EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Taskova**

Respondent: **GXO Logistics UK Limited formerly known as XPO Supply Chain UK Limited**

Heard at: **Sheffield**

On: **29-31 March, 1 and 4 April, 28-30 November, 1 and 2 December 2022 and 27 and 28 February 2023**

Before: **Employment Judge Maidment**
Members: **Ms J Lancaster**
Mr M Taj

Representation
Claimant: **In person**
Interpreters: **Ms V Nikolova, Ms M Spirdonova (31 March 2022) and Ms V Mondashka (27 and 28 February 2023)**
Respondent: **Mr B Williams, Counsel**

RESERVED JUDGMENT

The claimant's complaint of disability discrimination is well founded and succeeds to the (sole) extent that the respondent failed to comply with a duty to make reasonable adjustments from 30 July – 2 August 2019.

REASONS

Issues and evidence

1. The claimant worked as an operative at the respondent's large warehouse in Barnsley servicing the supply of goods from its client ASOS to its (ASOS's) customers. The claimant submitted her complaint to the employment tribunal on 20 January 2020 after a period of ACAS Early Conciliation which lasted from 18 November to 18 December 2020. At the time she commenced proceedings, she was still employed by the respondent.

2. The tribunal sets out below a number of procedural matters and how this case has progressed. As at the conclusion of the hearing, the sole claim for the tribunal to determine is an alleged failure to make reasonable adjustments from February 2017 to January 2020. It had been determined at a preliminary hearing on 17 July 2020 that the claimant was at all material times a disabled person by reason of her suffering from a condition affecting her knee. The respondent does not accept that it had the requisite knowledge of disability. During the aforementioned period, the claimant refers to waiting over 7 months for an occupational health meeting (May 2017 - January 2018), disregarding doctor's advice in November 2018 and disregarding amended duties and occupational health advice (January 2018 – January 2020). The claimant relies on the requirement for colleagues to walk and stand extensively and to pick from all heights as the relevant provision, criterion or practice. The respondent accepts that it applied such a practice in relation to its operatives. The claimant maintains that she was disadvantaged in carrying out those activities due to the pain in her knee. As the case has proceeded, it is clear that, in essence, the claimant is maintaining that it would have been a reasonable adjustment to restrict her duties and that her duties were not restricted so as to alleviate the disadvantage caused by her knee condition, including in circumstances where advice had been given and assessments had been made that those reasonable adjustments ought to have been implemented.

3. The hearing commenced on 29 March 2022. The claimant has had the assistance of an interpreter in her first language of Bulgarian on each day of subsequent hearing with the exception only of 28 November 2022 when arrangements could not be made for an interpreter to attend, but where the claimant had been given advance notice of the issue and had confirmed that she was content not to have the assistance of an interpreter on that day. The claimant has a very good understanding of English and is able to communicate effectively in English. Indeed, the claimant determined that it was unnecessary for any interpreter to provide a simultaneous translation, but instead be present to assist the claimant if there was something in particular she did not understand or if she required assistance in expressing any point she wished to make. In fact, the interpreters were only rarely asked to assist. Interpretation was provided predominantly from Victoria Nikolova, except on 31 March when such services were provided by Mariela Spirdonova and on 27 and 28 February, when Violeta Mondashka attended.

4. On the first day of the hearing, the tribunal spent some time going through the issues with the parties as clarified and identified during the preceding case management process. Some claims initially pursued by the claimant had been made subject to a deposit order which she had not paid. Nevertheless, a significant number of claims remained to be determined. These were complaints of direct race discrimination with reference to the claimant's Bulgarian nationality and direct disability discrimination. As described, a complaint was brought alleging a failure by the respondent to comply with a duty to make reasonable adjustments. There were then a

number of whistleblowing detriment complaints reliant on 6 separate alleged protected disclosures made in various emails and also verbally.

5. The claimant complained of constant disciplinary hearings as direct race discrimination and as a whistleblowing detriment in respect of the claimant having been disciplined for leaving the workplace. A complaint regarding a refusal to provide training opportunities was pursued as direct race and disability discrimination. The claimant being sent home on 7 February 2017 and 6 February 2019 were pursued as direct race and disability complaints. The claimant's grievances being ignored during the period from May 2019 to 20 January 2020 was alleged as less favourable treatment because of race and whistleblowing detriment. The claimant complained that her not being provided with a certificate recognising the 5 year anniversary of her employment with the respondent was a further act of race discrimination and whistleblowing detriment. The respondent's rejection of annual leave requests for 7 months from April 2019 to October 2019 was said to be direct race discrimination. The claimant having been given no chance to appeal the outcome of disciplinary and grievance outcomes from August 2019 was said to be direct race discrimination and whistleblowing detriments.

6. On the first day of the hearing the claimant sought to add a complaint of victimisation. Essentially, the claimant wished to allege that all of the foregoing matters were also acts of victimisation. The tribunal was clear that the claimant needed to identify what protected acts she was relying upon and which allegedly late disclosed documents had suggested to her for the first time that she was a victim of victimisation – a reason given by the claimant for the application to amend only at this stage. The claimant also raised some concerns regarding document disclosure more generally and the possibility that she would seek to apply to strike out the respondent's response.

7. The tribunal then sent the parties away until 1pm the following day, in which time the tribunal proceeded to read into witness statements exchanged between the parties and relevant documentation.

8. On reconvening there was further discussion of the issues - in particular the relevant parts of some documents said to amount to protected disclosures - and the claimant referred to there being documents she referenced in her witness statement which had not been included in the bundle. The claimant confirmed that she was not pursuing any strike out application. The claimant had been asked the previous day to provide the respondent with a list of documents referred to in her witness statement which had not been included within the bundle. The respondent undertook to check that list and to insert any documents within the bundle which were not already there. As a result of this exercise, an additional 41 pages were added to the bundle at pages 1325-1361. The tribunal has at all times been clear that it would consider only documentation it was specifically referred to.

9. The claimant started giving her evidence at 3pm on 30 March with reference to a first and second witness statement. On 1 April the tribunal interposed the claimant's witnesses Fiotos Arampatzis, Ventislav Bosev and Adina Marie Fodon (with reference to a first and second statement). The claimant's cross examination resumed at around 12:45pm.

10. Unfortunately, the hearing could not then proceed on Monday 4 April due to the claimant, whilst in attendance, clearly and understandably not being in a fit state to continue due to news of a sudden bereavement.

11. The hearing was then relisted to resume on the next convenient date for all parties, 28 November 2022. Prior to that date the claimant sought to include further documentation the relevance of which was questioned by the respondent. Nevertheless, at the commencement of the hearing the respondent had determined simply to agree to the inclusion of these additional documents which were added at pages 1362-1428. During the course of the hearing, the bundle expanded further to a total of 1447 pages with the additional of a small number of further documents incorporated within the bundle by agreement between the parties.

12. On the fourth day of that resumed hearing (1 December 2022), by which stage the claimant was part way through cross-examining the respondent's witnesses, the claimant told the tribunal that she had decided to withdraw all of her claims except for the reasonable adjustments complaint.

13. The resumed hearing continued until 2 December. The claimant's evidence was concluded at this resumed hearing and the tribunal then heard, on behalf of the respondent, from Mr Joseph Carman, Kerry Wilshire, Monica Placha, Jonathan Charlesworth (all team leaders), Mark Skelding and Sally Finnie, Senior HR Manager. Unfortunately, evidence could not be completed in circumstances where, in particular, one of the claimant's witnesses, Michael Parkin was unwell and unable to attend to give evidence.

14. The hearing was then relisted to recommence a further time on 27 and 28 February with an additional date of 1 March reserved for the tribunal's private deliberations. Written submissions were ordered to be exchanged by the parties in advance. The tribunal has had the benefit of these.

Applications

15. Two particular applications were heard and determined by the tribunal during the progress of the case. On the second day of hearing, the tribunal heard and determined the claimant's application to amend to include a claim of victimisation. That application was refused. The tribunal considered how its discretion ought to be exercised in accordance with the principles set out in the case of **Selkent Bus Company Ltd v Moore [1996] ICR 836**.

16. This was a completely new claim. During the case management process the claimant had expressly ruled out that she was pursuing a complaint of victimisation in March 2020. The issues were discussed at further preliminary hearings with no suggestion by her of a complaint of victimisation. In the circumstances, the tribunal must consider the question of time limits. The addition of the complaints of victimisation is significantly out of time. The claimant cannot say that new evidence has come to light which shows that she was treated adversely because of a complaint she made of discrimination. The application is made at the latest possible stage. The claimant already has significant discrimination claims covering the pleaded facts. The tribunal had to consider the balance of prejudice in that context. On the other hand, if the victimisation claim was allowed to proceed, the respondent would be significantly prejudiced. There was still a need to identify what exactly constituted the protected acts and for the respondent to deal in evidence with the knowledge of the decision makers of those protected acts and whether their decisions were influenced by them. That is not evidence which the respondent has come to this hearing prepared and able to present. The balance of prejudice is therefore in favour of refusing the application.

17. On 27 February 2023 the claimant made an application for the hearing to be postponed. This came after the completion of all witness evidence and before the tribunal heard final submissions. The claimant wished to refer to task data records which she said showed the tasks she had been completing on each day at work. It contradicted, she said, what the respondent was about to say in its submissions, based on the written document already provided to the claimant. The tribunal explained that this would be new evidence. These documents were not before the tribunal. They were not in the original bundle and were not part of the additional documents the claimant had requested during the course of the hearing to be added to the bundle. The claimant said that she had understood that the tribunal did have these documents and that they had been sent to the tribunal at some earlier date by the respondent's solicitors. On checking the file, it was clear that this documentation had not been received by the tribunal and in any event disclosure is an exercise to be conducted between the parties.

18. On considering the notes of earlier preliminary hearings, there was an order for the disclosure of task data to the claimant and the parties were to agree how this would be presented to the tribunal. The information appeared to have been voluminous, such that, in PDF format, it would comprise of 11,000 separate pages. However, it appeared that the information could be viewed through an Excel spreadsheet. In any event, this was not something the tribunal had. Mr Williams, on taking instructions, confirmed the order for disclosure, but that Employment Judge Miller had said that it was not for the respondent to decipher those pages to the claimant and that there had been no request from the claimant for any of this documentation to be put in the bundle. The tribunal noted that the claimant did refer to information about

the transactions she undertook as being evidenced by task data. She gave an example in her second witness statement of the tasks she had completed in late July through to the end of August. The tribunal also recalled that the claimant had referred to specific dates in January 2019 but without referring the tribunal to any documentary corroboration. Fundamentally, at this stage of the proceedings it was for the claimant to make an application to admit this evidence as an effective application to postpone the hearing, as there would be the need for time to be taken to provide the documentation in an accessible format and most importantly, if the claimant was to make submissions on such information, the respondent's witnesses would in the interests of justice have to be given an opportunity to be recalled to deal with whatever the data showed. The claimant had not put the task data to any of the respondent's witnesses and that data it appeared from what the claimant was saying to involve the actions of a number of team leaders who had appeared as witnesses. The claimant said that she had not put any information from the task data to the respondent's witnesses because they had not themselves referred to it in their witness statements. Following an adjournment, the claimant duly made an application to postpone.

19. That application was refused. It has been suggested by Mr Williams that the claimant's application was prompted by her understanding of his closing submissions and her realisation that, in the evidence, there was a lack of specific and clear evidence of the work she had been doing. Even supposing that the document did show what the claimant said, e.g. specific examples of the work she had been doing to show that the respondent's witnesses had given false evidence, there was no direct evidence relating to the task data in her witness statement other than at paragraph 100 of her second witness statement as referred to above. Save for that paragraph, the claimant had not addressed in her witness evidence what she had been doing for specific periods. The claimant had all of the task data when she prepared her witness statement but did not approach her case in the way she now wished to and had not explored any specific examples with the respondent's witnesses. He submitted it was too late in the hearing to do so now. He submitted that to grant a postponement now would ride roughshod over the tribunal's overriding objective. Even accepting that the document might have some relevance, the claimant had had a chance to have it admitted as evidence. If the tribunal granted a postponement, this would mean inevitable delay in circumstances where some witnesses have left the respondent's employment and further witness statements would need to be taken. It was not for the respondent to produce more documents, but rather for the claimant to decide which documents she wished to use. She had not asked for the documents to be before the tribunal.

20. The tribunal refused the application for the reasons set out by Mr Williams. In particular, the claimant had the relevant documents from the commencement of the first day of the hearing and had an opportunity then and before the resumed hearing to ask for it to be put before the tribunal in circumstances where she had selected other documentation which had been added to the bundle of documents. The claimant had the ability to

deploy the information within the document in questions asked of each of the respondent's witnesses. She had not done so in circumstances where she was well aware of the importance of putting her case and any supporting documentation to the respondent's witnesses. The claimant was aware that the tribunal did not have these documents. The admission of these documents would involve an adjournment and significant additional time and cost for the respondent together with the inevitable delay in a hearing which has already gone part heard on 2 occasions. Considering all of these factors, it was not be in the interests of justice to grant a postponement which was a necessary step to be taken if these documents are to be put in evidence and the respondent given an opportunity to answer them.

Facts

21. Having considered all relevant evidence, the tribunal makes the findings set out below. The evidence before the tribunal has been voluminous. A failure to refer to any particular aspect of the evidence does not mean that it has not been considered by the tribunal. The tribunal, at times, recites the competing positions of the claimant and the respondent's witnesses. It has resolved any conflicts of evidence only when material to the sole issue now before it. The findings of the tribunal are lengthy and have been difficult to draft in circumstances where evidence was presented and cross- examined on with reference to a large number of separate complaints (all but one of which is no longer pursued), where the reasonable adjustment complaint was only one of many, but where issues relating to the claimant's duties did arise and overlap with some of her other complaints. The tribunal has striven to refer only to matters where issues of the claimant's fitness and duties arose, save where it is helpful to provide some additional information by way of context. It must be appreciated that the claimant over the relevant period raised a considerable number of separate grievances and grievance appeals and was also taken through a number of disciplinary processes. At times a number of grievances were raised before an existing grievance/appeal could be resolved. Sometimes grievances were about the same matter already under some form of investigation. The tribunal has not attempted to provide a record of all the internal processes. The respondent's managers, against this background, struggled to manage the claimant and at times recollect specific events. The claimant did not throughout the period (or before the tribunal) always adopt consistent positions or make her position clear. Her reaction to events during the period of her employment to which this claim relates was not always calm and constructive.

22. As a distribution centre operative, the claimant was responsible for helping ensure a steady flow of goods (ASOS clothes and accessories) through the respondent's warehouse. Her role required her to get involved with inbound goods, outbound goods and stock control. In particular, the claimant was expected as part of the stock team to deal with returns (including "returns put away"), audit stock, complete quality control checks, some tasks involving the use of radio-frequency/arm mounted terminal guns.

23. The respondent conducts formal training of employees (of which it keeps records) as well as more informal on-the-job training, which is not necessarily recorded. Training is normally refreshed each year and, if employees move departments, they may be expected to complete additional training as part of their new role. For instance, there is training specific to the stock team, such as stock auditing. This covers low stocks, empty locations, picking exceptions and stock-take. The claimant had completed all the mandatory training that any employee in the stock team would be expected to complete. There was, however, an ongoing dispute with the claimant regarding the training she needed to do a greater variety of tasks.

24. The claimant was managed by a group of team leaders. The respondent operated two different shift patterns. For each group of employees within each pattern there were a number of team leaders who changed on a daily basis. The team leaders reported to shift managers. Over the period of this complaint the claimant was managed by a significant number of different team leaders. The key shift managers she worked under were Mr Skelding and Mrs Gaffney. Save where stated to the contrary, the various managers referred to below were those team leaders and shift managers. The respondent's team leaders shared responsibility for the day to day management of the claimant, including allocating her duties or, for instance, chairing capability hearings. All shift managers had access to a "restrictions tracker" on which is recorded the tasks/duties which employees should and should not complete if they have any relevant medical conditions. From 2017, notes of any relevant meetings, risk assessments or occupational health reports were sent to HR who updated the restrictions tracker. From 2020 shift managers also updated restrictions trackers themselves. Shift managers updated team leaders on any restrictions tracker changes at any briefing meetings or by email. The tribunal has, however, seen no such emails regarding routine changes affecting the claimant. Latterly, team leaders could view more limited information on restrictions directly.

25. The claimant, it is accepted, was a disabled person arising out of a knee condition.

26. The claimant alleges a failure to make reasonable adjustments from February 2017 up to January 2020. The claimant confirmed, however, that she was not saying that from February 2017 the respondent consistently failed to make adjustments. She said that adjustments had been in place in the beginning, but then they were not followed. The claimant confirmed that she was not saying that she couldn't walk or stand whilst at work, but rather that she was disadvantaged if she had to do these activities for long periods.

27. The claimant had been absent from work with bad knee pain from 27 January to 7 February 2017.

28. The claimant complained then of being sent home on 7 February 2017. The claimant accepts that she had been absent from work due to sickness with a sick note covering her absence until 10 February 2017. She decided to return to work on 7 February, as she felt fit to work, but was sent home by her shift manager, Joanna Stadnik. The claimant's case is that Ms Stadnik told a team leader, Michael Parkin, to inform the claimant that she was being sent home. The claimant had, she said, seen Mr Parkin for a return to work interview during which the claimant had informed him that she had a recurring problem, explaining a previous accident at work. He had told her, she said, that he needed to speak to Ms Stadnik and the claimant had later then been sent home. Mr Carman's evidence was that the claimant was advised that working might adversely affect any condition and the respondent owed her a duty of care. Before the tribunal, the claimant accepted that the decision of the respondent to send her home was because of her knee.

29. On 14 April 2017 the claimant submitted a payroll query sheet about this occasion. She said that she was promised that she would be paid for the day she attended work, but she hadn't been paid. When put to her in cross-examination that she knew she had been sent home because her sick note covered her for 4 more days, she agreed. She then said, however, that if she declared herself as fit, she should have been allowed to work. She said that she had telephoned the HR helpline, who said she could return to work.

30. An incident occurred on 30 March 2017 involving the team leader, Joseph Carman. The claimant was working in "Pick Lock", which involved her going to locations where pickers had confirmed stock was missing or there to be an issue with the stock. If stock was actually found and needed labelling, operatives carrying out this role were to return to floor 3 or the floor 5 inventory pod to confirm that the stock was correct and label up the quantity needed. The tribunal has been referred to a record of an informal discussion between Mr Carman and the claimant on that date, which the claimant countersigned. This referred to the claimant coming across a box of 92 units with labels thrown in the box. The claimant had not, however, then labelled these up. It was recorded that the claimant explained that she was tired of doing other people's work and someone who had left site before her had failed carry out the task. Mr Carman is recorded as explaining to the claimant that she should have completed the task and reported the matter to her manager. His evidence to the tribunal was that he explained to the claimant that the individual, who had not labelled the 92 items, as they ought to have, had been spoken to. He said that the claimant should have completed the task and then reported it to him. The claimant, on being cross-examined, repeated that she had not undertaken the task herself because she was tired of rectifying other people's errors.

31. The claimant was absent from 6 to 8 May due to back pain, returning to work on 10 May. On that day she had been given alternative duties by Mr Carman with a comment in the return to work meeting that they would look

into the possibility of physiotherapy. The claimant said that she told Mr Carman that she was suffering from lower back pain because she was bending her back instead of her knees. She told the tribunal that, if she could not undertake manual handling correctly, this should have been discussed further. Mr Carman told the tribunal that whilst the claimant's absence was due to back pain on this occasion, he knew about her knee issue and tried to restrict her duties to help her. Any long-term changes in duties, however, required the claimant to see Occupational Health. In response to questions from the tribunal, Mr Carman accepted that he had just put the claimant's restricted duties in place temporarily, rather than in reaction to anything which was put on the restrictions tracker. He said that he had cascaded that information to the other team leaders.

32. Mr Carman confirmed to the claimant that he would arrange alternative duties for her and he completed the occupational health referral form and sent it off on 6 June 2017. His evidence was that the claimant had been given lighter duties. He told the tribunal that these included returns counts, a role which was all completed on level 3 (thus avoiding using stairs) with no bending or lifting and with the racking consisting of 5 shelves, potentially "empties" which involved moving empty boxes and Pack QC, which was a quality check of a percentage of packages leaving the site and which could be carried out standing or sitting at a desk, albeit he couldn't specifically recall if he allocated that type of work to the claimant. His evidence is accepted. Mr Carman told the tribunal that he couldn't recall if and when those duties were put on the restrictions tracker, which he said he never looked at, nor had access to. He told the tribunal that the duties operatives could undertake were normally cascaded down verbally. It was clear from his evidence that team leaders receiving information by email was uncommon. He referred to emails normally being sent to shift managers, for instance, if there was an occupational health or physiotherapy report. Information would then be cascaded down to team leaders by them.

33. In cross-examination, the claimant raised with Mr Carman that she had received a record of conversation from Gary Hornshaw on 31 May after she received a low KPI rating for work that day on "empties". The claimant raised at a grievance meeting on 19 December that Mr Hornshaw had been sending her in May to jobs no one else wanted to do. When she told him that her back and knee hurt, he responded that, in that case, she needed to speak to her team leader about an occupational health appointment. The claimant put to Mr Carman that she had contacted Mr Carman because Mr Hornshaw had said that she needed to go through occupational health. Mr Carman said that he couldn't recall that it was the claimant who asked him to refer her to occupational health, but accepted that most likely he did have that conversation.

34. Mr Carman also referred the claimant to the respondent's on-site physiotherapist on 10 May 2017. The claimant saw the physiotherapist on 15 May. The advice recorded was to reduce walking and that prolonged standing was also an aggravating feature. Mr Carman told the tribunal that,

in the case of any kind of pain experienced by an employee, an initial referral would be made to see the physiotherapist.

35. The claimant did not, however, hear anything back from occupational health regarding any appointment. Mr Carman's perspective was that he had made the referral and, as a team leader, the matter was then out of his hands. He said he was not chased up by the claimant until much later in the year. Team leaders were not routinely sent copies of occupational health reports. They went to HR and the relevant shift manager. Around the end of 2017/early 2018, Mr Carman moved to a different role with no longer any line management responsibility for the claimant.

36. On 15 August 2017, Mr Carman completed the claimant's Personal Development Review ("PDR") recommending that she undergo training in "Pack Accuracy" and "No Sku Areas". He arranged for her to attend Pack Training and Stock Auditing training (which covers SKU queries) in August 2017 and Dispatch Packing in October 2017. She was assessed as mostly meeting expectations. There was no discussion of any problems regarding the claimant's health. The claimant said in cross-examination that that was not part of the PDR and the previous month she had been referred to occupational health. The claimant later also completed a training module entitled "No SKU Areas" on 29 May 2019.

37. On 19 September 2017, the claimant advised the respondent that she was taking medication for knee pain. An absence counselling form was also completed as a result of the claimant having two periods of absence within a six month period.

38. A return to work interview was completed on 19 September 2017 by Mr Sadowski, team leader. He had noted that no alternative duties would assist the claimant in an absence call log of 15 September. He confirmed at a subsequent grievance meeting that he had emailed occupational health requesting a referral and that the claimant had been offered a stool whilst completing Pack QC work, but had refused the offer as the stool was uncomfortable. The claimant's position was that she had approached Mr Sadowski to make the occupational health referral because Mr Carman, had, in her words, "done nothing".

39. The claimant disputed the content of the return to work meeting. Whilst the claimant had signed the form, she said that she only saw the document at a later stage, suggesting that some information had been filled in later. Her evidence was that she had not declared herself as fit. Mr Sadowski was making his own assertion that, if she was at work, she was fit. On balance, given that it was signed by the claimant, the tribunal considers this to be an accurate summary.

40. The claimant was absent due to flu in November 2017.

41. The tribunal has seen a typed note signed by Glyn Holmes dated 21 November 2017. He described being approached by the claimant after the shift briefing on 16 November and the claimant requesting a change of tasks, as she had been on the same task the previous day. He noted that he had advised her to stay on her assigned task for the time being and that he would call back around 15 minutes later for her to then undertake accuracy checks, once the shift was up and running. He noted from the electronic records that the claimant had swiped out and not completed any tasks since 4pm. Having spoken to security, he noted that the claimant had left site without telling any of her team leaders. In cross-examination, the claimant said that, after the incident, Mr Holmes had apologised and said that he had not been aware that she had restrictions on her duties. Her evidence was that he said that no one had told him that she had any health problems. This evidence is not contested.

42. Mr Parkin (one of the claimant's witnesses in these proceedings) had then conducted an investigation interview with the claimant on 21 November 2017. His notes, which the claimant countersigned, record her as saying that she left her work, because she was annoyed and not feeling well. She said that she had not been feeling well for about a year. Also, she explained that she was not happy with the tasks that she had been given. She said that she had a problem with her knee and had been referred to occupational health in the June. Mr Parkin asked if her feeling annoyed was caused by her knee pain, with which the claimant agreed. She said that she was asked to wait for some work involving accuracy checks, which she thought was pointless, so she decided to leave rather than be caused to have back problems as a result of the job she was on. The claimant said that she had not raised her concerns about the lack of an occupational health referral to her shift managers. When asked why she had not informed her team leader that she was leaving work, she said that she didn't want to go back to the POD and thought that there was no reason to do so. Mr Parkin interviewed Mr Holmes on 22 November. Mr Holmes commented that he had checked with other team leaders on the shift to see if the claimant had notified anyone that she was leaving site or given a reason for leaving on 16 November, but he learned, he said, that she had not.

43. Mr Parkin's finding was that the claimant had knowingly abandoned her position with the intention of not returning. She had no intention of completing a shift and showed no regret in doing so. He directed that the matter be progressed for disciplinary action.

44. When asked why she had not raised a grievance against Mr Parkin, the claimant said that when she raised a grievance in November 2017 this was against Mr Carman and Mr Sadowski, as they were constantly sending her to do tasks despite her issue with her knee. Following the incident of her leaving work without authorisation, she said that Mr Parkin had done a risk

assessment for her, something she doubted that anyone else would have done.

45. Sarah Peterson of the Community Union emailed Victor Omokhomlon, copied to Ms Alison Field of OH and Mr Carman, on 22 November saying that she had spoken to the claimant regarding the claimant not having a chair and waiting to see Occupational Health. She said that the claimant had been put on restricted duties until that appointment came through, but that this appointment had been requested a long time ago, around May/June. She asked if they could ensure that the claimant had the use of a chair or perching stool until then. She said that the claimant had been told that she could not have a chair as she was not pregnant and did not have a back problem, but Ms Peterson noted that the claimant did have ongoing issues with her leg which required her to sit down at regular intervals.

46. On 22 November, the claimant raised a grievance about her team leaders, including Mr Carman, allegedly victimising her. From that date the claimant was placed on restricted duties. She agreed in evidence that from that date she did not walk or stand for prolonged periods, but then said that the restricted duties were in fact not later accommodated. She agreed, however, that if the respondent had kept its promise and she had not had to walk or stand for as long, then she would no longer have been disadvantaged by her disability. Occupational health had wanted to see the claimant following her referral for x-rays which was yet to be completed. The claimant confirmed that these were booked in to take place in November, but, in any event, they did not provide any clarity.

47. As referred to, a risk assessment of the claimant was conducted by Mr Parkin on 23 November. Walking was said not to cause any issues and movement could improve pain level. The claimant could bend, but repetitive bending put a strain on her lower back. She struggled lifting heavier weights which put increased pressure on her knee. Perching on stools for a long period of time could exacerbate pain. Kneeling increased pain significantly, as did crouching or squatting. Mr Parkin noted in some further comments that certain audits that required prolonged periods of kneeling or being stationary, such as stock-take and returns counts, aggravated the claimant's symptoms. The risk assessment document recorded that walking did not cause any issues. Repetitive bending was in fact the issue. Reaching and stretching were recorded as having no direct effect, although the claimant should avoid overstretching. As regards kneeling, crouching or squatting the claimant should avoid spending prolonged periods in the same position. Whilst not consistent wholly with previous information provided, this was an accurate record. The claimant agreed in cross-examination that, looking back to 2017, her condition had since got progressively worse.

48. On 30 November, Ms Field responded to Ms Peterson's email saying that the claimant had been referred to occupational health in June and asking

what treatment and management of her symptoms she had had. She also asked whether a risk assessment had been done. Mr Carman responded that day saying that Mr Parkin had conducted a risk assessment on the claimant and that she was currently undergoing x-rays due to suspected cartilage damage in her left knee. He asked if an appointment with occupational health could be booked. Ms Field asked that an appointment be booked once the claimant had the results from her x-rays.

49. Mr Skelding, shift manager, accepted in his own evidence that the claimant shouldn't have had to raise a grievance for consideration to be given to the duties she was able to perform. They should have been identified in a return to work meeting.

50. Miss Placha joined stock control as an additional team leader at the end of November/beginning of December 2017. Before the end of 2017 she understood, from a conversation with Mr Parkin, that the claimant had restricted duties. She told the tribunal that he sent her and Mr Sadowski a copy of a risk assessment for the claimant. She couldn't recall now what the claimant's restricted duties had been at that time.

51. In late 2017/early 2018, Mr Skelding thought that Miss Placha had added a tab on the task frequency document (accessible directly by team leaders) to highlight any individual's restrictions.

52. Mr Skelding was appointed as grievance manager and saw the claimant on 19 December, arranged then as she had a disciplinary hearing that day and it was considered most convenient to hear both on the same day. The claimant made it clear that her grievance concerned all team leaders and the respondent's management in general. She was concerned about the provision of a chair and stool, the occupational health referral that she had discussed with Mr Carman and her knee pain. She suggested that Mr Sadowski had made a joke that she was eating, which would violate the respondent's contraband rules. She also discussed the respondent's approach to holidays and holiday booking. Mr Skelding met with Mr Carman and Mr Sadowski to put the claimant's allegations to them.

53. Mr Carman met with Mr Skelding indeed on 19 December and discussed the claimant's knee problem. He confirmed his previous involvement in completing a return to work following an absence for back pain in 2017 and his completion of an absence counselling form on 10 May 2017. He reported referring the claimant to occupational health on 6 June, that he had put the claimant on lighter duties and that the claimant had not come back to him to ask for a meeting with OH. He referenced OH suggesting that they wanted to see the claimant following her referral for x-rays. He confirmed to Mr Skelding that the claimant did not mention to him any tasks which she felt she could not do. He confirmed that, when he was running the shifts the

claimant worked, he kept her on lighter duties. Once referrals to OH were sent, team leaders and shift managers are not made aware of any appointments made by OH. These are sent straight to the person needing the referral. Mr Carman eventually became aware that the claimant had her OH referral in January 2018, as referred to below.

54. On 19 December Mr Sadowski told Mr Skelding that he had completed a return to work for the claimant on 19 September and that she had not suggested that she was struggling to discharge any particular tasks. He said that if she had, he would have flagged it up on her return to work form. He confirmed that he had emailed OH requesting a referral and that the claimant had been offered a stool whilst completing Pack QC tasks but had refused the offer as it was, she had said, uncomfortable.

55. A disciplinary hearing was indeed also held by Mr Skelding on 19 December. The claimant expressed her view that her disability was linked to her ongoing grievance. As a result, he agreed to adjourn until the grievance had taken place. The grievance outcome was communicated to the claimant on 20 December such that Mr Skelding wrote to the claimant on 5 January 2018 seeking to reconvene the disciplinary. It was then reconvened on 10 January 2018. The claimant, on discussing why she had left site on 16 November, said that she disliked the task she was allocated and, although she was instructed to wait for another task, she left site before this was allocated to her. She referred to her having raised her knee problem previously, but having been ignored. She commented that she "just had enough" and knew she had made a mistake. She realised now that if she had gone back, she would have been allocated a different task. The claimant was given a verbal warning to remain live for a period of 6 months and with a right to appeal.

56. The claimant said that the roles she struggled with were stocktake, low stock, hanging counts and return counts. Mr Skelding believed that these were added to the restrictions tracker in December 2017. The claimant had said what she couldn't do – any other tasks were, therefore, regarded as ones she could do. The claimant's position before the tribunal was that she couldn't do heavy lifting, yet there were other tasks allocated to her which did involve that – supplier checks, consolidation and accuracy checks. Mr Skelding said then that he could not recall what was put on the restrictions tracker.

57. As already referred to Mr Skelding had reconvened the grievance meeting with the claimant on 20 December and set out that the respondent was going to put additional criteria in place to make the restricted duties process more effective, namely ensuring that they were added to a restrictions tracker and that all team leaders were aware of the restrictions. He confirmed that the respondent would place the claimant on restricted duties and that she had the right to appeal. The claimant did not in fact exercise

that right. Mr Skelding's evidence was that the claimant confirmed that she was happy with the respondent's approach. The tribunal accepts that this was her position at that time. He believed that she regarded the matter as concluded. An arrangement was made for the claimant to see OH.

58. On 22 December Ms Gaffney, shift manager, emailed Ms Field, Mr Parkin, Mr Carman, Mr Skelding and others asking if the claimant was booked in to see occupational health yet. If not, she asked that an appointment be booked, saying that the x-rays results had been inconclusive. She continued that the claimant had provided a statement of fitness to work that day with the doctor advising that she may be fit with amended light duties, had been referred to a physiotherapist and would be undergoing further scans. Ms Gaffney said that as the statement was valid for the next 6 weeks, they would like further advice to determine a set list of tasks that should be undertaken with this type of injury, how frequent any job rotation should be offered and if they could offer any further in-house support.

59. The claimant saw the physiotherapist again on 19 January 2018. The claimant mentioned Pack QC duties but also a task known as "consolidation" it being noted that she sometimes struggled moving locations. There was a further reference to heavy boxes. The claimant told the tribunal that she had been given work on consolidation which did involve lifting heavy boxes. The claimant was also taken to a physiotherapy report of 19 January 2018 which referred to the claimant's MRI scan. This referred to her being on "full duties but amendments". Again, the claimant disputed that she had been advised by the respondent that she was on restricted duties. She had not seen this document until a preliminary hearing in these proceedings. She had, however, been informed of restrictions previously by Mr Skelding.

60. Occupational health produced a report on 22 January 2018 following an examination of the claimant on 17 January. This referred to the claimant's x-rays, physiotherapy and the things she was able to do. It was recorded that the claimant was able to manage her current duties without difficulties. The claimant disagreed in cross-examination. She said that she had only seen this OH document in July 2020 and disputed the content. She said that she had complained about the tasks she was undertaking. She referred, for instance, to a reference in the report to her having had bloods taken, which was inaccurate. She also questioned the reference to walking being a hobby of hers. The report recommended that the claimant's duties be rotated to avoid prolonged periods of kneeling and that she be referred to a physiotherapist. The tribunal cannot accept that the OH report was inaccurately completed in the way the claimant contends. There is no evidence that the OH report was invented or any suggestion as to why that might have been done. The claimant, when she saw such report was having to recall events a significant time earlier in circumstances where, over time her condition had worsened.

61. Mr Carman said that he had no recollection of getting any information arising out of that occupational health report from either of the shift managers, Ms Gaffney or Mr Skelding.

62. Following a sickness absence, Mr Skelding conducted a return to work meeting with the claimant on 7 February 2018. He noted that the claimant suffered from knee pain and that she had been referred to occupational health and for physiotherapy. He also flagged that the claimant was on restricted duties, which he told the tribunal would involve limited picking, tasks that involved limited standing/walking and that these had been added to the restrictions tracker. Given the claimant's level of absence he had referred her for an interview of concern which was he said the respondent's standard approach.

63. The claimant told the tribunal that she had been absent from work because she had been sent to do a stock-take and accuracy checks which involved lifting heavy boxes. The claimant's position was that she did not in fact know she was on amended duties. When pointed out that she had signed the form, she said that the first and third part of the form was signed, but she did not have access to what had been written down about her. She did not see the second part. The tribunal believes on balance that, given her signature, the form was accurate.

64. The claimant was absent due to stress in February 2018. She expressed an unwillingness to discuss her stress with the respondent on her return to work.

65. Also, in February 2018, the claimant was suffering from toothache and left part-way through a shift.

66. On 13 March Mandy Hague, HR Administrator, asked team leaders to look at the restrictions and if anything needed to be amended. Ms Gaffney asked whether it was possible to book an occupational health review for the claimant as the original restrictions on the tracker had expired. It was put to the claimant that, in terms of her capability, the situation looked to be the same as described in the occupational health report. The claimant said that she recalled the conversation with Ms Gaffney, saying that Mr Skelding was there and she was asked how she was managing her duties. She said that there was no discussion about the occupational health report. Ms Gaffney asked on 13 March for the restrictions to be extended to 10 April. She referred to the claimant having attended an external physiotherapist appointment that morning with another upcoming on 5 April.

67. On 14 March 2018, Glyn Holmes, team leader, wrote to the claimant to invite her to a stage 1 interview of concern because of her unsatisfactory level of absence.

68. The claimant had that meeting of concern regarding her attendance on 20 March 2018 conducted by Miss Placha, with Mr Holmes in attendance to take a note**.** The claimant said that the respondent had done nothing to help in relation to her knee, referring to Mr Sadowski putting her on stock-take when she told him that she couldn't do it. She said that she had complained to HR about this and, when asked if it had been resolved, she said it had been and she had been sent to occupational health. She criticised the delay in her going to occupational health - she said that she had been waiting for 6 months for an occupational health meeting. When asked what the respondent could do to help, the claimant suggested that it could continue to implement the task restrictions that Mr Skelding and Ms Gaffney had previously observed. When put to the claimant that she made it clear that she still had the restrictions in place, she said again that there were some restrictions during all this period of time, but they were not fully accommodated. This was not reported by the claimant at the time. The potential reasonable adjustment regarding stock-take was that the claimant should not be doing as much of this work, not that she should not be doing it at all. There was reference to her speaking to Mark Holmes and Angela Gaffney, where she did not say that she could not do stock-take, but that that if she did too much she would be in great pain. The claimant had stopped taking medication for her knee as she explained that this caused her side-effects and she had changed to a different medication.

69. After an adjournment, the claimant said that she felt let down by HR and the on-site physiotherapist as he hadn't even checked on her knee, but rather just asked questions. Miss Placha asked the claimant whether a department swap would help her and suggested a switch to packing. However, the claimant was not interested. Miss Placha evidence is confirmed by the notes where the claimant did not express an interest in a move including when it was with reference to her doing Pack QC. She asked the claimant whether there was anything else the respondent could do to support her and the claimant suggested there was not.

70. The claimant received a stage 1 warning on 17 April, which she did not appeal. She told the tribunal she never in fact received any outcome. There is no evidence, however, that she was chasing this up following the meeting.

71. On 5 May, the claimant met with the physiotherapist who reported that the claimant was capable of discharging her full duties, but with amendments. In May 2018, the claimant was discharged from physiotherapy, because of her non-attendance. The claimant said that she had not seen this discharge document and had not been told about these appointments.

72. The claimant said (as reflected in a contemporaneous handwritten statement she made about another employee's behaviour)) that on 16 May 2018 she had been sent to picking exceptions on floor 6. Mr Skelding accepted that, as a hanging location, she ought not to have been sent there

due to the requirement to use steps. She could, however, he said, work on picking exceptions elsewhere.

73. An investigation did take place in respect of the claimant from 29 May 2018 conducted by Miss Placha. The investigation report referred to the claimant not accurately counting the number of items physically present and not following the stock auditing standard operating procedures. The claimant was interviewed on 30 May 2018 by Miss Placha. Kerry Wilshire, another Inventory Team Leader, was also present and asked the claimant questions as well as Miss Placha. Although the claimant expressed her view that the systems logs did not tell an accurate story, Miss Placha considered that there was a disciplinary case for the claimant to answer. The claimant did during the meeting, she noted, accept that she may have pressed the wrong button and miscounted. The matter was then referred to Mr Skelding who conducted a disciplinary hearing with the claimant on 26 June.

74. At that hearing, an allegation of gross misconduct in the falsification of company records was put to the claimant.

75. The claimant attended a return to work meeting following an absence related to her knee on 5 June 2018. She was then restricted to Pack QC. It was recorded that the claimant was able to walk and there were no issues to highlight in respect of reaching/stretching.

76. A further risk assessment was also undertaken on 5 June 2018. It was noted that the pain in her knee was made worse by prolonged periods of activity, but generally not as bad as being immobile (stood) for long periods. Sitting was said to help relieve the pain. Again, kneeling, crouching and squatting were noted as increasing joint pain.

77. The outcome was that the claimant was restricted to performing tasks when seated. Pack QC was the only task available. When put to the claimant that there was never any recommendation that she always had to be seated, but rather that she should walk less and stand less, she said that, if Pack QC was not available, she could do other tasks. She said that she would rather be walking than standing in the same place. Moving, as long as not excessive, and bending her knee a bit sometimes made it feel better.

78. By letter of 26 June 2018, Mr Skelding informed the claimant that due to a failure to follow the correct process (a reference to Ms Wilshire and Miss Placha both asking the claimant questions during the investigation meeting) no further action would be taken on the gross misconduct charge.

79. A further disciplinary incident arose in July 2018. On 31 July Mr Parkin, made a statement that on that day the claimant had approached him to report an issue she was having on Pack QC. The claimant had reported sourcing a chair so that she did not have to stand so much whilst carrying

out the work, but that, whilst collecting packages to check, someone had taken the chair and swapped it with one which was broken. Mr Parkin went with the claimant to inspect the chair, which he believed was fit to use, with only cosmetic damage. He told the claimant that the chair was safe to use and, as she couldn't identify the person who took the original chair, he couldn't take any further action. The claimant had then argued that the chair wasn't suitable as it didn't have wheels, which she wanted so that she could move it around more easily. Mr Parkin explained that the chair wasn't designed with wheels and was suitable for the task she was carrying out. The claimant said that, if she didn't have a chair with wheels, she would go home. After searching the packing area for a chair with wheels, Mr Parkin returned to the claimant and explained that he could not find one and she should stay in place. The claimant walked away and Mr Parkin believed that she was leaving the building. In fact, she had gone to the Community trade union office on site. Later, Mr Parkin received a message from another team leader that the claimant was working on Pack QC. He had checked her transactions and noted that she had not started working until 08:11, after 56 minutes of downtime from when she was due to commence her work activities at 07:15.

80. On 2 August. Miss Placha noted that the claimant still required amendments to her duties. The claimant in cross-examination said that she was promised things, but they never materialised.

81. The claimant was issued with a four week fit note from 6 August 2018 citing knee pain and saying that the claimant was fit with amended duties – sedentary duties and avoiding kneeling, lifting heavy boxes and bending from the knees if possible.

82. Miss Pancha conducted a PDR for the claimant on 7 August 2018. Two development actions were agreed, namely for Reject Spur and No SKU training to be completed within 12 months. Nothing was raised about the claimant not being able to do her job and there was no reference from her to amendments not being made to her duties.

83. The claimant was invited to a disciplinary hearing by letter of 8 August 2018 by Ms Gaffney. Ms Gaffney chaired the disciplinary hearing on 15 August. The claimant was accompanied by a union representative. The claimant said that she had seen a person swap her chair over and she had actually started work at 08:11. Her position was that it was impossible to have actually started work at 07:15, given the need to get a chair and collect parcels. She said that she believed that she did much more than she was supposed to do that day to compensate for the first hour at work.

84. Ms Gaffney wrote to the claimant on 16 August. She said that she concluded that the allegations against the claimant were unfounded and no further action would be taken.

85. A further risk assessment was completed for the claimant (dated 13 September) by Miss Placha. It was noted that there were no issues regarding the claimant walking. The assessment flagged that "any activities like prolonged bending, lifting heavy boxes, overstretching, kneeling, crouching, squatting, working at height for the duration of a full shift may cause pain." The same tasks were identified which she could complete "as in October 2018". The claimant disputes that this September risk assessment was undertaken and questioned how something identified in October 2018 could be being referred to in a September 2018 risk assessment. Miss Placha was clear that the assessment had taken place, but there could have been some mis-dating. That is more likely than not an accurate explanation – again, the tribunal cannot conclude that the content was made up. It was noted that the claimant had been diagnosed with Hoffa's Syndrome. In cross-examination the claimant said that she never had a risk assessment. She said that 18 September was the first time she had made the respondent aware of the Hoffa's diagnosis. It was put to her that this was just a doctor providing confirmation of something she had already told the respondent – i.e. the claimant had already told the risk assessor what she had been told by her doctor. Certainly, that is possible. Miss Placha identified that the claimant could undertake miss picks, picking exceptions and induct rejects for a full shift and low stock and return counts, both on the basis that she would be rotated after half a shift. She noted that the claimant could carry out Pack QC work, but only when this was possible - a reference to whether such work was available, including in circumstances where this was the only task in the department which could be given to pregnant women. Miss Placha told the tribunal that her position at this time was that the claimant could be rotated around all of those tasks. Miss Placha ensured these were added to the restrictions tracker and, as far as she was aware, they were observed by her colleagues.

86. On 15 September 2018, the claimant raised a grievance against Julie Martin, another team leader. They had had an argument and the claimant believed that Mrs Martin was rude towards her. Mr Holmes, the claimant's team leader at the time, was appointed as investigation manager.

87. On 1 October, the claimant attended a grievance appeal accompanied by her union representative, Jackie Steel.

88. On 9 October 2018 the claimant attended a grievance hearing before Mr Skelding.

89. On 9 October 2018 the claimant also attended a capability meeting triggered by her absence levels with Mr Skelding. There was discussion of a letter from Ashville Medical Practice's musculoskeletal department. Mr Skelding asked the claimant what duties she felt she could perform (Mr Skelding's position was that the claimant was only doing Pack QC at the time) and they worked through a number of tasks. She suggested that she

could do picking exceptions, miss picks, induct rejects, low stocks and return counts, but that she would struggle with stocktake, hanging counts and supplier checks. He confirmed that he would add these restrictions to the restriction tracker which would then be shared with the other team leaders. He also confirmed that he would start rotating her when Pack QC was no longer an option. Mr Skeding said in cross-examination that the arrangement was that claimant should be given Pack QC, unless all the available slots were taken up by pregnant or disabled employees, although he said that he couldn't recall if there were other employees with physical limitations at that time – the claimant's recollection was that only pregnant employees had been referred to. These restrictions, he told the tribunal, would all involve limited standing and walking. Kerry Hindmarsh, HR adviser, provided a letter of outcome dated 9 October. Mr Skelding's evidence was that although he confirmed that the claimant could be on rotating tasks, it was her responsibility to inform her team leader if she felt she needed to be swapped after a specified period of time.

90. The claimant did not say during the meeting that her restrictions had not been adhered to. She accepted that, at the time of this meeting, she was still on restricted duties. When put to her that she was saying that walking was not a problem, she said that generally it was not a problem, but excessive walking was and she could not do it every day. That is likely to be the message the claimant conveyed to Mr Skelding and (earlier) to Miss Placha – the claimant would not have said that unlimited walking was not a problem for her. Regarding struggling with accessing the fifth shelf, she said that she was okay with exceptions and miss picks. She said that she could do sin bins, but had not been trained. She agreed that she had confirmed that she was able to do a number of tasks. She had been told that she would be rotated. It was recorded that she was not sure about hanging counts. She agreed that she had said her knee was curable, but that she did not know any timescales, clarifying in cross-examination that this was the case only if she went for surgery. She agreed that Mr Skelding said she should let him know if she was ever struggling.

91. The claimant was absent from work again due to knee pain from 5-14 November 2018.

92. Ms Wilshire's evidence was that, on 13 November 2018, the claimant submitted a fit note suggesting that she might be fit for work. The note commented that the claimant would benefit from "sitting duties, but patient is aware the availability may be limited – in light of this in order to reduce knee pain and swelling from prolonged standing, reduced hours might be a compromise – to be negotiated between Ms Taskova and her employers". On 15 November Ms Wilshire completed a return to work form with the claimant. Her fit note was discussed. Ms Wilshire noted that the claimant had seen OH, but that the claimant felt it would not benefit her to go again. Ms Wilshire flagged that the claimant was already on amended duties (she couldn't recall now what those had been, but they were recorded on the

restrictions tracker and which Ms Wilshire told the tribunal she would have taken into account when allocating duties). As far as she was aware all of these were also observed by the wider team. Ms Wilshire described herself as relatively new to the Department and her understanding of the claimant's restrictions being what had been passed to her by her other colleagues. Ms Wilshire believed that the respondent could accommodate seated duties. She was not sure, however, to what extent the respondent had the capacity to allow the claimant to go on Pack QC, for instance. Ms Wilshire confirmed to the tribunal that she could accommodate task rotation, which is what she had been told verbally by other team leaders was required for the claimant. The claimant told the tribunal that she was on Pack QC, but had been put on tasks for a full week which required her to walk excessively. That had led to her absence. Mr Skelding told the tribunal that the respondent could accommodate the claimant being sat down (which would further reduce the amount of standing, picking and walking she was required to do).

93. The tribunal has been taken to an email chain commenced by Mandy Hague, HR administrator, on 15 November quoting from the aforementioned 13 November 2018 sicknote and asking if the doctor's suggestions could be accommodated. Mr Bates, senior operations manager, replied: "Not really, all of the tasks of a DCO on stock will involve walking and climbing upstairs which is likely to exacerbate her condition…" He asked for more information about the suggestion of reduction of hours. Ms Hague responded 16 November saying that the fit note was dated from 13 November to 12 January 2019, that she had just called the claimant and she was requesting doing 6 hour shifts. Mr Bates replied again that he would rather look at normal part-time hours of 4 hours per shift, commenting that it should be better for the claimant's knee as well. On 19 November, Kerry Hindmarsh asked Mr Bates to confirm if he was happy to accommodate the restriction and whether there was any flexibility with hours. He replied that he would again rather stick to the standard 4 hour part-time shifts. Ms Hindmarsh then asked Ms Hague to contact the claimant and, if the claimant agreed, to update the restrictions tracker with a note to review it in the first week of January. Ms Hindmarsh then emailed Mr Bates on 20 November saying: "it seems Mariana is actually back at work doing her full-time hours. She asked if a team leader or shift manager could have a conversation with her to find out what she required, saying that it seems strange that the claimant had submitted a fit note "stating all these restrictions yet she has returned to work full-time and presumably full duties?" Mr Skelding was then asked to have that conversation with the claimant. He reported back by email on 20 November that the claimant had told him that her GP had advised she be rotated from a sitting task to a walking/standing task daily. He then stated: "we would be unable to accommodate this due to the amount of pregnant colleagues." He said that her fit note "with the advisements" was until 12 January 2019. Ms Hindmarsh responded to Mr Skelding as follows: "so are you declining her restrictions in that case? Apart from what her GP has said, what does she actually feel she can do? If she is now back and working full-time hours unsure why she needs the restrictions…" Mr Skelding responded on 21 November saying that they

would be unable to action the GP's request for 1 day sitting down, then the next being mobile." Ms Hindmarsh completed the correspondence on 21 November stating: "So based on everything, I am taking it that we are not accommodating her fit note and she will be expected to work full-time hours (or 4) and work her full duties."

94. Ms Wilshire told the tribunal that it was her understanding that the claimant was never on full duties and there were always restrictions on what she could do. However, the claimant was absent again from 26 November and signed off as unfit until 11 December 2018 due to work related stress.

95. Mr Skelding's evidence was that they were able to accommodate the claimant being sat down, but as she was absent again from 26 November until 11 December, this resulted in her being invited to a further capability hearing on 12 December. On her return to work, Kerry Wilshire completed a risk assessment on 3 January. Ms Wilshire flagged that the claimant had undergone a previous risk assessment and had been placed on restricted duties, namely Pack QC. There was a discussion regarding the claimant's functional ability and, based on her answers and Ms Wilshire's understanding of her role, she considered that the claimant ought to be referred to OH. It was flagged by Angela Gaffney that there was a concern that the claimant would be unable to follow the correct manual handling procedures when lifting due to her knee pain, causing her to overstretch her back when lifting. Ms Wilshire's evidence was that the risk assessment and Ms Gaffney's comments would have been relayed to the other team leaders verbally.

96. Mr Williams, on behalf of the respondent submitted that a line could be drawn in November 2018, in that the claimant was already on amended duties and had confirmed that adjustments had been made. The claimant said that she did not deny that amended duties had been promised, but they were not always accommodated.

97. The claimant told Ms Hindmarsh over the telephone on or around 10 December 2018 that her restrictions and reduction in hours had not been accommodated.

98. On 11 December the claimant contacted the respondent's compliance office and raised a number of concerns including relating to personal data.

99. The claimant's evidence was that she was put on Pack QC on 3, 4, 5, 8 and 9 January, but then told that she could not be put on that work due to the number of pregnant employees. Ms Wilshire was unable to comment on that. The claimant said that she was then put on other tasks on 10, 11 and 12 January. She stated when cross-examining Ms Wilshire, that on 10 January she had worked on low stock for 4 hours and then picking exceptions. The claimant's detailed recollection is accepted.

100. The claimant subsequently provided a further sick note, such that Mr Skelding wrote to her again on 25 January 2019 inviting her to rescheduled capability hearing on 6 February. However, the claimant did not attend.

101. The claimant complains about being sent home on 6 February 2019. The claimant had attended a return to work meeting with Miss Placha on 6 February stating her reason for absence to be work-related stress. She disclosed that she was taking amitriptyline and Miss Placha recorded that the claimant would like to be referred for MIND counselling. It was also recorded that she was currently on restrictions and was fully fit to complete the tasks which had been recorded as restrictions. The claimant said that her restrictions had expired, but said that this had been the case back in January, yet she had been allowed to carry on working. She agreed that she was told that the restrictions now had to be revisited, but disagreed that she had been told that there was a need to understand why she had been off and how this impacted on the previous restrictions. When put to her that she refused to sign to confirm what she was able to do, the claimant said that her restrictions had expired previously and then been extended without her having to write anything down. When put to the claimant that she had elected to leave work, rather than been sent home, she said that she saw that she would not be allowed to work and felt bad after 3 hours of arguing about the issue. She said she had no option but to go home.

102. Although the claimant was at the time off work with stress, Miss Placha noted at the 6 February return to work meeting that the claimant was currently on restrictions and was fully fit to complete the tasks indicated on the restrictions tracker. Miss Placha's evidence was that, as the tasks were on the restrictions tracker, all team leaders would have taken them into account when allocating duties. The claimant agreed that the return to work document was accurate. She was happy to return on the basis of the October 2018 agreement. She agreed that the basis of this agreement was that she would work on Pack QC, but, if that work was not available, rotate on different tasks. However, there were times when she disputed that Pack QC work was not available. Mr Williams put it to the claimant that she was to rotate (only when Pack QC was not an option), but that she had taken the agreement to be that she would only do Pack QC. The claimant responded that it was that she would do mainly Pack QC. When put again that there was never a commitment to her that she would only do Pack QC, she said that the arrangement was that she would rotate, but only when Pack QC was not an option.

103. Mr Skelding's evidence is that the claimant refused to confirm to Miss Placha why she had been absent from work and did not sign her return to work form. Miss Placha spoke to Mr Skelding. He was conscious that the claimant had been on restricted duties, some of which had recently expired, and he wanted to clarify with the claimant what tasks she could and could not do. He did not wish to place her on duties that were contrary to occupational health advice or might exacerbate her knee condition, but the claimant refused to confirm the duties she could and could not discharge.

He asked the claimant if she could write down what she could and could not do. However, she refused. He arranged for Adele Simpson from dispatch to complete a risk assessment. However, the claimant left site. Mr Skelding told the tribunal that he did not send the claimant home - he was waiting for dispatch to record her risk assessment, when the claimant elected to leave. Mr Skelding's evidence was that Mr Philip Bates also tried to clarify with the claimant the duties she could discharge. Mr Skelding said that the claimant was not sent home on the grounds of her knee condition.

104. Mr Skelding asked about the claimant only doing Pack QC, saying that the respondent shouldn't agree to the claimant only that work and Phillip Bates' response was that the respondent couldn't commit to that type of work only, due to volume and the number of people already limited to Pack QC due to doctor diagnosed illness and pregnancy. He said that the claimant had to do some other duties alongside this. That position reflected what the October document had said. The claimant said that she couldn't do the duties it said she could, if she was having to do them every day. When put to the claimant that her illness was not the same every day and her needs changed, she said that it was usually okay when she was on amended duties, i.e. when she was on Pack QC. When put to her that she had never said that she could only do Pack QC, she said that in October, when she did full duties, she ended up sick.

105. On 11 February 2019, the claimant raised a grievance against Mr Skelding and Philip Bates saying that when she returned to work on 6 February after her period of illness and holidays, they bullied and harassed her.

106. Mr Lewis, head of inventory and inbound, subsequently discussed the concerns with Mr Bates and Mr Skelding. The interview notes record Mr Bates as saying that they just wanted the claimant to confirm what she could do verbally, not to sign anything. He denied saying that the claimant had to do full duties - he said that if she didn't tell them, they couldn't put her on jobs. Mr Lewis believed that the management team wanted clarification on the claimant's duties as the date for her restrictions had expired while she was absent from work and believed there had been some miscommunication as regards what was required of the claimant. He said that he also discussed the further training that was required and this would be arranged for the claimant in respect of rejects and miss picks.

107. On 13 February 2019, the claimant was signed off work until 13 March. On 20 February 2019, Mandy Hague wrote to the claimant to invite her to attend an OH appointment. When she returned, Miss Placha and Ms Gaffney completed a further return to work meeting. It was noted that the claimant had claimed to have gone home due to not being fit for work.

108. The claimant saw occupational health again on 12 March 2019. It was recorded that the claimant said that her restrictions had stopped following her absence. Her problems were not relating to stretching, but being on her feet for too long and bending her knees. There was a recommendation that the claimant rotated tasks and that there be a phased return to work of 6 – 8 weeks. Occupational health believed it was possible that the claimant could get back to her full duties. The claimant had no recollection of what was said at this meeting. When put to her that the theme of the meeting was not to do too much for too long, she said that she would need to discuss this with team leaders. The occupational health opinion was that the claimant was unlikely to be a disabled person.

109. When put to the claimant that she had been off mainly due to work-related stress, she said that this was not just about her mental health, but regarding the respondent not accommodating her duties.

110. Temporary restrictions were put in place. The tasks were the same as October 2018 i.e. that the claimant was to rotate performing other duties when no Pack QC work was available. When put to the claimant that she interpreted this as meaning that if Pack QC work was available, she was always to be put on it, she confirmed that was the case and said that such work was in fact available every day. When put to her that her managers were saying that it was not always available for five 7 ½ hour shifts, the claimant maintained that there was always the full 40 hours of Pack QC work available for her to do. When put to her what the point was of all of the other agreements, if it was always available, she said that there was sometimes no work in packing or problems elsewhere, so then there would be no work available on Pack QC.

111. Miss Placha started to chair a further return to work meeting with the claimant on 13 March 2019. As the claimant had been off work for knee pain, the respondent wished, she said, to ensure that the claimant was not placed on duties that might exacerbate her condition. As a result, they sought clarification with the claimant that she was fit for work. The claimant then left site. Miss Placha told the tribunal that it was her intention to ensure that the respondent continued to observe the claimant's restricted duties.

112. The tribunal accepts, on the basis of an email sent by Miss Placha on 18 March 2019 to the other team leaders and shift managers, that she completed a risk assessment with the claimant on 13 March. No copy of that risk assessment has been retained. In the email, Miss Placha referred to the claimant's restrictions being as previously agreed, stating that she could work full shifts on miss picks, picking exceptions and Pack QC "only if available" and be rotated when working on low stock and/or returns counts. Miss Placha noted that the claimant had said that she would be able to do No Sku, induct reject and sin bins, but needed to be trained.

113. At a subsequent grievance meeting chaired by Mr Lewis on 20 March 2019, there was a discussion of tasks the claimant could do. There were 6 that she could do and 2 where she said she needed training. It was put to the claimant that this was an opportunity where she could have said that she could only do Pack QC work. The claimant said in cross-examination that she knew that, when there were pregnant women, she would not be able to do Pack QC. She was not saying that she had agreed that she would only do Pack QC. The agreement was that she would do Pack QC if available, but that she could do other things and would be rotated anyway. She was complaining that she did not do as much Pack QC as she wanted. The claimant said that she did not remember this meeting. It was put to the claimant that it explained why she was routinely complaining, if she did not understand what had been agreed. The respondent was saying it had made adjustments and she was saying that they hadn't because she understood the adjustments to be something different from the respondent's understanding. The claimant responded that, yes, it was her understanding that she would be almost exclusively on Pack QC.

114. An outcome letter was sent to the claimant by Mr Lewis dated 8 April 2019. The claimant's account, as already referred to, was that on her return to work she was asked what duties she was able to do and, when she said the same as before, she was told that she was unable to return as she was not fit for work in that she could not do her full duties. She said that she had been asked to write a statement to confirm that she could carry out full duties, but was unable to do this. Due to this, she went home. It was noted that the claimant had now informed Mr Lewis what duties she could do and she had since been to see occupational health who recommended her to rotate her duties, avoiding prolonged standing and bending of her knees.

115. The claimant sent an appeal dated 12 April 2019 to Mr Mayne, general manager, saying that she believed the outcome was unfair. She said that her contract did not mention anything about writing statements whenever a manager asked her to do so. She said that she also felt discriminated against when she had been asked to carry out full duties in circumstances where there were colleagues who were constantly performing just one task.

116. On 20 April 2019, Ms Wilshire chaired a return to work meeting with the claimant following her absence between 15 – 19 April. Ms Wilshire highlighted that jobs had been rotated to support the claimant's issues. Ms Wilshire's evidence was that this would have also been added to the restrictions tracker and she had no reason to believe that it was not and not adhered to. It was put to the claimant that if it had been just intended that she would do Pack QC, there would be no need to rotate her. The claimant confirmed that she would rotate if Pack QC was not available.

117. It is noted that the respondent also arranged for the claimant to attend the on-site physiotherapist on 28 March, 11 April, 25 April, 9 May, 23

May, 14 June, 28 June, 12 July and 30 August 2019. Ms Wilshire told the tribunal that the respondent was keen for the claimant to be referred as physiotherapy had been identified by OH as a tool which might assist the claimant's recovery.

118. In May, the grievance appeal took place before Mr Keith Mayne, accompanied by Ms Finnie, relating to allegedly sending the claimant home. It was recognised that there was a need to make reasonable adjustments. There was a discussion of when she went home in February and the only seated job to be Pack QC. There was mention of the restrictions being short-term. When asked if the claimant always understood them to be temporary, she said that she was sometimes confused and did not know the exact duration of restrictions. When put to her that the goal was to get her back working without restrictions, she said that she did not think she would be able to do that.

119. Training requests for No Sku and induct reject were sent to the training team on 28 May and the No Sku training was completed on 29 May and again 20 July 2019. The claimant had suggested that she required training on certain duties including on miss picks. Mr Chris Lewis, questioned Mr Skelding in the aforementioned grievance investigation, who said that the claimant had already been trained on Pack QC and rejects, but that he would arrange for miss picks training. This was carried out in July 2019. A further request had been sent by Ms Wilshire on for induct reject training, but the claimant had not as yet received that requested training.

120. The claimant said that in June/July her restrictions had not been adhered to and that she was still doing tasks outside Pack QC. In cross-examination she said that sometimes she was even asked to do tasks outside the rotated duties.

121. On 2 August 2019, Ms Wilshire recorded that the claimant had left site that morning without authorisation noting that, after being given a task, the claimant refused to do it as her risk assessment stated that she "should be doing Pack QC if there is no one pregnant". Ms Wilshire recorded that, to her knowledge, the claimant's risk assessment didn't say anything about this. Before a solution could be offered or her tasks changed, it was noted that the claimant said she was going home and left. Ms Wilshire had coded this as "AWOL". Ms Wilshire told the tribunal that the claimant had left work because she had been put on a task which she didn't think she should have been allocated to her. This was doing "returns counts accuracy" which was not a dissimilar task to "returns counts" which was on the list of tasks the claimant could undertake. She agreed nevertheless that the difference between the 2 tasks was that returns counts accuracy involved the claimant working across all of the floors of the site rather than only one. It was put to her by the claimant that she would struggle climbing the stairs. Ms Wilshire said that this was a task on which she could be rotated saying that she accepted that the claimant could do that task on some the days, but not every day. Ms Wilshire told the tribunal that the impression she had after

speaking to the claimant was that a lack of rotation was the problem for her. The claimant had been put on the same job of picking exceptions which again was on the list of job she could undertake, but had to be rotated. She explained that this duty involved walking to a location to look for an item which had not been picked to see whether it was missing or relabelled. She agreed that this role could involve working across all 6 floors with lots of walking around. Again, it was a task the claimant could complete as long as she was rotated. Ms Wilshire confirmed in cross examination an understanding that the claimant should have been rotated when Pack QC was unavailable.

122. The claimant had a fit note for 1 month from 9 August to 8 September 2019 in respect of her knee, saying that she may need less time standing/walking. A return to work meeting took place with Ms Wilshire following the claimant's absence from 3 – 9 August 2019. Ms Wilshire noted that the claimant had recently been referred to OH, but that a referral in the imminent future was not required and that the team should continue to rotate her tasks. The tasks that she was capable of discharging would not require her to pick from shelf 1 or shelf 5 and would reduce both walking and standing. The claimant referred to the task rotation. She told the tribunal that she had been asked to do 4 days in a row on picking exceptions, querying why, when the respondent had said that they would rotate her tasks. When put to her that she still believed that she should be exclusively on Pack QC, except on the rare occasions there was a need to rotate, she confirmed that to be the case.

123. Mr Charlesworth was the responsible team leader on 2 August. He had only worked with the respondent and the claimant since April 2019. He told the tribunal that he was aware that claimant was subject to a number of restrictions, which were recorded on the restrictions tracker. It was clear in cross-examination that he had not, however, seen the restrictions tracker and gleaned all his information from a separate spreadsheet used by the team leaders to allocate work – known as a task frequency tracker. As already referred to, at some point, Miss Placha had added a tab to this so that a brief statement was included against each employee of the tasks they could be allocated, but not the additional information and explanation which was included on the restrictions tracker. From that, the duties she could be given included Pack QC, returns counts, empties, dinbins, miss picks, picking exceptions and low stock, which he understood took account of her knee pain and would limit her standing, walking and picking. Picking exceptions involved being directed to a location to audit the stock within a location and then progress to the next location. Miss picks was only done at level 3 – a trolley was taken out and items put back. No Sku involved the same type of investigation to relabel items with more lifting, but less walking. The claimant had previously been able to sit on a chair when doing No Sku, but not when doing miss picks and, for instance, auditing.

124. On 2 August 2019, at the beginning of her shift, the claimant had approached Mr Charlesworth and asked if she could swap duties as she

had now been completing picking exceptions for a few of days and on 2 of these days had not been rotated onto a different task halfway through the shift which Mr Charlesworth said that they tried to do as often as was practicable. He said that the claimant asked to be placed on Pack QC (explained by him as a form of quality control which involves checking packages at the request of clients to ensure that the packages were correctly labelled). He explained that Pack QC was not available. This was in part because the respondent's client, ASOS, had requested that fewer packages be checked from a quality control perspective, thus reducing the need for individuals to complete quality control checks. However, the main reason on that day, he told the tribunal, was a pressure to complete a large volume of picking exceptions. Pack QC on that shift was being performed already by 2 employees and that was said to be a sufficient number on that shift and in circumstances where the priority was to complete other work. The 2 individuals working there were Elena Harper and Chris Wotton. Mr Charlesworth was unable to say that Mr Wotton could only work in Pack QC because of restrictions. The tribunal has heard evidence that Mr Wotton did at some time become restricted due to his own physical impairment to doing Pack QC work, but Mr Charlesworth did not think that he was at that particular point in time. Ms Harper was not pregnant. However, Mr Charlesworth suggested that there were other duties available, including stock hanging involving counting stock within the hanging locations. He asked the claimant if she wanted to complete this task temporarily whilst he sorted out other colleagues and before he got round to checking the restrictions tracker. The claimant responded that stock hanging was not one of her restricted tasks. The tribunal is clear that she was correct – Mr Charlesworth was under the misapprehension that this was a duty the claimant could undertake. As a result, he did not ask the claimant to work on stock hanging, but confirmed that, when he had set up the shift, he would go and check the restrictions tracker to determine what restricted duties she could discharge. He could not do this immediately as he was responsible for starting the shift, making sure that other colleagues were aware of their roles and responsibilities. The claimant subsequently left the site before he had a chance to check the restrictions tracker.

125. Mr Charlesworth told the tribunal that, as a team leader, he made sure that the claimant discharged different duties, not just picking exceptions. He said that the department had a large number of employees who were on restricted duties. This might mean that at times employees did not discharge all their restricted duties equally and might find themselves discharging particular duties more often than others. This was in line with the claimant's restricted duties set out on the restrictions tracker. The claimant was assigned to more than 3/10 of the restricted duties - he noted the claimant been assigned to 6 different tasks on specified dates.

126. However, it was clear to the tribunal from Mr Charlesworth's evidence that he did not understand that the claimant ought to have effective first call on any job in Pack QC because of her knee problems. He said that there were occasions that he had allocated her to Pack QC on shifts he had

run. However, if there were areas where more resources were needed, he needed to pull people from that area to work there. He understood only that there was a need to generally rotate her and that one of the tasks she could most easily complete was Pack QC. He did not believe that a non-pregnant or able-bodied colleague could be simply removed from Pack QC to another task in order to accommodate the claimant. He understood that he needed to be fair to everyone in terms of their work rotations and ensure that people who were trained on a task remained current in it.

127. Furthermore, there were limitations in the information provided in the task frequency tracker of the tasks which an employee had undertaken over the preceding 7 days. The information provided was latterly better than it had been in the past. At some point additional tabs had been included so that when it came to setting up the shift and allocating tasks to individual employees, the team leader could see, next to each employee's name, the task they had been allocated on the previous day. None of the team leaders could be certain as to when that tab was included. Mr Charlesworth was however clear that it was in place when he started with the respondent in April 2019. If the team leaders wished to, they could dig down deeper and see what tasks had been allocated on previous days. However, the tribunal concludes from Mr Charlesworth and Ms Wilshire's evidence that a team leader setting up a shift usually in the 30 minutes before it was due to commence, would have little time to do so in the context of assigning duties to around 60-100 operatives. Mr Charlesworth said that he couldn't always go through every individual's allocations, in circumstances where there were a lot of staff with restrictions on the duties they carried out.

128. He agreed that he wouldn't have checked the whole of the week preceding 2 August to see what the claimant had been doing. He thought she had been allocated to picking exceptions on the previous day, but did not know how long she'd been doing that work.

129. Even then, the electronic record of the task frequency tracker showed only the role in which an individual had started the shift. Changes of task part way through a shift were not recorded electronically - that would have involved an unrealistic amount of work for the team leaders, the tribunal was told. Mr Charlesworth explained that handwritten notes were kept when employees were moved from one task to another together with the time of their move. That information was inputted into a separate hours tracker at the end of the shift, but without reference to any individual's name and purely to record the number of total employee hours allocated to a particular task during the course of a shift. Those bits of paper were disposed of at the end of each shift. He accepted the proposition put to him by the claimant that she might have been shown as working on a number of previous days on Pack QC, but any team leader reviewing the records would have no way of knowing if, for instance, after an hour's work on that task each day she had been moved to a different task. Mr Charlesworth agreed in cross-examination that he had no way of knowing if the claimant

had, for instance, been doing picking exceptions for the previous 3 days involving significant amounts of walking, standing and picking without "diving in" to the electronic records of the previous days (with again the limitations on what those records would show as described) or if the claimant raised with him herself that she had been on picking exceptions for some days.

130. Ms Wilshire conducted a return to work meeting with the claimant on 10 August following which she emailed the other team leaders including Mr Charlesworth and Miss Placha, as well as the shift managers Ms Gaffney and Mr Skelding. She said that she had discussed the claimant's task rotation, referring to the claimant having provided her with a letter of 9 October 2018 which outlined what she could and couldn't do. Ms Wilshire said that the letter stated that rotation of tasks should take place whenever Pack QC was unavailable and, at the point where it was unavailable, she should be rotated on any of miss picks/restarted orders, induct rejects, low stock (half shift) or returns counts (half shift). The roles to avoid were stocktake, hanging counts/low stock hanging and supplier checks/incorrects. She noted that the claimant had said that she was not asking to be on Pack QC every day (which the claimant disputes) and she understood that she could not do it every day as others needed the opportunity, but was asking that the respondent honoured the rotation aspect of the letter. She referred to the claimant having said that before her absence she had been on picking exceptions for 4 days out of 5. She continued that she would be sending an email to the training team to organise training on induct rejects (upon which the claimant had not previously been trained) and refresher training on sin bins and restarted orders so that there were more tasks they could utilise her on. Ms Wilshire ended by asking: "can we all please try to rotate her as much as possible?"

131. Ms Wilshire told the tribunal that in this email she was setting out what she had understood had always applied to the claimant and what they had followed, rotating her wherever possible. Her understanding was that there was a practice of general rotation for the claimant. Pack QC was not always available although it was a function that was performed on every day up to a point. Nevertheless, there were other colleagues who had to be placed on that type of work. Subsequently in cross- examination she clarified that if it was available, the claimant would carry out Pack QC and where it was not, she would be rotated. If Pack QC was not available there were the other listed tasks she could complete.

132. Ms Wilshire said that, in some instances, rotation of the claimant would allow a day walking or a day stood still, but these were all tasks the claimant had said to the respondent that she could undertake. She accepted that a full day of picking exceptions would not limit the claimant from walking, standing or lifting. She accepted that working 3 days on picking exceptions would not be acceptable, but that they would expect an employee to tell them as they had different people running each shift. Every

day was different and they would expect operatives to come back to them during a shift if they were struggling on a task or having a bad day. They did not have a system for telling other team leaders what an operative had done. On their set up they now had a tab for showing what operatives had been doing on the preceding day. They could also see earlier days in the week if they opened the spreadsheet up further. She was not sure when that function had been added. She accepted that before then there was a possibility of the claimant doing, for instance, 3 days of picking exceptions then 2 days on returns counts and therefore standing for 5 days. There were 5 team leaders running the shifts which might involve managing 60-70 operatives. Each might run only one shift and the claimant's tasks could have been repeated without a team leader realising. Ms Wilshire referred to the setting up of a shift and team leaders not always having time to go into an employee's tasks on earlier shifts, saying "we just do our best to remember who needs what". Nevertheless, Ms Wilshire agreed that the claimant should have been on Pack QC if it had been available. If it was not, she would then be rotated. Typically, they would have a task which suited the claimant, but no particular task could be guaranteed on any day.

133. In re-examination Ms Wilshire referred to her always understanding that the claimant would work on Pack QC and be rotated on other tasks only if that work was unavailable.

134. Mr Charlesworth said that his understanding of Ms Wilshire's email was that if Pack QC was not available, he could rotate the claimant around the tasks she could perform. He did not, however, understand that she had any preference when it came to others having already been allocated Pack QC and again repeated that he made decisions on work allocation to be fair to everyone.

135. Miss Placha recalled receiving this email, but did not believe that it contained anything new or surprising to her. She said that they always put the claimant on Pack QC when it was available. The amount of Pack QC work available depended upon the target set for the percentage of products to be checked and the volume being dispatched at any one time. If the standard target of 1% was set, Miss Placha told the tribunal that "it was easy for us". If the target was dropped to 0.5%, the claimant would have less opportunity, particularly if pregnant colleagues were within the workforce. She said that, in terms of volumes, every day was different. She was unable to recall how many pregnant employees were within the workforce at any specific time. However, in her mind, if Pack QC was available that work would go to the claimant. The only others who would take precedence were pregnant employees or other employees with restrictions.

136. The claimant raised a grievance against Mr Charlesworth on 8 August. This was that he had purposively sent her on tasks on 2 August outside her restricted duties, knowing that she would struggle. She could do

picking exceptions, but not 4 days in a row, she said. She wanted to rotate duties, when Pack QC work was not available.

137. On 10 August Ms Wilshire conducted the claimant's PDR. One of the agreed developmental actions was that she would have training for induct rejects within 6 months. Ms Wilshire told the tribunal that she then arranged for the claimant to undergo that training.

138. At a grievance meeting the claimant attended on 29 August with Ms Gaffney, she referred back to the capability meeting in October 2018, but that team leaders still didn't know the tasks which had been agreed at that meeting and she was being sent on tasks which she could not do. She said that she had told Mr Charlesworth that she couldn't do picking exceptions for 4 days and asked to be swapped. He had said that Pack QC was not available and he offered her low stock hanging which she was excluded from doing.

139. A further risk assessment was carried out on 31 August by Ms Gaffney. This recommended that the claimant be referred to occupational health - their subsequent report was that the claimant was fit to work with restrictions. It appears from the risk assessment that Mr Charlesworth was not aware of the task list. The claimant explained what she couldn't do. She said that it was okay if the tasks were rotated. It was determined that she was fit with amended duties i.e. able to work under the amendments previously agreed. The claimant accepted that this could mean that she would do Pack QC and be rotated. When put to the claimant in cross-examination that rotation was not so important for the claimant if she worked on Pack QC most of the time, she agreed.

140. There were 10 duties the claimant could do but she was only put on 3 of them, she said. The tasks on 2 August were in line with current restrictions. There was an acknowledgement that 4 days on a task and not being rotated on 2 days was not appropriate. The claimant, however, was not limited to just Pack QC. Mr Williams put to the claimant whether she was still of the view that she was to work exclusively on Pack QC save where that work was not available. She said that was the case and additional tasks had now been added to the October list. When put again to her that there was very little need to rotate her, because Pack QC work was available, the claimant agreed. He questioned why the claimant had not made that point to the respondent i.e. that the vast majority of the time she could do Pack QC work.

141. Mr Williams said that, even if the claimant was right, from this moment to the date she put in her tribunal claim the agreement was stuck to. Was she saying that, even after this date in September, the respondent did not adhere to the agreement? She said that she was. When asked if she was saying that she was made to do tasks so that she was not on Pack

QC most of the time, she said that was the case. There were other rotations, but she was not rotated and she had had 3 more tasks added to the list, but was still put on the previous tasks. It was a case of more of the same.

142. On 3 September 2019, Ms Gaffney emailed the occupational health physician, copied into Mr Skelding and the team leaders, a new referral form and the claimant's risk assessment asking OH to arrange an appointment with the claimant "to clarify any restrictions that should currently be in place".

143. The claimant raised a further grievance dated 3 September 2019 with Ms Finnie. The claimant said that because she had raised grievances against managers, whose gross negligence had led to the sending of sensitive information to her old addresses, she had been punished with work tasks which she said she would struggle to do on a daily basis and which had had a negative impact on her health.

144. On 6 September 2019, Ms Gaffney provided a written outcome of the disciplinary allegations against the claimant. Ms Gaffney had concluded that the allegations had been proven in respect of the claimant leaving site on 27 July. She was satisfied that the claimant had acted in breach of the respondent's procedures and issued a verbal warning which would remain on her file for 6 months. The claimant was given the right of appeal. At the hearing Ms Gaffney had confirmed that there would be no further action in respect of the claimant's behaviour on 2 August as the claimant had outlined her concerns to her team leader and there was an acknowledgement on that day that "we should have been able to accommodate you". Ms Gaffney acknowledged that the claimant had been completing the tasks allocated on the previous 3 days and had not been rotated midway through her shift.

145. She confirmed that although the tasks she had been allocated on 2 August were within her restrictions, the respondent would reiterate to all team leaders the importance of offering the claimant a task rotation following half a shift, complete the risk assessment, review whether the claimant required additional training to suit her restricted duties and ensure that her future occupational health report recommendations were shared with the team.

146. Ms Gaffney and Ms Hague also conducted a grievance meeting on 29 August 2019 concerning the claimant's grievance of 8 August, as already referred to. The claimant raised that team leaders and managers still didn't know the tasks which had been agreed that the claimant could perform at the meeting with Mr Skelding and Ms Hindmarsh in the previous October saying she had been sent on tasks she couldn't do many times. Mr Skelding said that he did not know why team leaders had put her on tasks she couldn't do. Mr Skelding said that he wouldn't have left Mr Charlesworth out of any communications, so was not sure why he was unaware of the claimant's restrictions.

147. By letter of 11 September 2019 (the grievance outcome), Ms Gaffney set out that all the duties which the claimant had been asked to perform on 2 August were in line with current restrictions, but acknowledged that the claimant had previously worked 3 days on the same task and had not been rotated half way through the shift on 2 of these occasions. As she confirmed to the claimant in the outcome letter, Mrs Gaffney subsequently confirmed to Mr Charlesworth and the other team leaders what the claimant's restrictions were and reiterated that there was a need to rotate her duties midway through a shift. She referred to a further risk assessment now having been completed by her with the claimant and that she would be arranging a review with occupational health. Formal acknowledgment of all new restrictions accommodated would then be obtained from relevant team leaders. There would be a review of any training requirements on additional tasks suited to the claimant's current restrictions. Mr Charlesworth and other team leaders would be made aware of any additional occupational health recommendations once an up to date OH review had taken place. The claimant was asked to tell team leaders if completing assigned tasks was impacting negatively on her health.

148. Mr Charlesworth told the tribunal that he took these directions into account when assigning work to the claimant. He was aware that, because the claimant felt she was in pain and had decided to leave the site because of this, the respondent had elected not to treat this as an instance of her being absent without leave.

149. The grievance outcome letter was not shared with the team leaders. Nor is there any evidence that the information and in particular the remedial actions set out were, for instance, copied into any email to them. Mr Charlesworth told the tribunal that they had been advised by Ms Gaffney to make sure that the claimant was put on tasks which she could be deployed safely to and to rotate her. He said there was one conversation where the team leaders were just given a list of tasks the claimant could do, albeit he could not recall the exact list. He did not recall being told that the claimant had any priority as regards Pack QC. He continued, therefore, just to look at all the tasks she could do and rotate her around them. He said that, from the grievance outcome, the team leaders started to deploy the claimant on a 4 hourly basis so that there would be a rotation halfway through her shift.

150. Miss Placha told the tribunal that she did not get the grievance outcome letter, but that she thought she had received emails and something about task rotation. She recalled that the team leaders had been given a recorded conversation regarding the need to rotate tasks.

151. Ms Wilshire said that, to her understanding, the list of tasks was the same. They were asked to rotate the claimant if possible and the claimant would tell them if she had any difficulties.

152. Ms Gaffney recommended a follow-up review of the risk assessment be completed in order to check that the additional tasks the claimant had been trained on were suitable given her current condition.

153. The respondent's restrictions tracker is a living document and it is therefore not possible to view what was recorded on it at any earlier date. The last review date for the claimant appears from the tracker before the tribunal to have been undertaken on 29 October 2019. In the section detailing restrictions it is noted: "At the point in which Pack QC is unavailable, Mariana should be rotated on any of the following tasks: picking exceptions, miss picks/restarted orders, induct rejects, low stock (half shift), returns counts (half shift). There were then the following tasks that were said should be avoided: stocktake, hanging counts/low stock hanging and supplier checks/incorrects. The evidence again is that the tasks frequency tracker which the team leaders could access had a tab where team leaders could see simply a list of tasks which it was said that the claimant could perform.

154. Ken Perritt, Account Director, wrote to the claimant on 29 November seeking clarification of the processes the claimant thought to be outstanding. This included an appeal regarding the verbal warning issued on 29 August as well as a number of grievances, noting also that the claimant had stated that any outstanding appeals would be pursued by her via ACAS/the Employment Tribunal. The claimant, in cross-examination, said that she wanted to proceed to the tribunal because her complaints had not been addressed at the time.

155. The tribunal has seen data from Pack QC on 7 December 2019 which shows that the claimant and 3 other individuals were working on that task on that day. The respondent's witnesses had suggested that there might be less opportunity for Pack QC work in the period from August - January as this was the peak period where resources had to be directed to other areas and where the target for the proportion of parcels checked might be halved from 1 to 0.5%. Nevertheless, requirements clearly fluctuated.

156. As already referred to, the claimant saw occupational health again who produced a report on 3 December 2019. This recorded the duties which the claimant was currently performing. Under the heading of recommendations, OH advised the claimant to avoid prolonged walking or standing and to alternate positions. She was to use a stool/chair for short periods and avoid having her knee in a static position. She was to avoid also repetitive stair climbing, bending, crouching and lifting. She was said to be currently working on stock control: Pack QC, miss picks, and No Sku. She was said to use a chair when required. The restrictions were said to be permanent due to the chronicity of the symptoms. Mr Williams put to the claimant that, if she was right and she was still not doing the duties which it

had been said she was performing, why had she not reported that to occupational health. The claimant said that she did not remember.

157. Ms Wilshire said that having now seen the report, it reflected her understanding. Towards the end of her time in stock control, the claimant had become more limited in the tasks she could do.

158. Mr Charlesworth and the other team leaders were not provided with copies of the subsequent occupational health report or indeed the risk assessment. They relied on relevant information being cascaded down to them by the shift managers.

159. Mr Charlesworth told the tribunal that he was made aware of the subsequent occupational health report of 3 December and the restrictions. Mr Charlesworth said that whenever the claimant was in his section, he made sure that she was discharging those duties and tasks. He said that the above recommendations were all added to the restrictions tracker, so that he and all of the other team leaders were aware of them. He believed that the claimant's restricted duties were observed. He believed that she was suitably trained on all her restricted duties.

160. On 2 December 2019 the claimant raised a grievance against Mandy Hague for deliberately giving her false information about arrangements for a grievance meeting.

161. The claimant explained to the tribunal that she moved to the quality department from stock control in February 2020 and felt that, since then, occupational health recommendations were followed. Every day she had been accommodated to work on Pack QC.

Applicable law

162. The duty to make reasonable adjustments arises under Section 20 of the 2010 Equality Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

163. The Tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

164. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments it must know (actually or constructively) both firstly that the employee is disabled and secondly that she is disadvantaged by the disability in the way anticipated by the statutory provisions.

165. Otherwise in terms of reasonable adjustments, there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

166. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation, when it deals with reasonable adjustments, is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

167. If the duty arises, it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test, where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

168. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the

expiry of the period in which the person might reasonably have been expected to implement the adjustment. The tribunal has an ability to extend time if it is just and equitable to do so, but time limits are strict. The person seeking an extension should provide an explanation for the delay and there will be a balance to be conducted between the parties in terms of the interests of justice and the risk of prejudice.

169. The Court of Appeal considered the question further in **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA**. It noted that, in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point. The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Lord Justices Lloyd and Sedley both acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice which may be caused, could be alleviated, to a certain extent, by the tribunal's discretion to extend the time limit where it is just and equitable to do so.

170. Applying the legal principles to the facts, the tribunal reaches the conclusions set out below.

Conclusions

171. The claimant's reasonable adjustment complaint is essentially that her knee condition was exacerbated, causing her pain, if she was required to walk and/or stand extensively and to pick from heights. In evidence, it has emerged that the issue with picking from heights was the claimant's need to use a stool or stepladder to access higher shelves which put additional pressure on her knee.

172. Her claim is that her duties ought to have been restricted to appropriate activities which did not exacerbate her condition and that this

did not happen. Taking advice, for example, from occupational health or her doctor is a procedural step which might have led to reasonable adjustments, but is not a step in itself which would have alleviated any disadvantage. There was a delay in arranging her first occupational health appointment from May 2017 – January 2018, but the claimant's complaint is that it was evident before such advice that she ought to be restricted, yet she was not restricted appropriately. Then, following the receipt of the occupational health report, she continues to maintain that reasonable adjustments were not made in accordance with information flowing from that appointment. Similarly, information provided by her doctor in November 2018 is said to have further alerted the respondent to the need to amend her duties which did not happen. The claim is all about the duties the claimant ought reasonably to have been restricted from in the period from February 2017 to January 2020 to alleviate the disadvantage caused to her by her condition/pain.

173. It is not the claimant's case that throughout this period there was a complete failure to make reasonable adjustments. Her case is that there came a point relatively early within the chronology that adjustments were made, but then occasions when these were not followed. The tribunal agrees with Mr Williams that the claimant's case is not of continuous (uninterrupted) failure by the respondent. Mr Williams accepted, however, that intermittent instances of assignment to unsuitable work could still constitute failures to make reasonable adjustments. That is the case regardless of whether such failures were 'accidental' or exceptions to a rule.

174. Further, whilst the claimant's position has not been entirely consistent on the point, the position was reached where there was an acceptance from her that whilst working on Pack QC was her preferred task in the context of avoiding an exacerbation of her knee condition, she was not saying that she could or should have been guaranteed at all times that type of work. At times others were restricted to Pack QC due to pregnancy or their own disabilities – there might not always be room for the claimant. The level of Pack QC work fluctuated and was not at all times within the respondent's control. She accepted that there were other tasks which she was willing and able to perform. Those tasks inevitably involved more walking and standing than working on Pack QC. Therefore, the issue for her was ensuring that there was proper rotation of tasks and that she was not on one task for a protracted period. It is not, however, the case that the claimant could and should be asked in the context of a reasonable adjustment to work on any task. There have at times been tasks identified which would represent more strain on the claimant's knee and an inevitable strain which would be unacceptable. This was not just the claimant's view. The respondent's managers (or those who had proper knowledge of the claimant's limitations) recognised that there were tasks upon which she should not be sent.

175. There was a general requirement that operatives in the claimant's position completed a range of tasks which did involve extensive walking, standing and the need to pick from heights. There is then extensive evidence that the claimant was at a substantial disadvantage in meeting those requirements when compared to someone who did not share her knee condition. That condition became progressively worse during the relevant period and the claimant was not always consistent in what she said when asked to describe what she could do. Nevertheless, this was a condition which was never "cured" and the claimant bearing her weight on her knee was clearly causative of her suffering pain, particularly when this occurred over prolonged periods. Standing and walking involved pressure on her knee as did the activities necessary to work at heights. There were few periods from 2017 when there was not an appreciation by team leaders and shift managers that the claimant's condition required to be managed by appropriate allocation of tasks.

176. In this complaint of a failure to make reasonable adjustments, the tribunal must be able to identify what the alleged failures to appropriately allocate tasks were and when they occurred. With perhaps one or two exceptions, the claimant has not clearly identified to the tribunal, by reference to specific dates or periods, when she was disadvantaged as a disabled person by the respondent's failure to recognise the effects of her condition when allocating her work tasks.

177. The tribunal has endeavoured to identify where there is evidence of any suggested failing on the respondent's part and then consider it factual findings with reference to the claimant's pleaded case and the statutory provisions. It has considered the evidence of witnesses called by the claimant, but they were not specific as to when the claimant allegedly was assigned to unsuitable tasks.

178. The first instance of specific complaint the tribunal can identify is where the claimant approached a team leader on 16 November 2017 requesting a change of tasks, as she had been on the same task the previous day. The relevant team leader, Mr Holmes, was unaware of the restrictions (and there were some already recognised by the respondent) on the claimant's duties.

179. The background to this incident is that the claimant had absences from work due to her knee and her back. She had been referred to physiotherapy, an internal service within the respondent on 10 May 2017, resulting in advice to reduce walking and that prolonged standing was also an aggravating feature. Mr Carman had put the claimant on lighter duties which included Pack QC, but also return counts and empties. On 19 September 2017 the claimant advised the respondent that she was taking medication for knee pain. During the investigation meeting on 21 November 2017, the claimant complained about her knee and a lack of referral to occupational health. Mr Williams, in submissions suggest that the tribunal

might take the view that at this point in time the respondent was on notice as to the issues generally with the claimant's knee. He does not accept that she was yet substantially disadvantaged, but the evidence suggests otherwise and the low hurdle of "substantial" in this context must be borne in mind. The tribunal considers that the respondent had sufficient knowledge, such that it ought reasonably to have known both that the claimant was a disabled person and that she was disadvantaged in having to walk or stand for prolonged periods at the point of the physiotherapist's advice on 10 May 2017. By then it was clear that the claimant had a long-term knee condition which affected and would continue to affect her ability to walk and stand for prolonged periods without experiencing pain. The respondent was certainly on notice of those factors and indeed sought a medical opinion, as it was reasonable for it to do, and implemented adjustments to the claimant's tasks in the meantime.

180. Reverting, however, to the claimant's complaint to Mr Holmes on 16 November, there is on the facts no failure to make a reasonable adjustment. The claimant had spent a day working on a particular task. She discovered that she was going to be required to carry out that task for a second consecutive day. She did not, however, undertake that work. She spoke to Mr Holmes, who indicated that the claimant should carry on with her assigned task for a short period whilst he finished setting up the shift and that he would then come back to her to determine the task the claimant could be allocated to that shift. The claimant determined for herself to leave her workstation such that Mr Holmes never had the opportunity to have that conversation with her.

181. The claimant had an individual risk assessment on 23 November 2017. The tribunal considers the statement within that assessment, that walking didn't cause any issues, to be a less than full and accurate statement – it was not what the respondent itself understood. It was noted that the force required when climbing ladders increased the pressure to the knee and resulted in increased pain. The claimant was said to have pain in her left knee joint with suspected cartilage damage and prolonged weight bearing on this joint was said to cause significant pain and discomfort. Prolonged periods of kneeling or being stationary could aggravate symptoms. She struggled to lift heavier weights which put increased pressure on her knee. Amended duties were recommended. The evidence is indeed that from 22 November 2017 the claimant was, certainly for a period on the claimant's own case, placed on restricted duties so that she did not walk or stand for prolonged periods. The respondent recognised that there was a need to do so.

182. The next specific point identified by the claimant of a potential failure to make reasonable adjustments was when the claimant told Mr Skelding at a disciplinary hearing on 19 December and 10 January 2018 that tasks had been allocated to her which involved heavy lifting, namely, supplier checks, consolidation and accuracy checks. The claimant's pleaded case is

however that she was disadvantaged by a requirement to walk and stand extensively and to pick from heights. That does not encompass a requirement to carry out named tasks which are said to have involved heavy lifting and the tribunal can not reframe the claimant's case.

183. The tribunal next notes that the claimant raised with the physiotherapist 19 January 2018 that she had been given consolidation work which involved lifting heavy boxes. Again, the requirement to lift heavy boxes is not part of the pleaded practice relied upon by the claimant.

184. The claimant did see occupational health on 17 January 2018. In the report which followed, it was recorded that the claimant was able to manage her current duties without difficulties. She could do pack accuracy, sin bins, miss picks, picking exceptions and empties - low stock. The tasks which caused her difficulties were stocktake, returns counts and hanging. It was recommended that she rotated duties to avoid long periods of kneeling. Whilst it was stated that the claimant enjoyed walking, this appeared in a section dealing with her leisure activities and is not necessarily inconsistent with extended walking at work causing her difficulties. Whilst the report does not make reference to it, the tribunal nevertheless considers, on the totality of the evidence, that the claimant was still disadvantaged if she undertook too much walking – again something clearly recognised at the time by the respondent's managers. The context was of a knee problem which was not getting any better and where inevitable strain is placed on a knee by too much walking or load bearing/standing. On 7 February, Mr Skelding confirmed at a return to work meeting with the claimant that she was still on restricted duties, which he told the tribunal would involve limited standing/walking.

185. In terms then of the next potential specific failure to implement reasonable adjustments, the tribunal notes that at a meeting of concern regarding her attendance on 20 March 2018, the claimant said that Mr Sadowski had put her on stocktake, despite her telling him that she couldn't do that work. Whilst the claimant had told occupational health that she found working on stocktake to be difficult, there was no advice that this was work that she could not undertake at all and the evidence is that the claimant's professed difficulty with this task was the possibility of having to lift heavy boxes, again in a practice falling outside the pleaded practice relied upon in her reasonable adjustments complaint.

186. On 5 May 2018, the physiotherapist reported that the claimant was capable of discharging her full duties, but with amendments. The claimant reported contemporaneously that on 16 May 2018 she had been sent to undertake picking exceptions on floor 6. Whilst picking exceptions was not a restricted duty, Mr Skelding accepted that, as a hanging location, the claimant ought not to have been sent there due to the requirement to use steps. Mr Skelding was accurate in that it had been identified that working at heights, where the claimant was required to use steps or a stepladder,

would put additional pressure on her knee exacerbating her pain. The claimant was, therefore, being required on that day to "pick from all heights" which constitutes part of the pleaded practice which did indeed put her at a substantial disadvantage in comparison to a person who did not have her knee impairment. Sending her to this work location constituted a failure to make a reasonable adjustment which would have been to exclude her from carrying out work that involved the use of steps/stepladders. The respondent does not suggest that work within her restricted activities was unavailable. Subject to the issue of time limits, a complaint of a failure to make a reasonable adjustment is here well-founded.

187. The claimant attended a return to work meeting following an absence relating to her knee on 5 June 2018. Thereafter, she was restricted for a period to working on Pack QC. The tribunal notes that over time the claimant reverted to a rotation of her working tasks. A risk assessment took place on 13 September. Whilst that assessment was not negative regarding the claimant's ability to walk, the issue of the tasks the claimant could undertake without exacerbating her knee condition were further discussed with Mr Skelding on 9 October 2018. The claimant suggested that she could do picking exceptions, miss picks, induct rejects, low stock and return counts but would struggle with stocktake, hanging counts and supplier checks. Mr Skelding's belief was that the claimant had been recently confined to Pack QC work, but certainly from now the claimant's tasks would be rotated in line with those which she had agreed she was capable of performing. The plan was that the claimant would be rotated around those tasks when Pack QC was not available for her to carry out. That was confirmed in the outcome letter sent to the claimant dated 9 October 2018. This did refer to standing in the same place, amongst other things, as causing knee pain. Low stock and returns counts were tasks that the claimant could undertake for half a shift maximum. The letter confirms an agreement that the claimant would rotate on the tasks she could complete, but only when pack QC was not an option. There was a clear recognition on behalf of the respondent that Pack QC work was ideal in terms of alleviating the claimant's disadvantage. Once she was doing other tasks, there was a need to avoid excessive walking/standing by appropriate rotation. The respondent did not consider that a constant rotation of all restricted tasks, but no Pack QC work, constituted a manageable patten of work with reference to the claimant's knee condition.

188. The claimant told the tribunal that an absence from work in November 2018 had occurred after she had been put on tasks, other than Pack QC, for a full week which required her to walk excessively. That cannot however lead to the tribunal being able to conclude that there was a failure to make reasonable adjustments in circumstances where the claimant could be required to work 4 consecutive days on tasks other than Pack QC and such work was within her capabilities provided there was appropriate rotation. A longer period with no Pack QC work would probably have caused the tribunal to reach a different conclusion.

189. The claimant told Ms Hindmarsh on 10 December 2018 that her restrictions had not been accommodated, but the tribunal has been given no specific evidence. In terms of a more specific statement of the work she was required to do, the claimant subsequently referred to having worked on Pack QC on 3, 4, 5, 8 and 9 January 2019 but being then told that she could not be put on that work due to the number of pregnant employees. Again, that fell within the agreed restrictions dating back to October 2018 provided that the claimant was then rotated on suitable tasks. The claimant in evidence said that she was put on other tasks on 10, 11 and 12 January. In terms of further specifics, the claimant said that she had worked on low stock for 4 hours on 10 January and then on picking exceptions. She did not suggest that she had done picking exceptions on floor 6 where there might have been a need to work at heights. Picking exceptions was a task within the claimant's capabilities as confirmed in Mr Skelding's letter confirming their agreement dated 9 October 2018. Similarly low stocks was within the claimant's capability, provided she worked a maximum of half a shift on this activity. That is what the claimant is saying she did on 10 January. The claimant did not know what tasks she had been undertaking on 11 and 12 January. On that account, again, the tribunal is unable to conclude that there was any failure to make reasonable adjustments. The evidence is indicative of reasonable adjustments having been made i.e. the claimant working on Pack QC when available and then rotated on suitable tasks.

190. The position remained in February 2019 that the claimant was happy to work on the basis of the October 2018 agreement, working on Pack QC if that work was available, but otherwise rotating on different tasks. The claimant has disputed the respondent's assertion that, at certain times, Pack QC work was not available for her. An occupational health report of 12 March 2019 referred to a September 2018 letter from her GP stating that she should avoid prolonged walking, standing and overstretching on her knees. The recommendation was to rotate her duties avoiding prolonged standing and bending at her knees. There is evidence that those restrictions continued to be accommodated by the respondent. On 20 April 2019 Ms Wilshire's return to work meeting highlighted that jobs had been rotated to support the claimant's issues. The claimant in evidence confirmed that at that point she would rotate if Pack QC was not available. Somewhat confusingly, the claimant, in her evidence, still at times referred to restrictions not having been adhered to if she was doing tasks outside Pack QC.

191. However, there is then evidence that the claimant on 2 August 2019 was being assigned by Mr Charlesworth to carry out picking exceptions for what would be the fourth ¼ day in a row. This with him she was offered work on low hanging stock - the hanging element representing a need to climb which was outside her restrictions. The claimant left site that day. The claimant had worked on picking exceptions for a full day on 30 July, again on picking exceptions on 31 July (but interrupted by a need to attend a

grievance meeting and continued working then on low stock) and on picking exceptions for a full day on 1 August. As already stated, she was then assigned to picking exceptions again on 2 August 2019.

192. Mr Charlesworth did not allocate Pack QC to the claimant on 2 August as there was a reduced need for individuals to complete that task, but predominantly because there was pressure to complete a large volume of picking exceptions that day. He did not consider moving individuals already working there despite an apparent ability to do so. Certainly, the female employee carrying out that task that day was not pregnant. Mr Charlesworth thought that he had to simply act fairly as regards all employees in terms of making sure that they got a fair crack at each individual task. He did not understand that there was any positive obligation to free up space for the claimant to work in Pack QC if that work was available. He was unaware that the claimant had any priority when Pack QC work was available. However, in accordance with the agreement reached in October 2019 (and to clearly assist the claimant coping with her physical impairment), she did – whilst not at all times consistent, that is the thrust of the evidence of her managers. It has been said in submissions that giving Pack QC work to the claimant every time it was available was a step too far. The tribunal agrees that on occasions the claimant might be asked to do other tasks even when Pack QC was available without necessarily the respondent failing in a duty to make reasonable adjustments. However, the tribunal is not coming up with a priority for the claimant on Pack QC as its own suggestion of a reasonable adjustment. That was a view amongst the claimant's managers (as the task least likely to exacerbate the claimant's knee condition). All other tasks involved significantly more standing or walking. On Pack QC the claimant was more able to adjust her position to manage her condition – the task could be performed from a seated or standing position. She could move around if that helped her avoiding being in the same position for too long. The evidence is not that rotating the claimant on all other tasks (but not doing Pack QC) would alleviate her disadvantage. Mr Charlesworth, however, simply thought that the claimant had to be rotated, although, in any event, the evidence is that she was confined predominantly to picking exceptions for a number of consecutive days. He then suggested that the claimant carried out work involving counting stock within the hanging locations. He was under a misapprehension that this was a duty she could undertake.

193. The reality of the situation is that, when he assigned the claimant work on picking exceptions on 2 August, Mr Charlesworth did not know and did not check what the claimant had been doing the previous days. He thought that she had been allocated picking exceptions on the previous day, in circumstances where he could more easily see work done by individuals on a preceding day through the task frequency checker, but he accepted that he did not know how long she had done that work for on the preceding day. The records did not show any change of activity part-way through a shift.

194. When Ms Wilshire became aware of what happened, she sent an email to team leaders reflecting what she had thought to be the general understanding that, when it was available, the claimant would carry out Pack QC, but when it was not she would be rotated across appropriate tasks. Ms Wilshire accepted before the tribunal that working 3 days on picking exceptions would not be acceptable. Whilst she said that she would expect an employee herself to raise this as an issue, the tribunal considers the respondent to have a more proactive obligation to ensure an awareness of the tasks completed. It was not reasonable to expect an employee in the claimant's position to have to raise/complain every time she was allocated to an unsuitable duty or where there had been a lack of rotation. The claimant indeed had raised and debated the work she was able to do quite exhaustively over the preceding months and had a workable agreement in place. She was reasonably entitled to believe that the team leaders would be aware of that agreement and follow it.

195. The respondent failed on and in the days before 2 August 2019 to make reasonable adjustments. Again, the claimant was disadvantaged by a requirement to walk and stand for prolonged periods which is exactly what she would do if required to spend a number of consecutive days predominantly on picking exceptions. The respondent had agreed a pattern of work which would alleviate the claimant's disadvantage due to her knee condition. That did involve her having priority in terms of Pack QC work. Whilst the claimant could also be rotated across a number of tasks, the most effective way of alleviating the claimant's disadvantage was to give her as much Pack QC work as could be allocated to her since that was the type of work which would least exacerbate her knee condition. Even if the respondent could reasonably simply rotate the claimant across a range of tasks, working the amount of time consecutively on picking exceptions as she was required to do, did not amount to the rotation the respondent clearly itself envisage as necessary to alleviate the disadvantage. The respondent's failure was exacerbated then by an offer for the claimant to do work on a task which had been assessed as unsuitable for her, given her physical impairment. Subject to time limits, the claimant's complaint in respect of a failure to make reasonable adjustments as at 2 August 2018 is well founded.

196. The claimant underwent a further risk assessment on 31 August 2019. Again, it was clear then that Mr Charlesworth was not aware of all the duties the claimant could and could not undertake. An outcome to her grievance regarding the allocation of duties was issued by Ms Gaffney on 11 September 2019. Whilst setting out that the duties the claimant had been asked to perform had been in line with current restrictions, she acknowledged that the claimant had worked 3 days on the same task and had not been rotated halfway through the shift on 2 of these days. She confirmed in the letter that she had communicated the claimant's restrictions to Mr Charlesworth and the other team leaders and reiterated that there was a need to rotate her duties midway through a shift. The grievance outcome

recognised that the restrictions in place for the claimant as effective reasonable adjustments had not been honoured, albeit with a direction clearly that they be honoured in the future.

197. The tribunal has thereafter no evidence of any specific date on which the claimant was required to work outside her agreed restrictions. The respondent's witnesses thought that the restrictions had been adhered to. When asked to give examples, the claimant has referred to a lack of adequate communication to team leaders about her restrictions, including them not been sent the grievance outcome letter, nor provided with copies of a subsequent risk assessment and occupational health report. Certainly, without that level of communication, there was a greater risk that the restrictions might not at some future time be honoured. That does not nevertheless constitute evidence that they were dishonoured. The tribunal is concerned that Mr Charlesworth's evidence was that he did not recall still being told that the claimant had any priority as regards Pack QC and that he, therefore, just looked at the tasks the claimant could do and rotated her around them. It is quite possible that the claimant's restrictions were not universally adhered to, but the tribunal has no evidence that they were not and if not when and how. Mr Charlesworth, for instance, managed the claimant only sporadically and, whether what he gave her to do was an effective breach of the agreed restrictions, would depend on what she had done the previous days. He nevertheless was aware of the need to rotate the claimant and for some tasks to be completed for half a shift only. The respondent essentially still did not have a system in place to ensure that the claimant had the reasonable adjustments she required, albeit the tribunal cannot say that there was a specific failure up to the point the claimant submitted her tribunal complaint on 20 January 2020. The claimant did not suggest any ongoing issues when referred to OH on 2 December 2019.

198. In terms of time limits, the claimant's complaint to the tribunal was lodged on 20 January 2020. If time ran from the 2 August 2019 when the claimant raised an assignment to picking exceptions for the fourth day in a row, then, with the clock stopping due to ACAS Early Conciliation from the day after 18 November to 19 December (31 days), the claimant had until 2 December to submit her claim. On that basis it would be 7 weeks out of time. Mr Williams suggests that the latest date from which time could begin to run was 9 August, the day before the claimant returned to work after an absence following the failure to make the adjustment.

199. The tribunal can extend time where it is just and equitable to do so. This involves a consideration of a multiplicity of factors including the length of delay, the reason for it and the balance of prejudice. The tribunal bears in mind that the claimant was also not legally represented at the time she was considering whether to and submitted her tribunal application. The length of the delay was relatively short, 7 weeks at most. No specific prejudice has been pointed to in the respondent having to deal with this complaint up to 7 weeks late. There is inevitable prejudice in that it would

be faced with a claim it would ordinarily not have to answer. However, the relatively short delay has created no difference to the respondent in terms of its ability to evidence what occurred and the cogency of its witness evidence. The respondent was perhaps hampered more by the multiplicity of claims brought by the claimant, the vast majority of which have since been withdrawn. The claimant was, however, perfectly entitled to bring multiple claims if she believed them to be genuine.

200. The time limit in the case of a failure to make a reasonable adjustment operates differently from a claim in respect of a complaint of an act of an employer. In the case of a failure to make reasonable adjustments, the complaint is about an omission and it is often difficult for any employee to understand when time might start to run from. The authorities confirm that it runs from the point the respondent acted in a way inconsistent with it making any reasonable adjustment or alternatively at the point the employee ought reasonably to have appreciated that an adjustment would not be made. The respondent never told the claimant that it would not make a reasonable adjustment. In the claimant's mind, it was by its actions and failure to live up to promises that it showed a continuing disregard. The claimant being placed on 4 consecutive shifts performing the same activity was not, in the overall context of this case, definitive in terms of an obvious crystallisation of a claim the claimant now had 3 months to bring. She had on a number of occasions raised such failures including by way of formal grievances and then reached what had seemed to be an accommodation only to be then, in her view, disappointed by the respondent's failure to adhere to it. The claimant sought to address this failing by way of raising grievances. That was not an unreasonable cause of action. That grievance again provided what appeared to be a solution. The clearest acknowledgment by the respondent of its failings and clearest directions as to the future management of the claimant was in Ms Gaffney's grievance decision of 11 September 2019. It was reasonable for the claimant then to see if the respondent implemented the restrictions set out by Ms Gaffney. Mr Charlesworth's state of mind referred to above is indicative of a varying approach amongst team leaders and a precariousness in the claimant's adjustments always being met. It is difficult now to say with certainty when time ought to have run from and that must feed into the tribunal's conclusion as to a just and equitable extension of time. Whilst the claimant has not provided a clear explanation for her delay, she was unclear as to how her team leaders were allocating tasks to her and she had to wait and see to put them to the test. Particularly in the context of a relatively brief delay, the tribunal considers it just and equitable to extend time to allow it jurisdiction in the complaint regarding a failure to make adjustments culminating in the assignment to the same task for a fourth consecutive day on 2 August 2019.

201. The only other potentially successful reasonable adjustment complaint is in respect of a failure on one day, on 16 May 2018. The tribunal cannot simply regard that as linked to the 2 August 2019 failing. Even giving a liberal interpretation to the concept of continuing acts including acts of omission, the tribunal can only but see these two incidents as individually

isolated from each other. The respondent's failure to make reasonable adjustments arose out of an organisational and systemic failing rather than any form of conspiracy against the claimant. The systems operated by the respondent did not give the team leaders access to all of the necessary information to ensure that the claimant was given the appropriate tasks on each given day. The information given in handovers from one team leader to another far from guaranteed that an adjustment would be made. Busy individuals with much to do at the start of each shift had insufficient time to dig down into not easily accessible data in the context of them managing a significant number of employees, with more amongst them than the just claimant having restrictions on their duties. Team leaders changed on a daily basis. There was in a sense a continuing failure to set up an adequate system to ensure that the claimant's adjustments were maintained. However, the claimant's needs and the nature of restrictions did change over time, with significant periods where they were honoured and she was able to work pain free. The respondent is significantly prejudiced in terms of answering an incident occurring on a single day in May 2018 in circumstances where the claimant raised the issue at the time only as part of a statement made about another employee's behaviour. The claimant has not explained why she made no direct complaint. It would not be just and equitable to extend time to give the tribunal jurisdiction in respect of this earlier failure.

Employment Judge Maidment

Date 8 March 2023