Case No: 2415751/2020
2404679/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr M Hosseinnia

Respondent: ASDA Stores Ltd

Heard at: Manchester Employment Tribunal

On: 30 September, 1, 2 and 3 October 2024

Before: Employment Judge Dunlop
Mr G Pennie
Ms A Berkeley-Hill

Representation

Claimant: In person
Respondent: Mr H Zovidavi (Counsel)

JUDGMENT having been sent to the parties on 25 November 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Mr Hosseinnia was employed by the respondent ("ASDA") from 2005. Broadly, he was a store assistant throughout his employment although, as shall become apparent, his exact role changed over time, against a backdrop of changing work practices within the store environment.

2. Mr Hosseinnia brought his first claim (2415751/2020) in October 2020, whilst he remained employed. That was a claim about wages and included a complaint of disability discrimination. These complaints arose from issues with Mr Hosseinnia's sick pay in August 2020.

3. Case management of the first claim was protracted, and it finally came to a first case management hearing before Employment Judge Allen in January 2022. A final hearing was listed for September 2023.

4. In the meantime, Mr Hosseinnia was dismissed on capability grounds on 8 June 2022. He brought a claim of unfair dismissal and asked for the case to linked with his existing claim. A case management hearing took place in front of Employment Judge Butler in January 2023. He extended the final hearing dates in September 2023, with a view to both claims being heard together. Employment Judge Butler gave Mr Hosseinnia permission to amend his second claim to assert that the dismissal was discriminatory on grounds of disability. He formulated a list of issues, which expressed the claim relating to the dismissal in terms of a complaint of discrimination arising from disability under s.15 Equality Act 2010, and a complaint of failure to make reasonable adjustments, as well as a complaint of unfair dismissal.

5. Unfortunately, the parties were unable to prepare successfully for the final hearing in September 2023, and that was cancelled by Employment Judge Allen in August 2023, with a preliminary hearing for case management being held instead. The result was that the final hearing was re-listed to start on 30 September 2024, which was when it in fact took place.

The Hearing

6. This was an in-person hearing which proceeded in an uneventful way. The Tribunal was assisted by a Farsi interpreter who translated for Mr Hosseinnia were necessary. The hearing was marked by a high level of respect and courtesy demonstrated by all the participants towards each other. The Tribunal understands that these proceedings are not easy for anyone involved, and wishes to commend all of those involved for the way they conducted themselves.

7. At the start of the hearing the respondent produced a consolidated List of Issues which drew together the issues identified by Employment Judge Allen in the first claim and Employment Judge Butler in the second claim. Mr Hosseinnia agreed that this List of was accurate and the Judge explained that it would form the “roadmap” to the Tribunal’s decision-making.

8. Mr Hosseinnia gave evidence first and the Tribunal accepted into evidence a witness statement he had prepared. He was cross-examined by Mr Zovidavi.

9. The following witnesses gave evidence on behalf of the respondent: Mr Suhaib Mallu (Optical Manager, ASDA Opticians Blackpool); Mrs Helen Fairhurst (Strategic People Partner) and Mrs Barbara Stabler (People Business Partner). Mr Hosseinnia explained at the outset of the hearing that he had not prepared questions for the respondent’s witnesses. He was encouraged to do so during the Tribunal’s initial adjournment for reading, and during overnight breaks. In the end, Mr Hosseinnia did ask questions of the respondent’s witnesses, and the Tribunal also asked its own questions.

10. After we had heard all the evidence we heard submissions on behalf of the respondent from Mr Zovidavi and then submissions from Mr Hosseinnia We adjourned to deliberate.

11. The Tribunal reconvened on the afternoon of the final day when we were able to give a full oral Judgment. The Judge then drafted a short written Judgment, without reasons, to be sent to the parties. Unfortunately, due to an administrative oversight on the part of the Judge, that was not sent to the Tribunal administration for promulgation to the parties. It was only after Mr Hosseinnia emailed the Tribunal several weeks later to enquire about the Judgment that it was then sent out. The Judge apologises to both parties from that delay. Mr Hosseinnia then made a prompt request for full written reasons having received the short Judgment. Given the earlier delay, the Judge has prioritised the production of these written reasons ahead of other work, to put the parties in a similar position to that which they would have been in if the short Judgment had been sent out immediately after the hearing, as intended.

12. Finally, a further apology is due. In the oral Judgment the Judge referred to the respondent's witness, Mr Mallu, incorrectly as "Mr Mulla". Names are important and it is the practice of this Tribunal to strive to get them right so far as possible. We are sorry for the accidental error on this occasion.

The Issues

13. The agreed consolidated List of Issues is attached as an annex to this Judgment.

Disability status

14. It is convenient to deal with the question of whether the claimant was a disabled person within the meaning of s.6 Equality Act 2010 as a preliminary point within these reasons.

15. The respondent accepted that Mr Hosseinnia was disabled by reason of depression and anxiety at all material times. Mr Hosseinnia also relied on a range of physical impairments. The respondent's position in respect of those was that there was insufficient evidence to enable it to accept that Mr Hosseinnia was disabled by reason of those physical conditions.

Our findings

16. The primary physical condition that Mr Hosseinnia relies upon is acromegaly. That is a rare condition where the body produces too much growth hormone, which leads to abnormally large hands and feet but also a wide range of other symptoms. It is a disorder can affect many of the body's systems, and can lead to heart and circulatory problems and diabetes. Mr Hosseinnia also relies upon other physical conditions of diabetes, blood pressure issues, arthritis and anemia.

17. The evidence that we have about Mr Hosseinnia's physical conditions is limited, as the respondent notes. In particular, there is a lack of evidence directed towards the s.6 test and its focus on everyday activities – no doubt because Mr Hosseinnia is self-represented.

18. We find, however, that Mr Hosseinnia's own evidence, both in his statement and as he had expanded on it in oral evidence, supports the conclusion that he suffered from a constellation of physical impairments which led to significant restrictions in what he could do at work. This is supported by occupational health reports. Particularly, for example, the report dated 9 April 2021 which explains the links between the physical conditions and their effects on Mr Hosseinnia's ability to undertake various workplace tasks. No one has suggested that Mr Hossennia has been untruthful about his conditions and their affects, either to occupational health or to us.

19. Given the nature of the work Mr Hosseinnia did for ASDA (or would have done if he was able), which involved lifting and carrying, walking around and sitting for long periods, it is not a huge leap to infer that he would also suffer similar restrictions in his everyday life, which would have an obvious adverse effect on his ability to carry out day-to-day activities involving physical movement.

20. Further, we note the significant range of prescribed medication that Mr Hossennia was taking. The s.6 test requires us to consider the effects of his impairments without the benefit of medication (the "deduced" effect). Again, this is not something that Mr Hossennia has given direct evidence about, but, as a matter of common sense, we can be confident that without this medication Mr Hossennia would be a very ill man indeed given the conditions he was diagnosed with. (Again, we note that the occupational health report of 9 April 2021 refers to "deduced effects" in support of a conclusion that Mr Hosseinnia is likely to be disabled.)

21. We find that it would be artificial to try to separate out Mr Hosseinnia's physical impairments, which were overlapping in terms of their effects (and possibly also in terms of their root medical cause). We are satisfied that those physical impairments did have a substantial adverse effect on his ability to carry out day-to-day activities. Even if we are wrong about that, they certainly would have had such an effect absent the medication he was taking.

22. We note that in the medical evidence in the bundle there are many references to knee and shoulder pain. This is not explicitly referred to in the list of issues (although "arthritis" is, and it may be that it amounts to the same thing). In any event, taking account of the fact that Mr Hosseinnia is a litigant in person, and our finding that his physical impairments were all overlapping in terms of their effects, we consider it would be artificial to exclude his knee and shoulder pain from consideration. This was all part of an overall physical disability.

23. Mr Hosseinnia's health conditions are long-standing, and had lasted for at least 12 months by August 2020, which is the date of the earliest complaint in this case.

24. In summary, despite the paucity of evidence specifically directed to the s.6 test, we conclude that Mr Hosseinnia has satisfied the test and was disabled by reason of his physical impairments at all material times. Any other conclusion would fly in the face of logic, given everything we do know from Mr Hosseinnia himself, from his medical records and from the occupational health reports.

The first claim

Introduction

25. It became clear during the course of the hearing that, except for the question of whether Mr Hosseinnia was disabled, the issues raised by Mr Hosseinnia's two claims were really quite distinct. This Judgment therefore deals with each claim in turn.

Findings of Fact

26. From around 19 March 2020 Mr Hosseinnia was shielding at home due to the onset of the covid pandemic. ASDA agreed to pay him, and other employees in similar circumstances, full company sick pay.

27. For some reason, which ASDA has not been able to identify or explain, Mr Hosseinnia was not paid in full in August 2020 (when he was due to be paid in respect of July), his gross payment being around £650 short. Understandably, this was very distressing for Mr Hossennia, who approached his then-manager query the issue.

28. The query was passed to Mr Mallu. Mr Mallu had nothing to do with Mr Hosseinnia. However, this was all happening in the early months of the pandemic. For obvious reasons there was exceptional demand on the 'core' parts of the respondent's supermarket business, but the optician department, which Mr Mallu was responsible for, was operating on an emergency-only basis. ASDA used Mr Mallu, and other managers in similar circumstances, to carry out particular tasks which could relieve the workload of the managers within the store management hierarchy. Investigating Mr Hosseinnia's pay discrepancy was one such task.

29. Mr Mallu acknowledged the error and arranged for a transfer payment to be made prior to the next pay cycle. In Mr Hossennia's September payslip the underpayment was rectified, and the transfer payment deducted.

30. Mr Mallu gave evidence to explain the sums involved, including the tax implications. Mr Hossennia could only tell us that he still did not know whether he had been properly paid.

31. From the end of August 2020, in line with relaxing covid restrictions, the respondent began to invite shielding employees to have return to work meetings, with a view to integrating them back into the workplace. For those who were too unwell to return, the concession that they would continue to be paid company sickpay was withdrawn, and they reverted to statutory sick pay in line with their specific contractual entitlements. On 30 September 2020, Mr Hosseinnia reverted to statutory sick pay.

Discussion and conclusion

32. Section 13 Employment Rights Act 1996 limits the circumstances in which an employer can make a deduction from an employee's wage. The respondent did not seek to argue that the deduction made in August 2020 was authorised, nor that it was a deduction which it was otherwise entitled to make. The respondent's position was simply that the underpayment had been corrected.

33. On the basis that Mr Hosseinnia was unable to advance a positive case which was contrary to the position set out by Mr Mallu, we accept Mr Mallu's evidence and find that there is no outstanding deduction.

34. We do find, however, that there *was* an unauthorised deduction in August 2020, and on that basis Mr Hossennia is entitled to a declaration under s.24(1) ERA. In accordance with s25(3) ERA, we make no order for repayment.

35. The list of issues in respect of the first claim also records that there is a claim in respect of ASDA's decision to stop paying company sick pay.

36. That allegation must have reflected Employment Judge Allen's understanding of Mr Hossennia's claim when it was discussed at the case management hearing in January 2022, and it is put in Employment Judge Allen's list of issues as a complaint of discrimination arising from disability and alternatively as a claim of failure to make reasonable adjustments (with the proposed adjustment being that ASDA should have continued to pay sick pay, or at least given more notice of it stopping).

37. The decision to stop company sick pay didn't seem to be a decision that Mr Hosseinnia was qeuerying in the hearing this week. He did not give any evidence about that decision, nor did he question the respondent's witnesses about it, not did he raise it in his submissions. When the matter was raised by the Tribunal he did not give a clear answer, but referred back to the August 2020 deduction and a separate point about deductions related to council tax arrears.

38. In those circumstances, the Tribunal concluded that Mr Hosseinnia had not advanced any case in relation to the discrimination complaints, and those complaints must therefore fail.

39. In any event, in line with the Court of Appeal decision in **O'Hanlon v Revenue and Customs Commissioners [2007] ICR 1359** (as well as the

EAT decision in the same case) we noted that it will generally be permissible for an employer to apply the same sick pay policy to disabled and non-disabled employees. Without Mr Hosseinnia advancing a particular argument as to why that general principle was not applicable here, we could see no basis on which the claim could have succeeded, either as a s.15 claim or a reasonable adjustments claim.

40. Despite not advancing any argument about company sick pay, during the hearing Mr Hossennia was very concerned about on-going deductions which the respondent appears to have made from his pay in relation to council tax debt. That is a completely separate matter which does not form part of either claim before the Tribunal and we make no findings about it.

The second claim

Findings of Fact

41. As we have said, Mr Hosseinnia was a long-standing employee. He had been employed at the respondent's Fulwood store but had moved to Blackpool in around 2018.

42. Mr Hosseinnia's health conditions were also long-standing, and there is evidence of significant sickness absence (predominantly put down to depression, but also knee and shoulder pain and other ailments) and occupational health involvement in his case dating back to 2013.

43. Mr Hosseinnia struggled with many of the shop floor duties. He could not spend prolonged periods in cold environments, which prevented him from working in the refrigerated areas of the store, and also in the adjoining on-site warehouse. He could not undertake heavy lifting, or use ladders, both of which precluded a lot of stock replenishment duties, as well as putting up and taking down "point of sale" promotional materials. Mr Hosseinnia could work on checkouts, but could not sit still for too long. Therefore his checkout work needed to be limited to stretches of 2-3 hours.

44. One thing which Mr Hosseinnia could do, and enjoyed doing, was "price change". The prices of products are set centrally. Everyday, there would be price increases or decreases. Prior to covid, a printer in the back area of the store would be used to produce details of price changes and new shelf-edge labels. It was important to change the shelf-edge labels quickly, to avoid customers being charged a price at the till which was different to that showing on the shelf. To perform this role effectively the person doing it would need to have a good knowledge of where each product line was stocked, so that they could quickly find the labels that needed to be changed. From around 2012, in Fulwood, Mr Hosseinnia developed his knowledge of the product lines and locations so that he was able to perform this role very successfully, and was often allocated this work. (It is important to state that contractually, he remained on a general store assistant contract, under which he could be deployed to do a range of wok within the store.)

45. In around 2018 there was a reduction in staff numbers in Fulwood. This involved some staff being made redundant. Mr Hosseinnia was offered alternative employment at the Blackpool store, which he accepted. However, travelling to the Blackpool store caused difficulties for Mr Hosseinnia. It was not practical for him to travel using public transport, and the only car he had access to was his daughter's car, which she used for work during the day. This meant that he was restricted to working night shifts, although there had been medical advice that a regular day shift, which would help him to maintain good sleeping patterns, would be beneficial for his health problems.

46. Around the same time (possibly as part of the same reorganisation, although the evidence was unclear) the task of "price change" changed. Store colleagues were allocated to one department for each shift (or in some cases, part-shift), and part of the role within each department was to implement price changes. Technological changes made the printing of the labels easier, reducing the time that needed to be spent. The task therefore became of the departmental reporting structure, and the role of Admin Manager, who previously managed centralised tasks, was removed.

47. Some of Mr Hosseinnia's evidence and questions suggested that he believed that price change still exists as a distinct role at Fulwood. For the avoidance of doubt, we accepted the respondent's evidence that it does not.

48. Following his move to Blackpool, Mr Hosseinnia agreed to work predominantly as a 'home shopper'. This work involved picking orders from the shop floor for customers who had used ASDA's online shopping service. Mr Hosseinnia was broadly able to do this work, although he struggled with some aspects, for example the length of time that he sometimes had to spend in chilled areas. Mr Hosseinnia also spent some time allocated to checkouts, although, in line with occupational health reports (for example, the one dated 28 February 2019) he was limited to periods of around two hours on the check out, to enable him to move around.

49. It was this role that Mr Hosseinnia was undertaking when he began to shield in March 2020. It is worth noting that, even prior to shielding, there had been some sickness absence in early 2020, mainly due to shoulder and knee pain.

50. As we have stated, the respondent began to look to get Mr Hosseinnia back to work from shielding from around September 2020. There was some initial communication with Mr Mulla, but responsibility for this quickly passed to Mrs Fairhurst, who was a People Business Partner. She met with Mr Hosseinnia on 20 October 2020 and discussed his on-going absence, the counselling he was receiving through employee support services provided by ASDA, and a possible phased return to work. There were some further meetings in the latter part of 2020 where these discussions were continued.

51. On 27 January 2021, Mrs Fairhurst met with Mr Hosseinnia again, and the specifics of a phased return plan were discussed. Mr Hosseinnia highlighted that he wanted to move away from the home shopper role and

highlighted his preference to do price changes. Mrs Fairhurst (who was relatively new to the business) contacted the store and received information back that the role had changed in last few years (as described above) and that the proposal was not feasible. Instead a return to home shopping on (initially) reduced hours was suggested to address Mr Hosseinnia's concerns about feeling safe to return. Following some further discussion between Mrs Fairhurst and the store, it was agreed that Mr Hosseinnia could return on reduced hours, and only doing price changes, but that this was a temporary measure to get him back into the store.

52. It is unfortunate that the terms of the return to work, and the temporary nature of the duties, were not clearly set out in writing for the benefit of Mr Hosseinnia (particularly in circumstances where English is his second language and his understanding of spoken English, although good, is not perfect).

53. Mr Hosseinnia duly returned to work on 4 March 2021. Unfortunately, however, he was unable to sustain that return, even with the adjustments that had been made, and he was signed off sick again from 8 March 2021, initially for five weeks. The reason for absence recorded in the sickness certificate was mixed anxiety and depressive disorder. Mr Hosseinnia's evidence was that he was promised he could do price change work, and managers wanted him to do other things. There may be some truth in that, but we find that a large part of the difficulty was that Mr Hosseinnia wanted reassurance that he could do price change work permanently and that was not forthcoming. We find he genuinely struggled, for the various reasons we have outlined, to comply with requests to do other tasks within the store.

54. Mrs Fairhurst spoke to Mr Hosseinnia by phone on 10 March 2021. Following this a further occupational health referral was made and a report was produced on 9 April 2021. This is a concise but thorough and helpful report which the Tribunal found useful, including for its comments about the causes and links between Mr Hosseinnia's various conditions. The report advised against night shift working, working in cold environments and heavy stock replenishment. It also said "Previous time spent on checkouts should also be avoided due to increased joint and shoulder pain." There seems to be a typo in this sentence, and we conclude that the writer probably intended to say "Continuous time on checkout…" or words to that effect. The writer concludes that Mr Hosseinnia is fit to perform the home shopper role with the reasonable adjustments recommended in the report.

55. A welfare meeting took place with Mrs Fairhurst and Mark Evans, the Ecommerce Trading Manager, on 16 April 2021. Arrangements for a phased return were discussed. Mr Hosseinnia pointed out areas of disagreement with the occupational health report, and again argued that he should be given a role involving solely, or mainly, price changes. No firm conclusion was reached. Follow-up meetings were held on 7 May and 11 June 2021. Some steps were taken to explore the possibility of early retirement.

56. A further meeting was held on 1 July 2021, at which point Mrs Fairhurst told Mr Hosseinnia that if a role could not be agreed then there would have to be a capability meeting, and that one outcome of that would be dismissal. Mr Hosseinnia then agreed that he would try a return to work in a checkout role, for 2-3 hours at a time. There was some communication about agreeing the exact hours he would work, and the respondent adjusted its standard shift template to enable Mr Hosseinnia to work reduced hours in line with his overnight availability.

57. Mr Hosseinnia returned to work on 11 July 2021. Because Mr Hosseinnia was working during the night, his was often the only staffed checkout. Where there was only one checkout operating, the respondent required it to be the wheelchair accessible checkout. On one occasion, the conveyor belt broke on that checkout, which meant that Mr Hosseinnia had to manually move the shopping through the checkout. He wanted to move to a different checkout, but the managers required him to keep the accessible checkout open, so that any customers using wheelchairs would still be able to use the checkout.

58. One night, shortly after Mr Hosseinnia's return to work, an incident happened when Mr Hosseinnia was working on the checkouts. There was a problem with his checkout, which led to a queue building up. When he tried to summon assistance there was no one immediately available to come, and the customers became unhappy. Although help eventually came, it is easy to understand that this was a stressful and difficult situation for Mr H. Without seeking to minimize that stress, it is also the sort of difficulty that will inevitably arise in a retail environment.

59. Mr Hosseinnia was again signed off work with mixed anxiety and depressive disorder from 18 August 2021. This returned to work had therefore lasted only around five weeks. As it turned out, Mr Hosseinnia would not return to work again before his dismissal.

60. An occupational health report was prepared on 5 October 2021, and a welfare meeting was held with Mrs Fairhurst and Mr Evans on 18 November 2021. The occupational health report noted that "*his anxieties can become overwhelming due to common disruptions associated with his role.*" The occupational health practitioner also recommended that Mr Hosseinnia be given access to counselling sessions, and noted that he remained unfit for work at that time.

61. By the time of the meeting with Mrs Fairhurst and Mr Evans, Mr Hosseinnia had had five of the six counselling sessions. The meetings discussed the incidents on the tills. There was a further discussion about what Mr Hosseinnia could do and he suggested a mix of duties involving price checks, some time on checkouts and click and collect (i.e. home shopping) later in his shift.

62. At this point, Mrs Fairhurst's involvement in the case ended. There was a further meeting in December 2021, conducted by Mr Evans and James Mason. A subsequent meeting was arranged for 18 January 2022, and, at

this point, HR involvement passed to Mrs Stabler. By a sicknote dated 2 January 2022, Mr Hosseinnia was signed off for a further six weeks.

63. In the 18 January meeting Mr Hosseinnia raised the possibility of a transfer back to Fulwood. Mrs Stabler investigated this but found that the store was 480 hours per month "over contract" i.e. the staff it already had were contractually entitled to work hours in excess of that which the head office deemed appropriate for a store of its size and profile. Mrs Stabler informed Mr Hosseinnia that at the next meeting the respondent would consider whether his employment should be terminated on capability grounds.

64. A further occupational health report was prepared dated 7 March 2022. This recommended that a phased return to work may be possible, with adjusted duties continuing in the longer term. The report suggested that Mr Hosseinnia could work on the checkouts for 2-3 hours, then do 1-2 hours of "light duties" before rotating back onto the tills for a further 2-3 hours at the end of his shift.

65. We would observe that the writer of this report seems to have been new to Mr Hosseinnia's case, and to have had a less well-developed understanding of both his underlying health conditions and the work done in the store, than is evidenced in some of the other (copious) occupational health documents. We also note Mr Hosseinnia's own evidence that his GP's view at this time was that he was not fit to work in ASDA at all, irrespective of any adjustments.

66. Mrs Stabler considered that the proposals outlined in the occupational health report were not feasible for various reasons, which were elaborated on in her witness statement, and which, to some extent, will be evident from what we have already said. In brief, she emphasised that the move to self-checkout and self-scan meant that a main bank checkout operator would often be working alone (particularly if working at night) and this did not seem to be something that Mr Hosseinnia could manage given the experiences of his previous failed return to work. In terms of "light duties" she highlighted that replenishment and stock-related duties all involved elements of lifting and climbing which were unsuitable, as well as potentially working in the areas of the store which were cold. All of these issues would arise whether Mr Hosseinnia was working at Blackpool or at Fulwood.

67. Mrs Stabler decided that she could not offer a proposal for a further return to work, and instead invited Mr Hosseinnia to a capability meeting at which consideration would be given to the termination of his employment.

68. The meeting took place on 16 March 2022 and the decision maker was Mrs Stabler. Mr Hosseinnia advised that there had been no significant change in respect of his various health conditions and that his current sick note extended to 29 March 2022. Mrs Stabler checked the position at Fulwood, and found out that the store remained 251 hours over contract and that the only available vacancy was for a delivery driver, which would be unsuitable for Mr Hosseinnia, due to the need to carry products as part of the delivery.

69. Having discussed the issues with Mr Hosseinnia and adjourned the meeting, Mrs Stabler formed the view that Mr Hosseinnia had been unfit to carry out his duties since 18 August 2021, that there was no realistic prospect of him becoming fit to return to work and that there was no adjustments that could be made, or alternative role that could be offered, that would change that position. Mrs Stabler decided to dismiss Mr Hosseinnia on notice. She reconvened the meeting and explained this conclusion to him verbally, and it was also confirmed in writing.

70. Mr Hosseinnia's employment terminated on the expiry of his notice period on 8 June 2022. He was informed of his right to appeal against dismissal but did not appeal. He presented his second claim to the Tribunal, as we have said, on 9 June 2022.

Relevant Legal Principles

71. We have had regard to the EHRC Code of Practice on Employment (2011) ("the Code").

Reasonable adjustments

72. Where an employee is disabled within the meaning of s.6 EqA, their employer may come under a legal duty to make reasonable adjustments. This duty is set out in ss.20-21 EqA, which provide as follows:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) […]

21 Failure to comply with duty

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

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

(3) […]

73. Schedule 8 of the Equality Act 2010 deals with reasonable adjustments in the workplace and provides, materially, as follows:

20 Lack of knowledge of disability, etc

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

(a) […]

(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

74. In assessing a complaint of failure to make reasonable adjustments, the Tribunal must therefore first identify a provision, criterion or practice ("PCP") or a physical feature of the premises, which puts the claimant at a disadvantage. It must then assess whether the respondent knew (or could reasonably have been expected to know) about the disadvantage. If so, it must assess what steps the respondent could reasonably take to mitigate that disadvantage.

75. Paragraph 6.28 of the 2011 Code of Practice makes it clear that the question of whether proposed adjustments would be effective in preventing the substantial disadvantage is something which should be taken into account in determined whether that proposed adjustment would be reasonable.

76. In **Archibald v Fife Council [2004] ICR 954** the House of Lords confirmed that the duty to make reasonable adjustments may require an employer being required to treat a disabled employee more favourably than a non-disabled comparator. On the facts of that case, it would have been reasonable for the employer to move the employee into a vacant position, rather than require her to undergo competitive interview processes.

Section 15 – Discrimination arising from disability

77. Section 15 Equality Act 2010 ("EqA") provides:

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

78. The elements of discrimination arising from disability can be broken down as follows:

(a) unfavourable treatment causing a detriment;

(b) because of "something";

(c) which arises in consequence of the claimant's disability.

79. The respondent will have a defence if it can show:

(a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or

(b) It did not know and could not reasonably have been expected to know that Mr Hosseinnia had the disability – the "knowledge defence".

80. In terms of justification, the respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is the same test as for indirect discrimination and for direct discrimination on the grounds of age. Although there is limited legal authority on justification in the context of s.15 claims, principles developed from the application of the test in those other jurisdictions will be highly relevant.

81. The burden of proof in establishing both elements of the justification test lies with the respondent. In many cases the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant as tests established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

82. We had regard to paragraph 5.12 of the Code:

"It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."

83. In conducting this balancing exercise any failure to comply with the duty to make reasonable adjustments will be relevant. Paragraph 5.21 of the Code states:

"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified."

84. Cost alone will not provide a justification for discriminatory treatment (**Woodcock v Cumbria Primary Care trust [2012] ICR 1126 CA**).

85. For the purposes of objective justification there is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process (see **Cadman v Health and Safety Executive [2004] EWCA Civ 1317**).

86. The relationship between the test of objective justification and the band of reasonable responses test (applied in unfair dismissal claims) has proved

to be a problematic issue. It is not necessarily any error of law for a tribunal to find that a claimant succeeds in a section 15 claim but fails in the unfair dismissal that runs alongside it (see **City of York Council v Grossett [2018] IRLR 746 CA**).

87. However, the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** had this to say about such cases where they arise from long-term sickness absence:

"53. *However the basic point being made by the tribunal was that its finding that the dismissal of the appellant was disproportionate for the purpose of s.15 meant also that it was not reasonable for the purpose of s.98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and 'non-dismissal' are reasonable responses does not reduce the task of the tribunal under s.98(4) to one of 'quasi-*Wednesbury*' review: see the cases referred to in paragraph 11 above. Thus in this context I very much doubt whether the two tests should lead to different results."*

88. We take from this both a caution - that we must afford the proper "substantial degree of respect" to the respondent's judgment in taking the steps that it considered to be proportionate in furtherance of its aim - and also an indication that it is likely in long-term absence situations that the same result should be reached whether the dismissal is viewed through the lens of justification or the lens of reasonableness.

Unfair dismissal

89. Subject to what we have said above about the inter-relation of the two tests, in a claim of unfair dismissal involving an ill-health capability dismissal we must determine, in accordance with equity and the substantial merits of the case, whether the employer acted reasonably in treating the absence as a

sufficient reason for the dismissal of the employee. The essential framework for such an enquiry was described as follows by Eady J in **Monmouthshire County Council v Harris EAT 0332/2014** as follows:

‘Given that this was an absence-related capability case, the employment tribunal’s reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice’.

90. There are a helpful list of factors set out in **Lynock v Cereal Packaging Ltd [1988] ICR 670** as matters which might weigh one way or the other when considering whether dismissal was appropriate. Although that is a case of intermittent (rather than long-term) absence, we consider that this portion of Wood J’s judgment remains of considerable value in a case such as this:

“The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment — sympathy, understanding and compassion… every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following: the nature of the illness; the likelihood of it recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching.” (page 675, B-E).

Submissions

91. Mr Zovidavi made oral submissions which set out the respondent’s position on the various matters raised in the List of Issues. Mr Hosseinnia also made oral submissions. To some extent, he was assisted by the fact that Mr Zovidavi had made his submissions first, as he was able to respond to some of the points raised. Generally, however, Mr Hosseinnia had some difficulties in focusing his submissions on the List of Issues and instead tended to repeat what he had told us in evidence. (We recognise that Mr Hosseinnia was representing himself, and do not mean to criticise him by recording that this was the case.)

Discussion and conclusions

Reasonable adjustments

92. In our deliberations we started with the reasonable adjustments claims. If ASDA did fail to make reasonable adjustments, then that would be relevant to determining whether the dismissal itself was discriminatory and/or unfair.

93. We find that the respondent knew about Mr Hosseinnia's disabilities at all relevant dates, largely on the basis that it was in possession of a large number of occupational health reports detailing Mr Hosseinnia's various medical conditions and offering the opinion that he was most likely a disabled person.

94. There are various PCPs set out at paragraph 10.2 of the list of issues as follows:

    i. Requirement for employees to remain on check out tills for duration of shift

    ii. Requirement for employees to work alone on check out tills after 6pm

    iii. Requirement for employees to work alone on a damaged check out till.

95. The respondent concedes that there was a requirement for employees to remain on check out tills for the duration of their shift, and a requirement generally for colleagues to work alone on check-outs in the quieter times (although not with a strict 6pm cut-off).

96. We accept ASDA's case that there was no PCP for colleagues to work alone with a damaged check-out till. This was simply something which happened from time to time and would be rectified. We found it affected the claimant once during his attempted return to work in summer 2021 as we have described. Such an occurrence is not in the nature of a PCP.

97. We find that both of the accepted PCPs put Mr Hosseinnia at a disadvantage due to his disabilities. He could not remain on tills for an entire shift due to pain in his joints, particularly his shoulder. He struggled to work alone on the checkouts due to his anxiety. He found the stressful situations which could arise whilst working alone on the checkouts very upsetting and difficult to manage.

98. The list of issues also identifies the cold environments of some areas of the business as a physical feature which put Mr Hosseinnia at a disadvantage. We accept that that was the case, specifically in relation to the frozen and chilled food areas of the shop floor and the entirety of the warehouse section, located within the store but not accessible to the public. We accept that this caused Mr Hosseinnia a disadvantage as he had been advised to avoid exposure to cold due to circulatory issues which we find to be related to his disabilities.

99. Having obtained extensive occupational health advice, we find that the respondent also had knowledge of each of these disadvantages.

100. Mr Hosseinnia's position, as per the list of issues, is that the reasonable adjustment which would have helped with these difficulties was to allow him to work shifts involving 2-3 hours on the checkout alternating with shop-floor duties. It will be recalled that that was a recommendation that was also made in the final occupational health report prior to dismissal.

101. We find that ASDA generally, and both Mrs Fairhurst and Mrs Stabler in particular, would have been prepared to allow Mr Hosseinnia to alternate between check-outs and shop floor to break up his shift, even though that does not precisely fit with their current staffing model. The difficulty was with the duties that Mr Hosseinnia could do whilst the shop floor. What Mr Hosseinnia really wanted, throughout his return to work process, was a return to spending his full shift doing price changes. Given his physical limitations, we find that was the only type of shop floor work he could realistically do.

102. We find that it was not reasonable to expect the respondent to create a role for Mr Hosseinnia to do this job, either for his full weekly hours, or alongside working for periods on the checkouts. This finding is made in the specific circumstances of this case, including the fact that other colleagues had recently lost jobs and hours due to the restructure of administration functions within the stores and also including the fact that Mrs Stabler believed that the checkout portion of the work was unlikely to be sustainable as the bulk of Mr Hosseinnia's workload, given the problems that he had experienced in July/August 2021. In reality, he was not seeking to spend a minimal amount of time on price changes to enable him to mobilise in between long stretches of sitting at tills, he was looking to revert to price changing as a substantial part of his function for each shift, and that was simply not a role that weas needed, nor could reasonably be accommodated within the respondent's structure in 2022.

103. The second suggested adjustment, of providing a check-out till that worked, falls away in circumstances where we have found there was no PCP of providing broken till points.

104. The third suggested adjustment was to transfer Mr Hossainia to Fulwood where, it is said, the work pattern he wanted could be put in place. We reject that proposition and accept the respondent's evidence that all the difficulties in offering the claimant the work pattern he wanted would have existed in just the same way at Fulwood as a Blackpool. We accept the evidence that the administration function, including price changes, had been reformed in exactly the same way in Fulwood as it had in Blackpool and that all of Mr Hosseinnia's difficulties with mobility, lifting, working in cold environments and working on checkouts would have still been present in exactly the same way at Fulwood.

105. In those circumstances, we are satisfied that the proposed adjustment of moving Mr Hosseinnia to Fulwood was not a reasonable adjustment, as it would not be effective in preventing (or materially reducing) the disadvantage that Mr Hosseinnia was experiencing. Although one of the occupational health reports had suggested that Mr Hosseinnia would benefit

from being able to work a daytime shift, this was never something which he had pressed for. Whilst there might have been more opportunity, during the day, to work on the checkout bank alongside other staff, any advantage of this would be offset by the fact that the store would generally be busier. Broadly, for the reasons we have already said, we find that in terms of disadvantage related to his *disability*, Mr Hosseinnia would have been no better off at Fulwood, even taking account of the fact that he may have been able to work day shifts.

106. The real advantage sought by Mr Hosseinnia in arguing for a move to Fulwood was that is would make his life easier in terms of travel, as he would no longer be reliant on borrowing his daughter's car. That adjustment does not address any disadvantage caused by the PCPs which have been identified. It instead addresses a difficulty that was separate from, and unrelated to, Mr Hosseinnia's disabilities. It cannot, on that basis, be a reasonable adjustment under the Equality Act.

107. We do wish to briefly note that if the circumstances of this case had been slightly different, and if we had found that the move *would* have been effective in addressing a disadvantage caused by the claimant's disability, the respondent may well have been in difficulty. The main reason given as to why the move could not be accommodated was that the Fulwood store was over-contracted. In an organisation the size of ASDA, we are of the view that it might well be reasonable to accommodate a degree over over-contracted hours as part of accommodating an employee who requires reasonable adjustments. We would presume that over-contracted hours will generally reduce through natural wastage (as, in this case, they reduced from 450 at the point when the initial query was made, to 250 at the point of dismissal) and so the cost implications on the respondent would be time-limited. Further, it is difficult to see that there would be anything aside from costs that would prevent the respondent from moving a disabled employee to an over-contracted store if that would be an effective adjustment in their specific case. That is something that we would encourage ASDA to reflect on in its future management of disabled employees.

108. In any event, however, for the reasons outlined, there is no failure to make reasonable adjustments in Mr Hosseinnia's case.

S.15 – discrimination arising from disability

109. We then moved back in the list of issues to deal with the claim under s15 EqA.

110. There are two instances of "unfavourable treatment" relied on. The first is that the respondent failed to make reasonable adjustments including moving the claimant to a store nearer home. We do not agree that the respondent failed to make reasonable adjustments, as we have stated. This instance of unfavourable treatment (if it can be advanced as unfavourable treatment at all) must fall away.

111. The decision to dismiss undoubtedly does amount to unfavourable treatment. We are satisfied that the decision to dismiss was due to something arising from disability. The primary reason for the decision was the claimant's ill-health absence. The various restrictions in his ability to work were secondary reasons, in that they had caused the attempted return to work processes to fail.

112. It is then for the respondent to show that the decision to dismiss was justified. That is, that is was a proportionate means of achieving a legitimate aim. The two aims relied on are:

i. requiring its colleagues to attend their contractual role on a regular basis; and

ii. managing long term capability absence so as to save cost and management time and to allow ASDA to plan its workforce and operational needs with certainty.

113. We accept that those are both legitimate aims.

114. Was the dismissal a proportionate means of achieving those legitimate aims? We take account of the fact that Mr Hosseinnia had been absent, overall, for around two years at the date of dismissal. The respondent had arranged two attempted returns to work, with different adjustments made each time. Neither of those attempts had led to a sustained, successful return to work. Indeed, both had failed within a relatively short period of time. The respondent had obtained medical advice via a large number of occupational health appointments, including updated advice at the point where dismissal was being considered. There was a degree of conflict in that advice as to the adjustments which would assist Mr Hosseinnia. The respondent had repeatedly sought to engage with Mr Hosseinnia about what he could and couldn't do. Despite that engagement it was impossible to identify a role within the contemporary business set-up which the Mr Hosseinnia could successfully undertake. There was nothing to indicate that that position was likely to change. Indeed, Mr Hosseinnia has told us that throughout that period his GP was telling him that he was not fit to return to ASDA. We take account of the fact that this was not a rushed process. Aside from the two failed return attempts, Mr Hosseinnia had been out of the business through shielding and sickness absence for over two years. There has been no suggestion that any of his medical conditions were likely to improve, and we can see nothing that would have been achieved by any further period of waiting. Although Mr Hosseinnia was not receiving company sick pay, we recognise there is an on-going marginal cost to the employer of having people on long term sickness absence, including the costs of management time, of occupational health referrals and of the employee accruing rights (e.g. to holiday pay and notice pay).

115. When we weigh the interests of the parties, taking account of all of the guidance available in the case law set out above, we find that dismissal was a proportionate response, and the respondent's decision to dismiss was justified. That means the s.15 claim fails.

Unfair dismissal

116. Finally, we turned to the unfair dismissal claim. We are wholly satisfied that the decision to dismiss was within the band of reasonable adjustments. Our reasons for this finding mirror the reasons we have given above for finding that the dismissal was justified for the purposes of the s.15 Equality Act 2010 claim.

117. In terms of procedural fairness, we are satisfied with the procedure the respondent carried out.

118. It emerged in response to questions from the Tribunal that managers tasked with chairing capability dismissal hearings in long-term sickness cases do not necessarily have training in the rights of disabled employees under the Equality Act 2010. In some circumstances it may be necessary for the employer not to simply treat a disabled employee the same as everyone else, but to go the extra mile. We were not entirely sure from Mrs Stabler's evidence that she recognised and understood that principle. In the particular circumstances of this case, however, we are satisfied that any misapprehension about this made no difference to the outcome, and that the procedure followed was fair.

119. Mr Hosseinnia made a particular point, in his closing submissions, to say that ASDA had breached its own procedure by not having a panel of three professionally qualified people to detrmine the final capability hearing. We cannot find any such reference in the respondent's procedure. (It is possible that Mr Hosseinnia may have read something about the composition of Employment Tribunal panels, and this has confused him). However, there does seem to have been some irregularity in that Mrs Stabler, as the HR business partner, took the decision to dismiss and Mr Mason, the manager, acted as a notetaker. The procedure envisages those roles will be the opposite way around. We accept Mrs Stabler's evidence that that was due to Mr Mason being relatively new to the role and we are satisfied that this change did not compromise the overall fairness of the decision. To the contrary, Mr Hosseinnia has been clear that Mrs Stabler was someone whom he trusted and had a high regard for. There is no reason to suspect that Mr Mason, or any other manager, would have reached a decision that was more favourable to him. The policy also sets out certain requirements about the level of manager needed for a dismissal hearing. We are satisfied that Mrs Stabler met those requirements. In any event, as we have said, any irregularity in this did not affect the overall fairness of the decision.

120. In those circumstances, the complaint of unfair dismissal also fails.

Final conclusion

121. For the reasons we have set out, Mr Hosseinnia is entitled to a declaration that an unauthorised deduction was made from his wages but no award of compensation. The other complaints fail and are dismissed.

Employment Judge Dunlop

Date: 13 December 2024

WRITTEN REASONS SENT TO THE PARTIES ON

Date: 19 December 2024

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FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX – CONSOLIDATED LIST OF ISSUES

Claim 1

1 Disability

1.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the relevant time (1 August 2020 to 14 October 2020)? The Tribunal will decide:

(a) Did he have the following physical or mental impairments: brain tumour; type 2 diabetes; blood pressure; anaemia; arthritis; and/or anxiety with depression?

(b) Did any/each of the impairments have a substantial adverse effect on his ability to carry out day-to-day activities?

(c) If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

(d) If so, would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

(e) Were the effects of the impairment long-term? The Tribunal will decide:

(i) did they last at least 12 months, or were they likely to last at least 12 months?

(ii) if not, were they likely to recur?

The Respondent accepts that the following impairments amounted to a disability at the material time, namely 1 August 2020 to 14 October 2020:

- Anxiety; and
- Depression.

The Respondent denies that the remaining impairments which the Claimant seeks to rely upon amounted to a disability at the material time, on the basis that the Claimant has failed to set out in his disability impact statement, or evidence by way of his medical records, how those impairments substantially affected his ability to carry out day-to-day activities at the time of his complaints.

2 Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the Respondent treat the Claimant unfavourably by ceasing to pay him full salary or company sick pay on, or around, 14 August 2020?

2.2 Did the Claimant's absence from work, or inability to return to work at that time, arise in consequence of the Claimant's disability?

2.3 Was the unfavourable treatment because of either (or both) of those things?

2.4 If not, was the treatment a proportionate means of achieving a legitimate aim?

2.5 The Tribunal will decide in particular:

(a) was the treatment an appropriate and reasonably necessary way to achieve the aim(s);

(b) could something less discriminatory have been done instead;

(c) how should the needs of the Claimant and the Respondent be balanced?

3 The duty to make Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: reducing an employee's pay, or ceasing to pay company sick pay, when an employee has been absent on ill health grounds for 26 weeks?

3.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

3.3 Did the Respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The reasonable adjustments to the PCP relied upon are:

(a) To continue to pay full pay or company sick pay; and/or

(b) To provide proper advance notification of the reduction in (or stopping of) pay and/or company sick pay.

4 Unauthorised deductions

4.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted? The Claimant alleges that unauthorised deductions were made from 14 August 2020.

5 Remedy

5.1 If the Claimant succeeds in any of his claims, how much should the Claimant be awarded?

Case number: 2415751/2020 & 2404679/2022

Claim 2

6 Unfair dismissal

Dismissal

Reason

6.1 Has the Respondent shown the reason or principal reason for dismissal?

6.2 Was it a potentially fair reason under section 98 Employment Rights Act 1996? Was it capability?

6.3 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

(a) The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

(b) The Respondent adequately consulted the Claimant;

(c) The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

(d) The Respondent could reasonably be expected to wait longer before dismissing the Claimant;

(e) Dismissal was within the range of reasonable responses.

7 Remedy for unfair dismissal

7.1 What basic award is payable to the Claimant, if any?

7.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

(a) What financial losses has the dismissal caused the Claimant?

(b) Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

(c) If not, for what period of loss should the Claimant be compensated?

(d) Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

(e) If so, should the Claimant's compensation be reduced? By how much?

(f) Does the statutory cap of fifty-two weeks' pay apply?

8 Disability

8.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about 4 August 2020 to 8 June 2022 *(the relevant period)?* The Tribunal will decide:

(a) Did he have the physical impairment of brain tumour acromegaly, type 2 diabetes, blood pressure, anaemia, arthritis, and mental impairment: depression and anxiety?

(b) Did it individually or cumulatively have a substantial adverse effect on his ability to carry out day-to-day activities?

(c) If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

(d) If so. would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

(e) Were the effects of the impairment long-term? The Tribunal will decide:

(i) did they last at least 12 months, or were they likely to last at least 12 months?

(ii) if not, were they likely to recur?

The Respondent accepts that the following impairments amounted to a disability at the material time, namely 1 August 2020 to 8 June 2022:

- Anxiety; and
- Depression.

The Respondent denies that the remaining impairments which the Claimant seeks to rely upon amounted to a disability at the material time, on the basis that the Claimant has failed to set out in his disability impact statement, or evidence by way of his medical records, how those impairments substantially affected his ability to carry out day-to-day activities at the time of his complaints.

9 Discrimination arising from disability (Equality Act 2010 section 15)

9.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability from 4 August 2020?

9.2 If so, did the Respondent treat the Claimant unfavourably in any of the following alleged respects: failing to make adjustments including moving the Claimant to a store nearer home and dismissing the Claimant on the grounds of capability

9.3 Did the following things arise in consequence of the Claimant's disability?

(a) the Claimant's sickness absence?

(b) Incapable of working in cold areas of the business and taking up the alternative employment offered?

(c) The need to work 2-3 hours on the tills followed by time on the shop floor.

9.4 Has the Claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things? Did the Respondent dismiss the Claimant because of that sickness absence?

9.5 If so, can the Respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

9.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

(a) requiring its colleagues to attend their contractual role on a regular basis; and

(b) managing long term capability absence so as to save cost and management time and to allow ASDA to plan its workforce and operational needs with certainty.

9.7 The Tribunal will decide in particular:

(a) was the treatment an appropriate and reasonably necessary way to achieve those aims;

(b) could something less discriminatory have been done instead;

(c) how should the needs of the Claimant and the Respondent be balanced?

10 Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

10.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

(a) Requirement for employees to remain on check out tills for duration of shift

(b) Requirement for employees to work alone on check out tills after 6pm

(c) Requirement for employees to work alone on a damaged check out till.

10.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that [_____]?

10.4 Did a physical feature, namely working in the cold, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was unable to work in cold areas of the business?

10.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

10.6 Did the Respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The Claimant says that the following adjustments to the PCP would have been reasonable:

(a) Allowed the Claimant to work 2/3 hours on the check out till followed by shop floor duties and back to the check-out tills.

(b) Provide a check out till that worked

(c) Transfer the Claimant to the Fulwood store where 10.6(a) could be put in place.

(d) [ ] …

10.7 By what date should the Respondent reasonably have taken those steps?

11 Remedy for discrimination

11.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

11.2 What financial losses has the discrimination caused the Claimant?

11.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

11.4 If not, for what period of loss should the Claimant be compensated?

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

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

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

11.8 Should interest be awarded? How much?