



EMPLOYMENT TRIBUNALS

Claimant: Miss D Fisher

Respondent: Tesco Stores Limited

HELD AT: Manchester

ON: 7-9 December 2022

BEFORE: Employment Judge Slater
Ms F Crane
Ms C Doyle

REPRESENTATION:

Claimant: Mr N Duke, friend
Respondent: Mr C Kelly, counsel

JUDGMENT having been sent to the parties on 12 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. Complaints of direct disability discrimination and failure to make reasonable adjustments were identified at a case management preliminary hearing in October 2021. At a preliminary hearing on 11 April 2022, the complaints of failure to make reasonable adjustments were dismissed on the basis that the complaints had not been brought in time and it was not just and equitable to extend time. That left us with the complaints of direct disability discrimination to deal with at this hearing.

2. The issues in relation to the complaints of direct disability discrimination were set out in the Annex to the record of the preliminary hearing held on 11 April 2022. At the start of this hearing, the parties confirmed that the issues for us to decide remained as set out in that list annexed to the record of the preliminary hearing except that the respondent had conceded disability in relation to Morton's Neuroma,

having previously conceded disability in relation to fibromyalgia and depression, so there was no live issue in relation to whether the claimant was disabled by reason of various conditions for us to determine at this hearing. Mr Kelly also raised the possibility that there could be time limit issues in relation to some of the complaints of direct discrimination.

3. The Judge raised with Mr Duke whether the claimant was making an application to amend her claim to include a complaint of victimisation, since the claimant had referred to victimisation in paragraph 57 of her witness statement. After an explanation given by the Judge of victimisation under the Equality Act and giving time for Mr Duke to take instructions on the matter, Mr Duke confirmed that no application to amend the claim was made. The complaints the Tribunal, therefore, had to consider were the complaints of direct disability discrimination set out at paragraphs 2.1.1 through to 2.1.17 in the List of Issues annexed to the notes of the preliminary hearing. Further issues to be determined in relation to those complaints were set out in that Annex. These issues are set out in the Annex to these reasons. In addition, the Tribunal needed to consider whether, having regard to the relevant time limits, the Tribunal had jurisdiction to deal with all the complaints.

Facts

4. We deal first with a brief chronology of the events leading to this claim.

5. The claimant's employment with the respondent started in 2007. In 2017 she was diagnosed with fibromyalgia. She was also noted in 2017 as suffering from foot pain, although we have not established when it was that Morton's Neuroma was diagnosed.

6. Kara Nairn started at the same store as the claimant in November 2017 and became the claimant's line manager.

7. The claimant had a number of short-term sickness absences, but started a period of long-term sickness absence on 24 June 2018 which continued until the termination of her employment. There was a wellness meeting and stress risk assessment on 4 October 2018. There was also an Occupational Health report in October 2018 which noted that, at that time, the claimant was off work with health and work-related depression and that she was unfit for her contracted role as a team leader.

8. There was a further Occupational Health report on 24 January 2019. This noted that the claimant was unfit to return to work in the foreseeable future and the Occupational Health adviser could not suggest any adjustments which would allow for a return to work.

9. On 31 January 2019, the respondent's Occupational Health adviser advised the respondent that they considered there was already enough information for an application for an ill-health pension to be submitted. This application was duly submitted in March and the application was successful.

10. A final meeting was held on 8 June 2020 with Chris France of the respondent. The claimant was accompanied to this meeting by Mr Duke who represented her at that meeting. The outcome of the meeting was that the claimant's employment was

terminated with the claimant to receive her ill-health pension. The effective date of termination was 8 June 2020.

11. A dismissal letter was produced, dated with the effective date of termination. This was not, however, received by the claimant and it appears that the claimant did not make any enquiries about the missing letter or about why she had not received her pension payments for around six months after the end of her employment. After enquiries were made, the dismissal letter was re-sent, this time by recorded delivery, on 22 December 2020, and was received by the claimant.

12. On 27 December 2020, Mr Duke wrote on the claimant's behalf to appeal regarding the dismissal letter. He complained in that letter about the meeting on 8 June 2020: that Mr France did not ask who Mr Duke was until the claimant mentioned his name; and he alleged that no plan, process or documentation that Mr Duke could see was followed so the claimant understood what payments were due. He alleged that no understanding of the notice period was discussed. He wrote that he did not believe enough support was given with reasonable adjustments to help the claimant while in work to ease her health and keep her absence lower. He complained that the stress risk assessment carried out on 4 October 2018 was not done without disturbance and it was rushed and incomplete.

13. Richard Wareham telephoned Mr Duke on 7 January 2021. Mr Duke clarified in that call that the claimant was not seeking to overturn the dismissal and to return to work. Mr Duke said it was about concerns being heard and investigated, although he said he was unsure what outcome was wanted. Mr Wareham agreed to investigate the concerns raised. It appears that the claimant had not received her pension payment at that time but this was then rectified before a meeting which was held on 14 January 2021.

14. There was a meeting held by Teams on 14 January 2021 attended by Mr Duke, the claimant and Mr Wareham and a note-taker. The meeting lasted from 10:00 am until 12.10 p.m.. Notes were taken of the meeting which were later sent to Mr Duke and agreed. A number of allegations were made at the meeting but there was a notable lack of dates relating to those allegations. Mr Duke confirmed that the claimant had now received her pension payment. Concerns were raised at this meeting about the meeting on 8 June 2020: that Mr Duke had not been introduced; that Mr France was slouching in his chair and that the claimant did not get a breakdown of payments or holiday pay. There were also a number of complaints about lack of support at work. Mr Wareham said that he would speak to Kara Nairn, Chris France and Gareth and then give the claimant and Mr Duke a detailed report on every point. Mr Duke agreed with the people that Mr Wareham said he would interview. Mr Duke said that he was concerned about direct disability discrimination, indirect disability discrimination and failure to make reasonable adjustments. Mr Duke did not explain what, in particular, he considered to be direct disability discrimination and indirect disability discrimination. Mr Duke said that, if he disagreed with Mr Wareham's findings, he would be looking to go to a tribunal for compensation, but he would like a settlement with the respondent.

15. Following this meeting, Mr Wareham obtained and read the claimant's personnel file.

16. Mr Wareham informed Mr Duke that there would be a delay in his investigation due to the absence from work of Kara Nairn at that time.

17. Mr Wareham interviewed Chris France and Kara Nairn both on 10 March 2021. He then produced his report with his findings on 29 March 2021.

18. The claimant notified ACAS under the early conciliation process on 6 May 2021 and the ACAS certificate was issued on 10 May 2021. The claimant presented her claim to the Tribunal on 17 May 2021.

19. We now deal with the facts relating to the specific allegations made listed at 2.1.1 through to 2.1.17 in the List of Issues.

20. 2.1.1 is an allegation that Richard Wareham failed to interview Gareth Fairhurst. It is correct that Richard Wareham failed to interview Gareth Fairhurst. We accept the evidence which Mr Wareham has given as to why this was the case. He considered that this was not necessary after reviewing the file. Mr Wareham had said that he would interview Gareth Fairhurst because, at the complaints meeting, Mr Duke had said to him that Gareth had raised the matter of a risk assessment in a wellness meeting on 4 October 2018. Mr Wareham read the notes of the wellness meeting which had been signed by the employee and the interviewer. On reviewing these notes, Mr Wareham saw that Kara Nairn had, in fact, raised the matter of a risk assessment rather than this being raised by Gareth. Considering this, and the fact that he had access to, and had reviewed, the meeting notes, Mr Wareham did not consider it necessary to interview Gareth Fairhurst.

21. 2.1.2 is an allegation that Richard Wareham failed to look at the reason why Kara Nairn had changed the claimant's shifts previously and he concluded that those changes were to help the claimant with her disabilities. The claimant accepted in cross-examination that Mr Wareham did look at the reason for changing the claimant's shifts and this is supported by the document at page 277 of the bundle. The claimant also accepted in cross-examination that Mr Wareham did not conclude that the changes were to help the claimant with her disabilities. This is supported by the document at page 288. We note that Kara Nairn was changing rotas to make everyone more flexible rather than to assist the claimant with her disabilities. This complaint is, therefore, not made out on its facts.

22. 2.1.3 is an allegation that Richard Wareham incorrectly considered Christmas 2017 and not Christmas 2018 in his report and failed to check the claimant's file or with the claimant herself or Mr Duke if unsure. The claimant and Mr Duke in his witness statement at paragraph 21 both agreed that Richard Wareham was, in fact, correct in identifying this as Christmas 2017 rather than 2018. Looking at the file, he reached this correct conclusion.

23. 2.1.4 is an allegation that Richard Wareham failed to look into the claimant's file to see if a wellness meeting was conducted on the claimant's return to work after she had visited the hospital due to a lump in her chest and, if there was no meeting, failed to ask Kara Nairn why not. The claimant and Mr Duke did not give a date for this incident in either the appeal letter or the complaints meeting. We accept Mr Wareham's evidence that it is not the process to have a wellness meeting if someone is at work. There is nothing in policies we were shown to indicate that this was the practice. Richard Wareham was not asked in the complaints to look at

whether there was a wellness meeting. He did look at the file but there was no documentation of the incident. There was no record of such a discussion, but we accept Richard Wareham's evidence that he would not have expected to find one, given that it would not have been in accordance with procedure to have a wellness meeting at this point. Mr Wareham had been asked to look at the question of whether there was support. Kara Nairn told Mr Wareham that she was not sure whether she was at work at the time.

24. The concern which was raised at the complaints meeting by Mr Duke was that the claimant was not sent home after she returned from the hospital. Mr Wareham asked Kara Nairn about this incident and the claimant's belief that she should have been sent home. Kara Nairn replied that this was not her responsibility – if the claimant was not fit to return, she should not have returned; it was her decision, not that of Kara Nairn.

25. Mr Wareham did not look specifically at whether a wellness meeting was held or ask Kara Nairn why not, because this was not a complaint that he was asked to investigate. However, he did review the entire case file so would have seen a note had there been one. It would not have been in accordance with policy to have a wellness meeting at that point.

26. Allegation 2.1.5 is that Richard Wareham failed to check if a wellness meeting was held with the claimant and what was the outcome. This allegation does not make it clear when the claimant says there should have been a wellness meeting which was not held. Mr Duke had not raised this matter in the complaints meeting or the appeal letter. To the extent that this deals with the same matter as in allegation 2.1.4, we have already dealt with this. The respondent's policy at page 124 is that there is normally an informal wellness meeting after four weeks' absence of a long-term absence or as soon as they know that the absence is likely to be long-term. It is clear from the policy at page 123 that a long-term absence is where someone is expected to be off a number of months rather than weeks. The claimant has not satisfied us that there was any long-term absence where wellness meetings should have been held and were not. Wellness meetings were held with the claimant when the claimant was on long-term absence from June 2018 in accordance with the respondent's policy. We accepted Mr Wareham's evidence that it was not policy to conduct a wellness meeting when a colleague was not absent. Mr Wareham did not look at this matter because it was not part of the complaint he was asked to investigate.

27. 2.1.6 is an allegation that Richard Wareham failed to look at the claimant's health issues on her file and/or to obtain notes from an informal meeting Kara Nairn mentioned and/or to appropriately consider the claimant's concerns that things would go back to the way it was. There was some confusion as to which informal meeting this referred to. By reference to the further particulars provided by the claimant which appear at page 68 of the bundle we consider this relates to an informal meeting which was mentioned by Kara Nairn in the 4 October 2018 wellness meeting. The note of this meeting at page 204 records Kara Nairn saying that she had spoken to the claimant in an informal meeting and this was how the meeting on 4 October 2018 had come about. We accept the evidence Mr Wareham gives in paragraph 52 of his statement. He looked at all the information, considered the claimant's concern and was comfortable that Kara Nairn had provided reasonable support. We consider this complaint is not made out on the facts.

28. 2.1.7 is an allegation that Richard Wareham failed to take appropriate account of the duty to report an accident after the claimant fell on the way back to the store and/or to determine the support provided afterwards. Mr Duke and the claimant did not provide a date for this alleged incident, which we understand relates to a fall which the claimant had after locking up the petrol station. Mr Wareham looked at the claimant's personnel file but found nothing relating to this on that file. He asked Kara Nairn about it. Kara Nairn did not recall the incident. In the complaints meeting, Mr Duke said that a customer had helped the claimant and the accident was reported to "DM", which we take to be the duty manager. He did not identify the name of the duty manager. Mr Duke did not give Mr Wareham the name of "Michael" who Mr Duke suggested to Mr Wareham, in cross-examination, should have been asked about the incident. Mr Wareham considered that he was unable to draw a conclusion or make findings without available evidence. When referred in cross-examination to page 185 in relation to another matter, Mr Wareham noted that a fall had been referred to on those notes and speculated that this might have been the fall but, with further discussion, neither party thought that this was correct. We accept that Mr Wareham did not make a link between the fall referred to at page 185 and the petrol filling station incident at the time so there were no further obvious lines of enquiry which Mr Wareham should have followed at that time. We accept his evidence that he could not look at the centrally kept accident book without having a date for the incident to look at. We decide that this complaint is not made out on the facts.

29. 2.1.8 is an allegation that Richard Wareham failed to ask Michael who picked up the claimant from her fall and/or to check if Kara Nairn had completed an accident report and conducted a wellness meeting. As noted above, Mr Duke had not mentioned the name of Michael in the complaints meeting or the appeal letter. Consequently, Michael was not on the list of people Mr Wareham agreed to interview. Mr Wareham asked Kara Nairn about the incident, but she did not recall anything. As previously noted, since dates were not given, there were no further obvious lines of enquiry which could have been followed by Mr Wareham. We note that it would not have been Kara Nairn's obligation to do an accident report if she was not on duty at the time and we have no evidence that she was, in fact, on duty at the time. The person to whom the accident was reported, according to the information Mr Duke gave at the Teams complaints meeting, was the duty manager, name unspecified. As previously noted, a wellness meeting would not have been applicable where the claimant was at work.

30. 2.1.9 is an allegation that Richard Wareham failed to get from Kara Nairn that she knew that the claimant suffered from ill health and, if she did so, that support should be recorded in a wellness meeting and supporting action taken. The claimant accepted in cross-examination that Mr Wareham had asked questions of Kara Nairn and got from her that she knew about the claimant's ill-health. Kara Nairn said that she knew about ill-health some time after Christmas 2017. The claimant did not accept that supporting action was taken. Mr Wareham asked Kara Nairn about support offered and Kara Nairn gave some details. A plan had been put in place after the claimant had been off, but she said the claimant worked against it by doing extra overtime. Mr Wareham concluded that Kara Nairn had been trying to explore support with the claimant. In relation to these parts of the allegation at 2.1.9 the complaint is not made out on the facts. Mr Wareham did not ask Kara Nairn why this was not recorded in a wellness meeting. However, as previously noted, in

accordance with policy, there would not be a wellness meeting unless the claimant was on long-term sickness and she was not at this time.

31. 2.1.10 is an allegation that Richard Wareham failed to conclude that no care was shown. This allegation appears to relate to an occasion where the claimant's leg swelled up while she was at work. In the complaints meeting, Mr Duke and the claimant could not remember whether the claimant was advised by anyone at the respondent to go to hospital or whether she just carried on with her shift and went to hospital afterwards. There was no documentation about this in the claimant's personnel file. Kara Nairn was asked about it but could not remember anything. Mr Wareham had no further information which would have allowed him to undertake any further investigations. There was no evidence on which he could conclude that no care was given.

32. 2.1.11 is an allegation that Richard Wareham did not look at the cash office support and/or challenge Kara Nairn about why the claimant was not doing duties that would have kept her off her feet for long periods of time and/or to question Kara Nairn about why the claimant was working extra overtime. In relation to the part about cash office support, Mr Wareham asked Kara Nairn about this. Kara Nairn said there were no vacancies. Mr Wareham looked at the information in the file, in particular the notes of a return to work meeting on 27 March 2018, where it was recorded that the claimant should sit on the till if she felt she needed to rest or go to the petrol – which we understand to be an abbreviation for the petrol filling station – to cover breaks. The notes record that Mr Wareham did have a discussion with Kara Nairn about why the claimant was working extra overtime. The claimant denied that Richard Wareham discussed this, in the face of the evidence of the notes. We have no reason to believe that those notes are inaccurate. We find that this complaint is not made out on the facts.

33. 2.1.12 is an allegation that Richard Wareham did not deal with the right support which was given to the claimant which would have been shown on the claimant's file. In cross-examination, the claimant was not able to identify any additional issues which had not been dealt with in her other complaints. We accept the evidence Mr Wareham gave in relation to this matter in paragraph 56 of his statement. He considered whether support was given and considered documentation available which showed support. The outcome letter refers to support plans following absences, altered hours and amended duties.

34. 2.1.13 is an allegation that Richard Wareham failed to show the dates upon which support was/was not provided prior to 18 September 2018. It is correct that Mr Wareham did not list in the outcome letter dates of support provided prior to 18 September 2018, but his letter is clear that he found support had been provided prior to this date. It is unclear how the claimant says this is detrimental treatment.

35. Allegation 2.1.14 is that Richard Wareham failed to take sufficient note of the claimant's 100% attendance record before the accident with the heavy box in approximately 2016. The claimant now says that the date given in the List of Issues was wrong: it was 2011 rather than 2016. However, no application was made to amend the List of Issues. Mr Wareham did not deal with this allegation because he was not asked to look at it in the complaints. Had he been asked to look at it, however, examination of the claimant's absence records would have shown that she did not have 100% record prior to 2016.

36. Allegation 2.1.15 is that Richard Wareham took the word of both Chris France and Kara Nairn and/or did so without looking at the evidence in the claimant's file and/or challenging them. Mr Wareham did accept the information given by Chris France and Kara Nairn but he did not do so without examining the evidence in the file and challenging them. Mr Wareham reviewed all the documents in the claimant's file. Mr Wareham interviewed both Chris France and Kara Nairn separately and independently. He questioned them about points raised by the claimant. There was no obvious reason why Mr Wareham should not accept what they told him.

37. Allegation 2.1.16 is that Richard Wareham accepted Chris France sending out the dismissal letter when Chris France should have sent the letter out as a recorded letter and/or no evidence could be found showing that this policy and procedure was followed. It appears that this allegation is that the dismissal letter should have been sent by recorded delivery. However, no policy of the respondent required it to be sent by recorded delivery. Mr Wareham questioned Chris France about whether the letter was sent and Chris France said it was sent. Mr Wareham saw that, in the long-term absence pack, Chris France had ticked the box relating to having sent out the letter. On the basis of this information, Mr Wareham concluded that the letter had been sent. If the complaint is correctly understood as being that Mr Wareham should have found, in accordance with policy, that the letter should have been sent by recorded delivery, the complaint is not made out on the facts.

38. Allegation 2.1.17 is that Richard Wareham accepted Chris France's word that he had the pack in the meeting on 8 June 2020 and that he had it on the chair next to him. Mr Wareham did accept that Chris France had the pack. Chris France said he did in answer to Mr Wareham's questions. He said he had it next to him. Kara Nairn confirmed this, saying that the pack was not visible because it was on a chair. Chris France and Kara Nairn provided the information in answer to open questions put by Mr Wareham and both gave answers consistent with each other. There was no obvious reason why Mr Wareham should not have accepted their evidence on this point. We note that both were interviewed on the same day and there is no evidence of collusion between them.

39. We now make some other general points in relation to the facts. There were various allegations of breaches of policies. However, the claimant has not satisfied us that the respondent, in any material respect, breached their own policies and procedures.

40. We accept that Mr Duke, as he explained in cross-examination, had health issues of his own at the time which made it difficult for him to represent the claimant as effectively as he would have liked to do. We also accept that the claimant's disabilities made it difficult for her to recall relevant dates and details and to give Mr Duke proper instructions.

The Law

41. Section 13(1) of the Equality Act provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

42. Section 23(1) of the Equality Act provides that:

“On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case”.

43. Section 39(2) provides amongst other things that an employer must not discriminate against an employee by subjecting that employee to a detriment.

44. Section 136 of the Equality Act provides: “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” but that does not apply if A shows that A did not contravene the provision.

45. The Tribunal makes findings of fact having regard to the normal standard of proof in civil proceedings which is on a balance of probabilities. A party must prove the facts on which they rely. A claimant must prove that they suffered the treatment alleged, not merely assert it.

46. Once the relevant facts are established, the Tribunal must apply Section 136 in deciding whether there is unlawful discrimination. The effect of the relevant legal authorities is that the Tribunal must consider, at the first stage, all the evidence, from whatever source, in deciding whether the claimant has shown that there is a prima facie case of discrimination which needs to be answered. A finding of less favourable treatment without more is not a sufficient basis for drawing an inference of discrimination at the first stage. The fact that a claimant has been subjected to unreasonable treatment is not of itself sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

47. If the claimant establishes facts from which the Tribunal could conclude that there was unlawful discrimination, the burden then passes to the respondent to provide an explanation for its actions. The Tribunal must find that there was unlawful discrimination unless the respondent provides an adequate (in the sense of non-discriminatory) explanation for the difference in treatment. Less favourable treatment will be because of the protected characteristic if the characteristic is an effective cause of the treatment. It does not need to be the only or even the main cause. The motivation may be conscious or unconscious. In some cases, particularly those involving a hypothetical comparator, it may be appropriate for the Tribunal to proceed straight to the second stage: considering the reason why the respondent acted as it did.

Submissions

48. Mr Kelly, on behalf of the respondent, made oral submissions which we summarise as follows.

49. The claimant did not establish facts from which the Tribunal could conclude there was unlawful discrimination. The thrust of the claimant’s case appeared to be that the investigation was so badly carried out that the explanation must be disability discrimination. The Tribunal should reject this; the investigation was appropriate. There is no evidence that it was because of the claimant’s disability. If the burden did pass to the respondent, Mr Wareham had provided a non-discriminatory explanation. Admissions by the claimant and Mr Duke supplemented what Mr Wareham said. Mr Kelly made submissions in relation to the facts which we do not seek to summarise.

50. Mr Duke did not try to establish when failures occurred. This was a problem for jurisdiction. If the Tribunal is considering whether to extend time, the respondent says the Tribunal cannot, because no reason has been established for the delay in presenting the claim.

51. Mr Duke, for the claimant, made oral submissions. Mr Duke submitted that the way the ill health meeting was conducted did not show the checklist had been used. No reference had been made to occupational health. A risk assessment ought to have been done before 4 October 2018. Using these tools would have given the claimant the correct support with her disabilities.

52. Mr Warner should have looked at the root cause managers had failed to support the claimant. Mr Warner should have dug deeper.

53. When asked by the judge what evidence Mr Duke said the Tribunal should draw an inference of discrimination from, Mr Duke referred again to needing to look at the root cause. If Kara Nairn had taken steps to understand the claimant's disability, she would have been able to give the claimant the right support and this may have prevented the claimant going off sick again in a short period.

54. Mr Duke submitted there was a trail that the claimant suffered with her disability. There had been no correct support through the respondent's own policies, which guide them on what they should do. If this had been done correctly and policies followed correctly, this may have helped the claimant to stay in work longer and make the necessary reasonable adjustments to help her stay in work. The claimant accepted that she would have had to give up work at some point. The correct support may have meant she had a few more years in work.

Conclusions

55. We begin our conclusions by noting that, from the evidence of the claimant, we are satisfied that the claimant is bringing the claim from a genuine sense of grievance against the respondent. We also comment that Mr Duke has done his best to assist Miss Fisher, both by representing her in the dealings with the respondent prior to bringing proceedings, at Miss Fisher's request, and in dealing with the proceedings up to and including this hearing. However, it appears to us from the evidence presented for the claimant and from Mr Duke's cross-examination of Mr Wareham and closing submissions, that much of what has been presented on behalf of the claimant would be more relevant to complaints of failure to make reasonable adjustments, which were dismissed at a preliminary hearing because they were presented out of time, rather than to the complaints of direct disability discrimination that are to be decided by us.

56. We have had difficulty in understanding what it is that the claimant would have us rely on as facts from which we could conclude that there was unlawful direct disability discrimination. Unfortunately, Mr Duke, whilst doing his best, and recognising that he is not a legal representative, has not been able to state concisely in closing submissions what the evidence is that the claimant contends should result in a shift in the burden of proof as His Honour Judge Taylor advised, in the recent case of **Field v Steve Pye & Co (KL) Ltd and others** [2022] EAT 68, should be done. From the submissions, what was said in the witness statements for the claimant, and from the nature of the cross-examination by Mr Duke, it appears to us

that the claimant may be inviting us to draw inferences of discrimination from alleged failures on the part of the respondent to follow its own procedures and from Mr Wareham allegedly failing to investigate the claimant's concerns to a sufficient degree and reaching conclusions which the claimant does not think Mr Wareham could reasonably reach on the available evidence.

57. The claimant has not satisfied us that there was any material breach of the respondent's policies and procedures. Even if there had been, this would not have been enough on its own to draw an inference of disability discrimination.

58. The claimant has not satisfied us that Mr Wareham failed to investigate the claimant's concerns to a sufficient degree and that he reached conclusions which he could not reasonably reach on the available evidence. Even if he had acted unreasonably, this would not have been enough, by itself, for us to draw an inference of disability discrimination.

59. Although Mr Duke did not refer to this specifically in closing submissions, it is possible that the claimant is also inviting us to draw inferences from the respondent having not disclosed some documents which the claimant considers relevant to the claims. In relation to this matter of disclosure, we are not satisfied, on the evidence we have heard, that the respondent has failed to disclose documents relevant to the issues which we need to consider. It appears there may be some missing fit notes which were not in the claimant's personnel file when examined by Mr Wareham. We have no explanation for what happened to these. However, we do not consider this to be sufficient for us to conclude that there has been deliberate withholding of relevant evidence. Having considered the correspondence between Mr Duke and the respondent's solicitors, we consider that other material which Mr Duke considered relevant was not, in fact, relevant to the issues we need to consider. We are not satisfied there was any failure of disclosure on the part of the respondent.

60. We have, therefore, considered all the evidence before us in relation to the individual complaints and overall to consider whether there are facts from which we could conclude that disability was a material factor in what Mr Wareham did or failed to do in relation to the matters set out in the issues. For the reasons we have given in our findings of fact, not all the allegations have been made out as a matter of fact. We have found that the following allegations were not made out on the facts: 2.1.2; 2.1.3; 2.1.6; 2.1.7; 2.1.9 in large part; 2.1.11 and 2.1.16. In relation to allegations which were not established on the facts the complaints of direct disability discrimination fail.

61. In relation to allegations which were made out on the facts, we refer back to those findings of fact. We conclude that the claimant has not proved facts from which we could conclude that the claimant suffered less favourable treatment than an appropriate hypothetical comparator and that disability was a material factor in how the claimant was treated. We have considered the facts in relation to each particular allegation and the evidence more generally in reaching this conclusion. The claimant has not discharged the initial burden of proof on her in relation to any of the allegations that were proved as a matter of fact.

62. We have some doubt whether the claimant reasonably saw the treatment as a detriment in relation to all the matters alleged, but do not consider it necessary to

reach a conclusion on this since the complaints fail for the reasons given, even on the assumption that the claimant was subjected to a detriment by the treatment.

63. If the burden had shifted to the respondent, we would have been satisfied that the evidence of Richard Wareham had showed that disability had played no part in his actions.

64. In relation to the time limit issue, anything done before 7 February 2021 was out of time unless forming part of a continuing act of discrimination and the Tribunal would have no jurisdiction to deal with such a complaint unless it considered it just and equitable to do so in all the circumstances. The complaints meeting was on 14 January 2021. It appears Mr Wareham started his investigations prior to 7 February 2021 but was not able to interview Kara Nairn until 10 March when he also interviewed Chris France. We conclude that the acts complained of happened, or continued, after 7 February 2021. All the complaints were, therefore, presented in time and the Tribunal has jurisdiction to deal with them.

65. We conclude, however, for the reasons previously given, that the complaints of direct disability discrimination are not well-founded.

Employment Judge Slater
Date: 13 January 2023

REASONS SENT TO THE PARTIES ON
16 January 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX
Issues to be determined by the Tribunal

1. Disability

The respondent conceded that the claimant was disabled at relevant times by reason of fibromyalgia, depression and Morton's Neuroma.

2. Direct disability discrimination (Equality Act 2010 section 13)

2.1 What are the facts in relation to the following allegations concerning the investigation by Richard Wareham into the claimant's grievance/complaint that she raised following the termination of her employment and; in particular, as recorded in his investigation outcome and report of 29 March 2021 (greater detail of what is alleged was contained in the further particulars document of 1 December 2021):

2.1.1 That Richard Wareham failed to interview Gareth Fairhurst;

2.1.2 That Richard Wareham failed to look at the reason why Kara Naim had changed the claimant's shifts previously and that he concluded that those changes were to help the claimant with her disabilities (point 3 of the report);

2.1.3 That Richard Wareham incorrectly considered Christmas 2017 and not Christmas 2018 in his report and failed to check the claimant's file or with the claimant herself/Mr Duke if unsure (point 4 of the report);

2.1.4 That Richard Wareham failed to look into the claimant's file to see if a wellness meeting was conducted on the claimant's return to work after she had visited the hospital due to a lump in her chest and, if there was no meeting, failed to ask Kara Naim why not (point 5 of the report);

2.1.5 That Richard Wareham failed to check if a wellness meeting was held with the claimant and what was the outcome (point 6 of the report);

2.1.6 That Richard Wareham failed to look at the claimant's health issues on her file and/or to obtain notes from an informal meeting Kara Naim mentioned and/or to appropriately consider the claimant's concerns that things would go back to the way it was (point 7);

2.1.7 That Richard Wareham failed to take appropriate account of the duty to report an accident (after the claimant fell on the way back to the store) and/or to determine the support provided afterwards (point 9);

2.1.8 That Richard Wareham failed to ask Michael who picked the claimant up from her fall and/or to check if Klara Nairn had completed an accident report and conducted a wellness meeting (point 1 1);

2.1.9 That Richard Wareham failed to get from Kara Nairn that she knew that the claimant suffered from ill health and, if she did so, that support should be recorded in a wellness meeting and supporting action taken (point 12);

2.1.10 That Richard Wareham failed to conclude that no care was shown (point 13):

2.1.11 That Richard Wareham did not look at the cash office support and/or challenge Kara Naim about the why the claimant was not doing duties that would have kept her off her feet for long periods of time and/or to question Kara Naim about why the claimant was working extra overtime (point 15);

2.1.12 That Richard Wareham did not deal with the right support which was given to the claimant which would have been shown on the claimant's file (point 17);

2.1.13 That Richard Wareham failed to show the dates upon which support to the claimant was/was not provided prior to 18 September 2018 (point 18);

2.1.14 That Richard Wareham failed to take sufficient note of the claimant's 100% attendance record before the accident with the heavy box in approximately 2016;

2.1.15 That Richard Wareham took the word of both Chris France and Kara Naim, and/or did so without looking at the evidence in the claimant's file and/or challenging them;

2.1.16 That Richard Wareham accepted Chris France sending out the dismissal letter, when Chris France should have sent the letter out as a recorded letter and/or no evidence could be found showing that this policy and procedure was followed; and

2.1.17 That Richard Wareham accepted Chris France's word that he had the pack in the meeting on 8 June 2020 and that he had it on the chair next to him.

2.2 Did the claimant reasonably see the treatment as a detriment?

2.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability was or would have been treated? The claimant says she was treated worse than a hypothetical comparator.

2.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

2.5 If so, has the respondent shown that there was no less favourable treatment because of disability?

3. Remedy for discrimination or victimisation

3.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

3.2 What financial losses has the discrimination caused the claimant?

3.3 Has the claimant taken reasonable steps to replace lost earnings, for

example by looking for another job?

3.4 If not, for what period of loss should the claimant be compensated?

3.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

3.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

3.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.8 Should interest be awarded? How much?