but to resign."*

35. Ms Ramsay was on annual leave from 28 July. The claimant emailed Ms Holt on 27 July to ask what was happening and for the payment to be made by CHAPS. She replied to say the form had been sent in to payroll, Ms Ramsay was sending a follow up email, and once she saw a reply she would give him an



update and ask how they will pay him. The claimant chased for an update 24 hours later, saying he was concerned and anxious he was going to have to wait a while to get his wages. Ms Holt replied the next morning, *"I will chase payroll but if you ring store and talk to the admin she be able to let you know the update to the form. I am unable to see this."* She says that she suggested this as store admin would know what was going on. She thought he was shielding rather than off sick, but it would still be reasonable to ask someone who was off sick to contact their store. The claimant replied that he was signed off with stress and anxiety and it was not his job to phone up the store and chase this, saying that not being paid is making him worse. Ms Holt replied confirming they had followed process, the form had been submitted, they were waiting for payroll. She said, *"I will contact the store that's no problem, I can't promise I'll have an answer by 5pm today as I'm waiting to hear from payroll. As soon as I have an update I will contact you."*

36. Ms Holt did not contact the claimant again about his pay. He was given a pay adjustment in his August payslip which the respondent says is the missing pay, although it does not appear this was explained to the claimant at the time. He also received another payment in July, which was then deducted as a "loan deduction" in his August pay. The claimant did not ask for a loan or agree to a deduction, and the respondent's witnesses were not able to explain what this related to. The claimant was also overpaid by several hundred pounds in August, which caused him to lose out on a universal credit payment.

37. On 17 August the claimant emailed the respondent's occupational health team to ask what was happening as he had been told he would get some counselling from Nuffield Health (which provides counselling on behalf of the respondent). He had a response on 21 August that the referral form was forwarded to them on 3 August, and he should contact HR. The referral was chased by Ms Holt in early September. As the claimant's employment had ended by then, Nuffield Health was not sure whether the treatment would be covered, and he was then told that the respondent would no longer cover the costs of the counselling.

38. The claimant says that the respondent wrongly blamed him for the pay issue in May. He refers to the grounds of resistance to these proceedings, which say the error was due to him failing to provide a reference number to his bank account. The respondent now accepts that this is not correct. Ms Ramsay accepts that the error was caused by her not completing a required form, and then making a mistake with the account number when she sent it to Ms Holt.

### **Applicable law**

39. **Direct discrimination.** Discrimination in employment is regulated by the Equality Act 2010 ("EA"). Disability is a protected characteristic under the EA. Under section 13 EA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

40. A claimant can rely on an actual comparator or a hypothetical comparator. Under section 23 EA, on a comparison of cases there must be no material difference between the circumstances relating to each case.

41. We have considered the burden of proof provisions at 136 EA and reminded ourselves of the relevant case law:

*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.*

42. The key cases providing guidance on the burden of proof provisions are ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR 332, (EAT), ***Igen Ltd and others v Wong and other cases*** [2005] IRLR 258 (CA), and ***Hewage v Grampian Health Board*** [2012] IRLR 870 (SC). The continued application of the two-stage burden of proof test was recently confirmed by the Supreme Court in ***Royal Mail Group Ltd v Efofi*** [2021] UKSC 33.

43. The key question is whether the facts show a prima facie case of discrimination and, if so, whether the respondent's explanation is sufficient to show there has not been discrimination. We are not to apply this in a mechanistic way, and there is rarely direct evidence of discrimination. As noted in ***Hewage*** (and reiterated in ***Efofi***), the burden of proof provisions, "*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*" (paragraph 32). The essential issue is finding why the claimant was treated as he was. However, under the burden of proof provision so we do require some facts to indicate that there may have been discrimination before we scrutinise the respondent's explanations. A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the respondent or for the Tribunal to find that this treatment was unlawful discrimination.

44. **Harassment.** Harassment is defined in section 26(1) EA:

- (1) *A person (A) harasses another (B) if—*
  - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
  - (b) *the conduct has the purpose or effect of—*
    - (i) *violating B's dignity, or*
    - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

45. Conduct will be harassment if it was "related to" an individual's protected characteristic. This covers conduct towards an individual by reason of their

protected characteristic (e.g. bullying someone because they have a disability), or conduct that is related to a protected characteristic because of the form it takes (e.g. offensive jokes about disability).

46. Conduct will be harassment if it is done with the purpose of violating dignity or creating the proscribed environment. Otherwise, the Tribunal must assess whether the conduct had this effect on the claimant. In deciding whether conduct had this effect, the Tribunal must take into account the perception of the claimant (a subjective test), whether it is reasonable for the conduct to have that effect (an objective test), and the other circumstances of the case.

47. **Reasonable adjustments.** A claim for a failure to make reasonable adjustments is made under Section 23 EA. The duty arises where a provision, criterion or practice ("PCP") applied by an employer places a disabled person at a substantial disadvantage in comparison with persons who are not disabled. "Substantial" for these purposes means "more than minor or trivial", as defined in Section 212.

48. A PCP for these purposes should be widely construed. It does not require a universal practice, and a "general or habitual" approach by the employer can be sufficient (*Williams v Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19). Some one-off acts or decisions by an employer may be a PCP, but only where there is an indication that the same course of action would happen in the future and it is capable of being applied to others. Parliament has chosen to use the words PCP rather than "act" or "decision", and there must be a level of repetition about how similar cases are generally treated or how a similar case would be treated if it occurred again (*Ishola v Transport for London* [2020] EWCA Civ 112).

49. Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled, the employer must take such steps as it is reasonable to have to take to provide the auxiliary aid (section 20(5) EA). The EHRC Code described an auxiliary aid as "something which provides support or assistance to a disabled person", which can include provision of a specialist piece of equipment, or auxiliary services such as a sign language interpreter or a support worker for a disabled worker. (paragraph 6.13).

## Conclusions

50. We have considered the main liability issues in turn.

51. **Direct disability discrimination.** Did the respondent do the following things:

51.1 **Tell the claimant to chase his wages up through the store himself whilst he was signed off on sickness absence.** Ms Holt suggested he could telephone for an update alongside her also contacting payroll, and it was said while he was on sickness absence.

51.2 **Fail to investigate the claimant's grievance adequately or at all.** The respondent did investigate the claimant's grievance in that they

resolved the issue about his missing pay and explained why this had happened. However, we find that the respondent failed to deal with the grievance adequately. The respondent did not tell the claimant that they were dealing with the grievance through an informal route. The claimant had submitted a formal grievance. Although informal resolution is an option in the respondent's policy, it is not clear that the respondent can unilaterally decide this without discussion with the employee. We do not accept that the comment in Ms Holt's email, "*hearing this grievance will not change how fast you get paid*", informed the claimant that they were dealing with the grievance informally. The claimant was never given a reply to the list of requested outcomes. Even if some of these were not things the respondent could do, this should have been explained to him. The claimant was left waiting for an outcome of what he thought was his formal grievance. He did not know the respondent regarded the grievance as having been dealt with informally, so he did not know he could raise it again formally under the policy. We do not see how this process would comply with the Acas Code on Grievance Procedures.

- 51.3 ***Fail to refer the claimant to occupational health.*** We accept that the respondent followed its usual policy of referral after 4 weeks of absence, and this was interrupted by the COVID-19 pandemic and shielding. However, the respondent did tell the claimant that he could be referred earlier for counselling before 4 weeks, and this was not done until towards the end of his employment.
- 51.4 ***Fail to provide the claimant with access to employment policies and procedures.*** These were provided to the claimant when he asked for them. However, he did not have access to Our Tesco in the same way as other employees, and so there was a failure to provide the correct level of access which would allow him to see what policies were available and access them immediately.
- 51.5 ***Fail to pay the claimant his correct wages on time on more than one occasion.*** This did occur in October 2019, May 2020 and July 2020.

52. ***Was that less favourable treatment and, if so, was this because of disability?*** The claimant had named an actual comparator in relation to the failure to refer to occupational health. However, it was established during evidence that the comparator was referred due to shielding in the same way as the claimant, and not for any other reason. We have therefore considered a hypothetical comparator, being someone without the claimant's disabilities. He was actually treated less favourably than others in relation to access to employment policies and procedures. He was also the only person in the store where he worked who was not paid correctly in October 2019 and May 2020 (although the July issue affected others as well). We do not have any evidence of how others were treated in relation to the remaining issues, so it is not possible to determine how a hypothetical comparator would have been treated without considering the overall issue of whether the treatment was because of disability.

53. ***Was the treatment because of disability?*** The respondent submits that

the claimant has failed to link his treatment to his disabilities, and so has not produced the evidence required for a prima facie case – i.e. the claimant has not shown something other than alleged unfair treatment that is needed to shift the burden of proof to the respondent.

54. We have considered whether there is an argument that the burden of proof has shifted to the respondent in this case. We note that the respondent does not appear to have recognised the impact on the claimant's mental health that was caused by the failure to deal with his grievance in full and the repeated pay mistakes, in particular because this was never addressed in a grievance outcome. We also note the email exchanges between Mr Hart and Ms Holt, which appear to make light of the grievance and doubt the claimant's entitlement to shielding. On balance, we find that these matters are not sufficient evidence to enable us to decide that there had been direct disability discrimination and so shift the burden of proof to the respondent. They are areas where the respondent can be criticised, but they do not indicate that his treatment in the areas listed above was because of disability.

55. Although we have not found a prima facie case of discrimination, we are mindful of the guidance in **Hewage** that the tribunal should consider whether it is in a position to make positive findings on the evidence one way or the other. We have therefore gone on to consider the reasons for the claimant's treatment. We find that this was not because of disability.

55.1 Ms Holt's suggestion that the claimant contact admin at his store was made to help him get an update, as she could not see the relevant form. The claimant says it was inappropriate as he was off sick. Ms Holt thought he was shielding at the time and, in any event, we accept on the evidence that this suggestion was designed to help the claimant and was not because of disability.

55.2 Failure to deal with the grievance adequately. As explained above, we are not satisfied that the respondent did deal adequately with what the claimant thought was a formal grievance. However, we accept the respondent's evidence that they thought his issue about pay had been dealt with, which was the core of the grievance. His pay was corrected, and the respondent explained and apologised for what had gone wrong. Ms Holt believed she was following the respondent's procedure by dealing with the matter informally. Although we have found the respondent should have followed a different procedure and provided the claimant with a clear grievance outcome, these failings were not because of disability.

55.3 Failure to refer to occupational health. The respondent did fail to progress an early referral which could have provided the claimant with counselling. However, this happened at a time when there was a change of people managers, the respondent was under a lot of pressure due to the impact of COVID-19, and the claimant had started shielding for 12 weeks. The usual policy of waiting for 4 weeks was then applied when the claimant was signed off sick at the end of shielding. We accept that the claimant may have benefitted from counselling if the referral had been progressed earlier. But, the failure

to do so was not because of disability. In his submissions the claimant also referred to Ms Holt's point that he should have remained on sickness absence rather than shielding, and says this would have meant he was referred more quickly. Again, we find that this was not because of disability. We also note that the claimant benefitted from this as he received full shielding pay rather than sick pay.

55.4 Access to policies and procedures. The claimant's inability to access Our Tesco was a technical problem that was never resolved. It is not clear why this happened, and the claimant was left being unable to access policies and procedures when he wanted to. However, there is no evidence that this was because of disability – it appears to have been a technical problem with the claimant's access, it was not deliberate, and Ms Ramsay did try to help.

55.5 Failure to pay the correct wages. Although this did occur, there is no evidence that this was because of disability. The July error affected a number of employees who had been shielding. The October 2019 error took a long time to resolve but there is no evidence that this was because of disability. The May 2020 error was a genuine mistake caused by a failure to provide the right form and an error in the bank details provided to payroll.

56. We do accept that mistakes made by the respondent had a significant effect on the claimant because he had anxiety and depression. This may well have been a worse effect for him than for others who did not have the same disability. Although the respondent did work to resolve the various pay issues, it failed to acknowledge what the claimant said in his grievance about how the situation affected his mental health. However, this does not give the claimant a direct disability discrimination claim. It does not show that the treatment was "because" of disability. The claimant's case was based on the *effects* of the treatment on him, which was due to his anxiety and depression. He says that the respondent should have taken better care of his health as a disabled person. This is different from the *cause* of the claimant's treatment. Direct discrimination is about the cause of a person's treatment – why they have been treated in a certain way. The claimant has not shown that the cause of his treatment was disability, and so his claim for direct disability discrimination does not succeed.

57. **Reasonable Adjustments** The first issue is - ***did the respondent know or could it reasonably have been expected to know that the claimant had the disability?*** The respondent was aware of the claimant's dyslexia at interview, and aware of his anxiety and depression by February 2020.

58. ***Did the respondent have the following PCPs:***

58.1 ***A practice of asking employees to chase their place of work regarding pay errors.*** We have no evidence that this was a practice which the respondent did apply or would have applied to others. This was a suggestion made to the claimant by Ms Holt to assist him to find out what was happening in relation to his own pay error. It was not a PCP.

58.2 ***A practice of not investigating grievances quickly or in full.*** The claimant's main grievance was investigated quickly, as he was provided with his pay and an explanation as to why the error was made within seven days. We have found that the respondent failed to provide the claimant with a full outcome to his grievance. However, there is no evidence to indicate that this was a practice that was or would be followed by the respondent in other grievance situations. It was not a PCP.

58.3 ***A practice of only providing access to policies and procedures in online electronic format.*** Online access through Our Tesco was the primary method for providing access to policies and procedures. However, the claimant was sent copies by email when requested. He never asked for hard copies, and we accept the respondent's position that they would have provided copies in an alternative format if requested. This was not a PCP.

59. As we have found that the matters raised by the claimant were not PCPs, there is no need for us to consider whether these put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The claim for a failure to make reasonable adjustments does not succeed.

60. ***Did the lack of an auxiliary aid, namely the lack of a hard copy or alternative method of accessing policies and procedures, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he needed to have a different format, and suffered distress at not being able to access the policies and procedures?*** As noted above, online access through Our Tesco was the primary method for providing access to policies and procedures, but the claimant was sent copies by email when requested and the respondent would have provided copies in an alternative format if requested. The claimant was given some assistance. We note that the claimant's case as put forward during the hearing is a complaint about not having the same access as others to the online policies, rather than asking for an auxiliary aid to provide him with additional assistance due to disability. In addition, it is not clear that this put the claimant at a substantial disadvantage. He may have found online policies more difficult to read due to dyslexia, but his complaint is that he was unable to access the online policies rather than unable to read or understand them. We accept that not having instant online access was inconvenient for the claimant, but we do not have evidence that this issue caused him particular distress and so was a "substantial" disadvantage due to anxiety and depression.

61. **Harassment related to disability** Did the respondent do the following things:

61.1 ***Fail to pay the claimant's wages on the 1 May 2020.*** This did happen.

61.2 ***Blame the claimant for the non-payment of his wages.*** The claimant was not blamed for non-payment at the time – the respondent apologised for the mistake with his May 2020 wages and explained why this had happened. The respondent's grounds of resistance did

suggest the claimant was at fault by not providing sufficient bank details, but this was a mistake as acknowledged at the hearing.

- 61.3 **Refuse initially to pay the claimant by CHAPS.** The claimant did ask for this, and it was not actioned until 7 May 2020 when he received his missing wages.
- 61.4 **Fail to deal with the claimant's grievance of 4 May 2020 adequately or at all.** As explained above in our findings on direct discrimination, the respondent did investigate the claimant's grievance in that they resolved the issue about his missing pay and explained why this had happened. But, the respondent failed to deal with the grievance adequately as they did not tell the claimant it was being dealt with informally or provide a response to all of the points in his grievance.
- 61.5 **Fail to ensure that the claimant knew what to do if his wages were paid late again.** This was a question asked by the claimant in his grievance and it was not answered. The respondent says he did the right thing by raising it with his manager, but this was not explained to him at the time.
- 61.6 **Fail to refer the claimant to occupational health for 5 months.** As explained above in our findings on direct discrimination, there was a failure to refer before the usual 4-week period of absence in order to see if counselling was available.
- 61.7 **Fail to ensure the claimant had access to his employer's employment policies and procedures.** As explained above in our findings on direct discrimination, the claimant was provided with policies when he asked for them, but there was a failure to ensure he had full online access.
- 61.8 **Pay the claimant incorrect wages, missing a quarter of the pay due to him in July 2020.** This did happen.
- 61.9 **Tell the claimant that he should contact the store himself to chase up wages as the people manager was not able to do it.** This is a mischaracterisation of what Ms Holt said. Ms Holt suggested he could telephone for an update alongside her also contacting payroll, because admin would be able to see the relevant form.

62. **If so, was that unwanted conduct?** This was unwanted conduct, in the sense that the claimant did not want to be treated like this (although we note the respondent's submissions that it is not the type of conduct that would generally be regarded as harassment as opposed to direct discrimination).

63. **Did it relate to the claimant's protected characteristic, namely disability?** We find that none of the above things related to disability within the meaning of the EA. None of this was in a form that related to disability, such as inappropriate comments about disability. There is also no evidence that any of these things happened to the claimant by reason of disability or were motivated



by the knowledge that he was disabled. The listed conduct overlaps with the issues in the direct discrimination claim. There a number of mistakes were made by the respondent, but we accept these were all genuine mistakes (as explained in more detail in our findings on direct discrimination). We have not found that the respondent would have behaved differently if the claimant had not been disabled, or if he had different disabilities. As with direct discrimination, the claimant says that these things had the *effect* of harassing him because of his poor mental health, and made his health worse. However, this does not mean that the conduct itself was “related to” disability.

64. These findings mean that the claim for harassment does not succeed and there is no need to consider the rest of the issues.

65. The claimant also referred in his closing submissions to the email exchanges between Ms Holt and Mr Hart, and said these were harassment. We find that these emails were unprofessional and inappropriate, particularly because they were a conversation between a senior area manager and an HR professional. We accept that these emails caused the claimant distress when he saw them as part of a response to his data subject access request. These emails did not form part of the claim for harassment as set out in the list of issues. However, we hope that the respondent reflects on these exchanges and that similar communications do not happen in the future.

66. The claimant also referred in his closing submissions to the original list of issues under the heading of constructive dismissal. As explained above, this was not a separate head of claim. For the avoidance of doubt, this list overlapped with the conduct relied on for direct discrimination and harassment, and we do not find that any of the conduct was either because of or related to disability.

67. We acknowledge that these events happened during a particularly difficult time for the respondent, during the height of the COVID-19 pandemic when it was necessary to protect colleagues’ health and keep supermarkets operating. We also acknowledge that these events caused the claimant genuine upset, and this was made worse by his anxiety and depression. The claimant’s overall point at the end of his submissions was that these events had a cumulative effect on his mental health, and things were not in place to support him. The respondent did make number of mistakes. However, applying the relevant law to the facts we have found, none of these mistakes were disability discrimination within the meaning of the law.

Employment Judge Oliver  
Date: 23 October 2021

Judgment sent to parties: 29 October 2021

FOR THE TRIBUNAL OFFICE