EMPLOYMENT TRIBUNALS

Claimant: Mrs J Wisniewska

Respondent: DHL Services Ltd

Heard at: Midlands West

On: 6, 7, 8, 9 and 10 January 2025

Before: Employment Judge Faulkner
Mrs D Hill
Mr K Palmer

Representation: **Claimant** - Mr O Lawrence (Counsel)
Respondent - Mr G Price (Counsel)

Interpreter: Ms I Drazewska (Polish)

JUDGMENT having been sent to the parties on 13 January 2025, and written reasons having been requested by the Claimant in accordance with Rule 60(4) of The Employment Tribunal Procedure Rules 2024, the following reasons are provided.

REASONS

Introduction

1. This Claim is essentially about the Respondent not permitting the Claimant to work from 4 October 2021, because of her inability to lift anything more than 5 kg in weight. The Claimant says this amounted to discrimination of various types, including a failure to make reasonable adjustments. The Claim also concerns the Respondent not paying the Claimant in full when she was not working, and a dispute regarding annual leave.

Issues

2. The issues to be determined at this Hearing were identified in a List of Issues appended to Case Management Orders dated 4 April 2024, which I produced following a Case Management Hearing on 20 March 2024. That List, amended by agreement following discussion with the parties at the start of this Hearing, and at other stages during it, is reproduced in the Annex to these Reasons.

Hearing

3. We read statements and heard oral evidence from the Claimant (with the assistance of Ms Drazewska) and for the Respondent, Mr T Koblasa (formerly a Shift Manager, now employed in a more senior role), Ms A Logan (Payroll Hub Manager) and Mr D Davies (Senior Operations Manager). Alphanumeric references below are to the statements, for example JW5 is paragraph 5 of the Claimant's statement and TK7 paragraph 7 of Mr Koblasa's. The parties agreed a bundle of 508 pages. The Respondent provided a supplementary bundle of a further 47 pages and the Claimant some photographs and a fit note, all without objection. We made clear, and the parties accepted, that we would only consider the documents the parties drew to our attention either at the start of the Hearing or during oral evidence. Page references below are to the bundle, those prefixed with SB being references to the supplementary bundle.

Facts

4. The findings of fact set out below were made on the balance of probabilities based on the evidence we were taken to. We have not set out every factual matter the parties raised in evidence, instead focusing on those that seemed to us most material to the issues before us, though just because we do not mention something does not mean that it was not taken into account. We should also make clear that we did not find it necessary to say anything about the cause or severity of the Claimant's injury at work in 2021 which we understand is the subject of a personal injury claim in the civil courts.

The Respondent's operations

5. The Claimant was employed by the Respondent, a logistics company, as a warehouse operative in Rugby, working alternatively on the early and late shifts (not the night shift) from 23 April 2018 until she resigned on 15 May 2023. There was no complaint before us about the termination of her employment. The Claimant is Polish.

6. The warehouse is operated for a specific client. Mr Davies detailed in his statement how the warehouse works, supplementing his statement with a few further details in his oral evidence. We essentially adopted his evidence in that respect in finding that the key elements of the warehouse operations were as follows:

6.1. When a lorry arrives at the site the pallets on the lorry (there could be between 30 and 60) have to be unloaded into the warehouse, using the equipment described below, either a Powered Pallet Truck ("PPT") or manual pump truck, through one of several bays. Typically, more lorries arrive during the early shift than the late shift. Different lorries are unloaded at the same time at

different bays. All the pallets on a lorry are removed as quickly as possible so that it can leave.

6.2. Once goods are in the warehouse, if they are on a mixed pallet (namely a pallet with multiple different products), the boxes have to be manually "broken down" into product groups and placed in those groups on to other pallets, so that the same products can be stored together. Two or three operatives work on breaking down a pallet together.

6.3. The products are then "received" using a scanner, which needs to be done with great care – there was a detailed "Work Instruction" describing this task at page 132. Mr Davies told us that this requires some moving of the boxes by the person doing the scanning. We accepted that as common sense, as the label for scanning may not be immediately accessible. We could also accept that boxes may well need to be lifted to scan them, especially for a mixed pallet, for example if the box is in a stack or the label has ended up on the bottom of the box. The scanning can begin immediately a box is removed from a pallet.

6.4. Products may need to be weighed, which from 2019 required lifting boxes onto a machine. There was broad agreement between the parties that this was only required for new products and thus for on average around 5% of the goods coming in.

6.5. Where a pallet has been broken down as above, boxes of each product have to be stacked on to separate pallets ready to be taken for storage.

6.6. The pallets are then moved to be stored, which is often the larger share of the work required on the late shift. It is done using equipment as follows:

6.6.1. A manual pump truck, which requires the operative to pump it (so as to lift the pallet hydraulically), then pull the pallet manually, walking in front of it. It is not possible to push the truck as the pallets being stacked on it would mean the operative could not see where they were going.

6.6.2. A PPT for heavier pallets. This does not require strength to move. The operative stands on the back of it, needing to rotate both arms to the side whilst standing forwards, and to look over their shoulder.

6.6.3. A reach truck, which puts products away on, and retrieves them from, higher racking.

6.6.4. There was also a counter-balance machine, which the Claimant could not use.

6.7. Products can then be "picked" from where they are stored, to satisfy customer orders, using a low-level order picker ("LLOP") for those not requiring a reach truck.

6.8. There is then a process for despatching products to customers from Outbound, which may involve splitting product boxes on to separate pallets, requiring manual handling.

6.9. Both goods coming in and goods going out may need to be shrink-wrapped on the pallets, usually using a machine, occasionally manually.

6.10. There is also a "hygiene" process, whereby an operative collects waste by pulling around a wheelie bin.

6.11. There are other jobs which were mentioned in Mr Davies' statement, such as those in a control room and for the carrier TNT, but they did not feature in the evidence otherwise and so we need say nothing further about them, though we will come separately to the question of discussion of administrative roles with the Claimant when she was not permitted to work in the warehouse.

7. Mr Koblasa concurs with Mr Davies' description of how the warehouse works, saying at TK43 that once Inbound work is completed, operatives move to another task in the warehouse rather than waiting for another delivery. Whilst accepting that the various stages of the warehouse operations are as described above, we noted that the Claimant was trained to work in Inbound only, and in practice in approaching three years of active employment was not required to work elsewhere. She was trained to use a PPT.

8. In August 2021 (see further below), Mr Davies and Mr Koblasa worked on a Roles and Requirements form (pages 174 to 175), which was rolled out to staff in September. The idea was to provide a more structured basis for determining possible options when staff could not perform the full range of warehouse operative duties. It set out the weights to be lifted for each role, generally up to 20kg manual lifting and up to 150kg being moved by some form of machinery. Mr Koblasa described this during his oral evidence as a change in the roles performed in the warehouse, though we were not given any details of how that was the case.

9. The Respondent says that the weight of a box cannot be known by an operative without moving it. The Claimant told us that for an unmixed pallet, an information sheet sometimes gives the pallet weight and always says what the product is, and for a mixed pallet, the sheet sometimes gives the weight of each box – Mr Koblasa said more specifically that this was for about 50% of mixed pallets, which we accepted. Mr Davies told us that the Respondent does not accept at face value the weight signified on any label when a box is received, which is why boxes are weighed, though he agreed that this was only the case for new products. The Claimant also told us that she knew from experience which boxes were heavy, except for new products. The Respondent does not accept that, pointing out that the client has multiple thousands of different products, so that it would not be possible to remember the details of them all. Obviously, the Claimant did not control what goods were received on any given day.

10. We concluded that whilst her experience meant that she would be able to judge the weight of many boxes without lifting or moving them, that could by no means be the case in every instance, given the vast range of products and of course the scope for a label to be wrong.

2019 accident

11. The Claimant says at JW3 that she had an accident at work on 26 June 2019, returning to work on 14 August 2019 (page SB45). The Respondent did not contest this. She says that for over a year thereafter she was permitted to work without being required to lift anything (in oral evidence she said "anything heavy"), telling us that a manager called Oleg Stroi gave her permission to this

effect, and that her colleagues assisted her when lifting was required as she carried out her duties.

12. Whilst it challenged the Claimant at length about this in cross-examination, the Respondent eventually accepted that the Claimant carried out amended duties of some description for around a year as she says. At SB11 to SB13 are notes of a welfare review meeting on 3 October 2019 between the Claimant and a manager called John Lindsay. The notes show that the Claimant told Mr Lindsay she could operate a PPT and that he referred to the fact that she was being assisted by colleagues, in that she was not stacking boxes or breaking down pallets, but said that the Claimant not doing lifting for herself was not a long-term solution. Mr Lindsay went on to say, "You're not fit to work as we don't want you to hurt yourself even more", and at the end of the meeting told the Claimant that there were no light duties. The Claimant says that none of her colleagues complained about having to assist her. The Respondent did not seek to contradict that evidence, which we thus accepted.

13. A GP note on 1 November 2019 (page SB19) said that the Claimant needed to undertake light duties. At a meeting on 12 February 2020 (page SB25) Mr Koblasa said that the Claimant was not engaged on light duties, but on amended duties, and that there may be a spike in volumes of work which would mean the Respondent may require the Claimant to do normal duties whatever the job required. Mr Koblasa thus accepted that the Claimant had been on amended duties to this point, that this continued to September 2020 and that to his knowledge, this did not create any logistical issues in the warehouse. Mr Price in closing submissions pointed out that Mr Koblasa also said in evidence that he was not the Claimant's line manager and so did not have a detailed understanding of her work at this point. Given however that he was involved in more than one of the meetings with the Claimant at this time, we did not accept that this diluted in any way his evidence that the amended duties arrangement was in place for a year-long period and that no major logistical issues were reported to him during this time.

Working arrangements from August 2021

14. The Claimant suffered a serious spinal injury in a car accident in September 2020. She was off sick for 236 working days, returning to work on 23 August 2021. There is a return-to-work form, completed by Mr Koblasa, at page 152ff which stated that the Claimant could not resume her normal duties and needed additional support. The form said, "Joanna has confirmed that she cannot lift any cases and needs a job which don't [sic] require lifting or any rotational movements/bending". This was consistent with a medical certificate the Claimant provided on 16 June 2021 (page 147). Mr Koblasa told us that it was for the Claimant's line manager, a Ms V Siriut, to determine what adjustments could be made in practice.

15. On 5 September 2021 (a new document the Claimant handed up by consent on day 2 of this Hearing) a consultant signed a fit note for the Claimant saying she was fit for work with amended duties – "light duties only" – for a period of 6 months. The Claimant was meant to have the appointment before her return to work, but it got rearranged. She says she handed the note to Mr Koblasa. He could not recall whether she did or not. On balance, we concluded that the note was not handed to Mr Koblasa, principally because we were not taken to any references to it in any of the review meetings which took place after the Claimant

was absent from work from 4 October 2021 (see below), and we felt certain she would have mentioned it in that context had it been provided.

16. For the period from 23 August 2021 to 20 September 2021, the Claimant was assisted by her colleagues when carrying out her duties, with the Claimant focusing on scanning and labelling boxes and not being required to lift them. This meant that her colleagues were breaking down the products and passing them to the Claimant for scanning, waiting for her to do that, and then taking the product back and placing it on the pallet. They were also weighing products for the Claimant. Mr Koblasa says that all of this meant that in an 8-hour shift, sometimes the Claimant would only be scanning for 2 or 3 hours. He clarified in oral evidence that this was on the late shift, whilst on the early shift the Claimant was occupied for 4 or 5 hours (when there was more scanning to do because, generally, more lorries were arriving). He also told us that the Claimant's colleagues spent a lot of time waiting around in this period. He says that all of this disrupted the Respondent's operations, added additional time to the inbound process and made everyone far less efficient.

17. Mr Koblasa told us that it was Ms Siriut who informed him that the Claimant was not fully engaged as described above. Mr Lawrence pointed out this was not mentioned in Mr Koblasa's statement, nor when he was being cross-examined on the impact of the Claimant doing amended duties, but on balance, we accepted what Mr Koblasa said on this point. It seemed to be agreed that he did not observe the Claimant's work directly and he did mention in his statement (at TK19) that the Claimant was not fully occupied. Those two points can only sensibly be reconciled if he was told this by someone else, and it is logical that it would have been mentioned by a colleague closer to the Claimant's work than he was. We noted also, in support of that conclusion, that Ms Siruit was at the first review meeting which took place after 4 October 2021, namely on 14 January 2022 (page 199), which supports the notion that she and Mr Koblasa were in discussion about the Claimant's situation. The Claimant does not accept that she or colleagues ended up standing around doing nothing. She says she scanned products whilst colleagues were breaking down pallets, she would then scan those products whilst they broke down the next pallet, and so on, so that she was fully occupied throughout her shift. We will come back to this point in our conclusions.

18. We accepted Mr Koblasa's evidence that a colleague, Claudio Pires, said to him at some point in August or September 2021 that it was not fair that he was having to do manual handling. We agreed however with Mr Lawrence that it is not clear whether this was because Mr Pires was doing work that the Claimant would otherwise have been doing, or because he simply felt it was unfair that he was doing manual handling and she was not.

19. In August or September 2021, the Claimant asked Mr Koblasa if she could do a similar role to someone called Christina, which the Claimant described to us as a paperwork role, but Mr Koblasa told her nothing was available. This is a role the Claimant says she could have been redeployed to as a reasonable adjustment after 4 October 2021. Christina was a troubleshooter, dealing with problematic pallets. Whilst the Claimant does not agree that Christina had to break them down, and says that the lifting requirements for Christina were not significant in practice, she agrees Christina had to move pallets, and sometimes weigh them and accepted in oral evidence that she would not have been able to

do either of those things. In any event, the Respondent had no requirement for an additional person to do this role.

20. The Claimant says at JW6 that Mr Koblasa then offered her a position occupied by Marta Baran, which the Claimant describes as a simple office job, which did not require lifting. She was hesitant to take it because of her view of her command of English, and says that she thought about it for a week, but when she raised it again with Mr Koblasa, he told her it was no longer available – Mr Koblasa clarified in evidence that the application window had closed. The Claimant did not raise any other request for or interest in an administrative role.

21. Ms Baran's was the only administrative vacancy at the Rugby site in the period from 4 October 2021 to the date of the Claim Form. In a meeting in April 2022 (page 235), Mr Koblasa asked the Claimant about administrative roles (we assume so that he could enquire if there were any vacancies) and she said she could not sit for long periods. It is agreed that Mr Koblasa also spoke to the Claimant about the Hygiene work at some point, but the Claimant said she could not do that, because the lifting was more than she could manage.

October 2021

22. Unfortunately, after a month back at work, the Claimant suffered a shoulder injury in the warehouse. Because of that and a positive Covid-19 test, she was off work again from 21 September 2021. On her return from that sick leave on 4 October 2021, and repeatedly thereafter, she was told that all warehouse roles required lifting boxes up to 20kg, which she confirmed she could not do, and so she was not permitted to work. This is what lies at the heart of this case.

23. At page 168ff there is a return-to-work form completed on 4 October 2021 by Connor Tanner, a manager at the time who is no longer employed by the Respondent and who met with the Claimant on that day. To the question of whether the Claimant was fit to return to work, the answer was negative. According to the notes of the meeting at pages 172 to 173, the Claimant stated that she could not lift anything and that she could not do any rotational movement. With reference to the Roles and Requirements document at pages 170 to 171 she is noted as saying, "I can't do anything from this list as I am not able to lift anything after my surgery …I can only do receiving without lifting". The Claimant says at JW12 that at some point around this time, Mr Koblasa told her that the Roles and Requirements document set out new requirements. Mr Koblasa could not remember whether he said this. Given that as set out above he told us that the document reflected a change in roles, we concluded on balance that he did.

24. According to the notes, Mr Tanner said that he did not want the Claimant to hurt herself, referring to the Respondent's duty of care. The Claimant said she wanted to come back to work, and that the Respondent could send her home but would have to pay her. She says at JW12 that she was available and ready to work, but as she would not sign the Roles and Requirements document to say she could do the full range of duties for any of the roles, she was sent home. It is recorded that Mr Tanner asked her to provide a fit note. Mr Koblasa said to us that fit notes were required, but that the Claimant did not provide them. Evidently, no action was taken against her as a result.

25. There appears to have been a meeting on the next day, 5 October 2021, this one with Mr Stroi – page 177. The Claimant again said she could do receiving only (that is, scanning), could work but not lift anything, and that she had received help from her team. Mr Stroi told her that the Respondent had a duty of care and since the Claimant was not fully fit and capable of performing all required tasks, the Respondent could not allow her to return to work at that point.

The Claimant's absence

26. The Claimant saw Occupational Health ("OH") on 26 November 2021 – the report is at pages 181 to 182. It said that her reported symptoms were slowly improving, but on an average day her pain levels were from around 5/10, increasing to 9/10 or higher depending on what she was doing. It concluded she was unfit for her substantive role but might be able to manage light duties if such a role was available. She was "unlikely to manage any work tasks that require repeated manual handling, twisting, bending or reaching with [her] right arm" and was "likely to struggle to carry any objects over 5 kg in weight without this causing worsening of her pain". The report concluded that it was difficult to know for how long such adjustments would be required or whether in the long term she would be able to return to her substantive role, adding in closing, "My suspicions are that she may struggle with repeated heavy lifting in future".

27. On 7 January 2022 (page 188) the Claimant emailed Mr Koblasa, complaining about how she was being treated. She complained that the Respondent was discriminating against her by not letting her "get back to the duties I did before the road accident", which she says was a reference to what she was doing in 2019, that is working without lifting.

28. The first health review meeting took place on 14 January 2022. The notes at pages 192 to 198 record the Claimant as saying she could not lift heavy cases but that the Respondent could offer her at least a part time shift. Mr Koblasa replied that he could not give her just light duties with her colleagues doing what she could not, and said that the Respondent did have an issue with this "as we all have to be treat[ed] this same way". The Claimant then said she could do lifting, but that cases could not be as heavy as 20kg and she could not push a 150 kg pallet. Mr Koblasa replied that the Respondent could not create a specific job for the Claimant. With reference to the Roles and Requirements document, the Claimant said to Mr Koblasa that the Respondent did not have a task for her as all of the roles required good English speaking and lifting. When she said she could work if a case was light, Mr Koblasa asked what would happen if it was heavy and the Claimant was not aware of this, a point which the Claimant appeared to understand. She said, "I can't lift now, but I can do this later".

29. We also observed that Mr Koblasa is noted as saying that "as bad as it sounds", the Respondent did not want the Claimant back at work because of her accident (page 194). He told us that the note taken by his colleague, for whom English was not their first language, was inaccurate. We agreed with Mr Lawrence that it is highly unlikely such specific words would have been wrongly noted, though it is clear that the comment was about the Respondent wanting to "make sure [the Claimant was] ready to [go] back". In other words, Mr Koblasa's concern was very evidently that the Claimant did not suffer more injuries; he told us that whilst he accepted the warehouse is a potentially hazardous environment for everyone, he felt the risk to the Claimant was greater, given her particular health issues.

30. At page 199 there is a letter from Mr Koblasa to the Claimant dated 20 January 2022. It said, "Based on the OH report and what has been discussed in our meeting, you are unable to fulfil any of the presented duties within its entirety [sic], it was agreed that you are presently unable to carry out your role … due to your medical condition". The Respondent made arrangements for physiotherapy sessions, though the Claimant indicated to us that she did not find them useful.

31. At a further review meeting on 11 February 2022 (page 216ff), the Claimant said that the Roles and Requirements document did not work for her, as she could not push anything weighing 10kg, Mr Koblasa replying that as a result she could not return to work. At a further meeting on 11 March 2022 (page 224ff), the Claimant said she would never sign the Roles and Requirements document as she could not guarantee that she could lift the amounts stated.

32. The Claimant told us that from around March 2022 she could have driven a PPT. A further OH report (from the physiotherapist) on 24 March 2022 (page 231) said that the Claimant had reported that any movement was painful, particularly turning her head when driving. The Roles and Requirements document included using the pump truck and the PPT, and the Claimant was still at this point saying she could not do what was listed in it. Given that, and given what the physiotherapist said, we concluded that the Claimant was not correct in saying she could have used the PPT in March 2022. The physiotherapist's report also said that if any desk role could be accommodated, this would help the Claimant's recovery, but "lifting at this moment is not appropriate".

33. The next review meeting was on 8 April 2022 (page 233ff). The Claimant said she wanted to return to work but could not lift heavy cases, Mr Koblasa replied that she needed to be 100% ready for the role, and the Claimant retorted that she was never 100% well. Mr Koblasa again told the Claimant that he could not give her light work as the Respondent needed to treat everyone equally. He asked if she could pull a pump truck and the Claimant said she did not know, would need to try, and nothing would change if she did not try anything (page 235). As noted already, Mr Koblasa asked if she could do an administrative role, but the Claimant replied, "even if I'm sitting it's still not good" (page 236).

34. The next meeting was again with Mr Koblasa on 6 May 2022 (page 239). The Claimant said her pain levels were never low, sometimes 8/10, sometimes 10/10. Mr Koblasa again referenced the need for a fit note. As the Claimant says at JW25 there was a further meeting (with Mr Tanner) on 24 June 2022 (page 246), at which she said nothing had changed and she could lift up to 5kg only, the Respondent maintained that she was unable to perform her normal role, and said that it had to make sure she was safe in the workplace. Mr Tanner again said a fit note was required. 2 August 2022 was the date of the next meeting, this time with Mr Koblasa (pages 254 to 258). As stated at TK64 and JW26, the Claimant said she wanted to try a return to work, and if she could not lift something she would not do it and would seek help, but Mr Koblasa responded that she had to be fit to do everything – he told the Claimant he did not want her to get injured again and could not let her return to work if she was not fit. The Claimant says she confirmed she would be able to drive the PPT, and that she could do some of the tasks on the Roles and Requirements document, but could not lift the required weights. The Respondent did not contradict that she said this, but points out that the experience of driving the PPT may have been difficult for the Claimant given the uneven floor in the warehouse.

35. There was a further review, after the date of the Claim Form, on 22 December 2022 (page 280ff). The Claimant said she was fit to work but could not lift. Mr Koblasa asked if she would potentially work in the office and she said she would if trained. The Claimant agrees that at each review meeting at which the Roles and Requirements document was reviewed, she told the Respondent she could not perform the duties set out in it.

36. Although also after the events with which this Claim is concerned, we note that the OH report of 10 May 2023 (pages 378 to 379) said that the Claimant was experiencing right shoulder pain in almost all planes of movement, particularly reaching overhead. It recommended amended duties including lifting objects up to 5 kg, and scanning.

37. The Claimant says that one step the Respondent could have taken to overcome the disadvantage of her not being able to lift weights, with its consequence that she did not work, was to provide her with an electric pump truck ("EPT"). Whereas an operative stands on a PPT to operate it, an EPT is operated by pulling it. The Claimant does not accept that using an EPT would have required rotational movements looking over her shoulder, nor any particular strength to move it. Mr Koblasa insists however that it does require looking over one's shoulder, as the EPT is pulled behind you and you have to check where you are walking for the reasons set out above. We concluded that whilst no physical strength is required to use an EPT, for the reasons Mr Koblasa gave it would require twisting and looking over one's shoulder. The Claimant accepted in evidence that some pallets would still need to be stacked before being moved for storage, and that she could not have done that. She also accepted that she could not have done the breaking down of mixed pallets, nor the stacking of pallets, nor weighing of boxes. An EPT would not have enabled her to do any of those tasks. She nevertheless says that using an EPT might have meant she could take more goods out of lorries and move heavy pallets in the warehouse.

38. Mr Koblasa accepted in his evidence that the Claimant could have scanned products and that at some point during her absence she would have been able to drive a PPT, and that these tasks together would have been productive work. He said that whilst giving his evidence he was trying to imagine how things could work in these scenarios and wanted us to note the following:

38.1. Scanning is much faster than moving boxes, so that the Claimant would have been waiting whilst unloading was done. Mr Davies said that receiving a complex mixed pallet could take 2 to 3 hours, though the scanning was only a small part of that. He also made the point at DD57 that incoming product varies and on that some days there might not be any, though we were sure that would be very rare. Mr Koblasa also said that if the Claimant worked as a dedicated scanner, there would have been times when her colleagues would have been waiting around for her.

38.2. It is important to be able to allocate operatives wherever work is needed, something Mr Davies also emphasised. Mr Koblasa told us that whilst the Respondent could have assigned the Claimant to early shifts only, when more receiving work is undertaken, she would still not have been fully occupied.

38.3. There was insufficient floor capacity to have multiple unloads done at the same time. To avoid such issues, products from all the lorries being unloaded

together have to be scanned at the same time at each bay, and a mixed pallet cannot be scanned until all the boxes are removed. Mr Lawrence suggested that Mr Davies' statement at DD17, referring to each bay being 194 square metres means there would be ample space. Each bay is clearly a large area, but we cannot disagree with Mr Davies that floor capacity would be a huge issue. We found his evidence to be clear and convincing on this point.

38.4. It is important to ensure that lorries are unloaded within their scheduled delivery slot so that they can leave as quickly as possible.

38.5. It would be impractical for colleagues to test whether a box was something the Claimant could lift, as the more people touch boxes, the more process errors may arise.

39. For pregnant employees, a risk assessment is done, and (TK49) the weights they lift are reduced over time. Mr Koblasa told us that if they can only lift light weights, they are found roles in the office or signed off. He did not seek to trial a gradual increase in duties for the Claimant, as he says she did not want a phased return to work. It is clear that was the case, not least because the Claimant wanted to be paid in full.

40. When asked what changed in October 2021 so that the Claimant could no longer do amended duties as in 2019/2020 and in August/September 2021, Mr Koblasa told us that the Respondent had reviewed how the warehouse worked and what was needed for each task, which led to the Roles and Requirements document.

Holiday

41. The Claimant was entitled to 33 days of annual leave per year, 35 in 2022. On 15 September 2022 (page 264), whilst not working, she requested holiday for 22 September 2022 to 3 October 2022 (8 days). Mr Koblasa replied on 3 October 2022 (page 263) saying he was willing to authorise her to take holiday whilst off work, but the Respondent would need to recover overpayments from what would be due to her (see below), suggesting reducing the pay by 75%. The Claimant was not prepared to agree to this. She did not take this holiday, or (it appears) any holiday during her absence, and none was authorised.

Pay

42. The Claimant's annual salary from 1 April 2021 was £19,886.19 and from 1 April 2022 it was £20,482.78. She was entitled to statutory sick pay ("SSP") (up to the statutory maximum 28 weeks) and company sick pay ("CSP") for the first 5 years of service amounting to 6 weeks' full pay and 6 weeks' half pay in any 52-week period. This included any SSP and there were 3 waiting days.

43. As Ms Logan said in her statement, as far as relevant to this Claim the Claimant was overpaid twice. The first overpayment (AL22ff) arose as follows:

43.1. In August 2019, she was paid full basic pay.

43.2. She was absent from 11 to 31 July 2019 so that her pay for August should have been adjusted but due to a site-wide issue it was not. She was not paid for

her 3 waiting days, but effectively was paid twice, because she was paid sick pay for July in the August payslip. See pages 292 and 480.

43.3. The Claimant was absent from 1 to 13 August 2019, and again no pay adjustment was made for September 2019, when she got full basic pay, there was no deduction for this absence and she was paid sick pay, thus again leading to her being paid twice.

43.4. Overall, Ms Logan says that £1,773.06 was overpaid.

44. The second overpayment related to the Claimant's absence from 28 September 2020 to 22 August 2021. Ms Logan gives the following details at AL30ff:

44.1. The Claimant was paid CSP from 1 October 2020 to 23 December 2020.

44.2. She was then entitled to 16 weeks SSP, paid from 24 December 2020 to 19 April 2021.

44.3. She continued to be paid SSP until 31 December 2022, a total of £7,897.28. The Claimant accepts this was paid. She told us she was not eligible for any sick pay at all, given her previous absences, but should have been paid full salary as she was not off sick as she was able to work as long as she did not do any heavy lifting.

45. The Claimant's contract (page 94) says that for the purposes of section 13 of the Employment Rights Act 1996 ("ERA"), the Claimant agreed that the Respondent could deduct from her remuneration (including her final salary on termination) any sums whatsoever she owed the Respondent including any overpayments made in error. It said she would be notified in writing of any overpayment before any deductions were made. The Respondent withheld £2,583.04 from payment in lieu of accrued but untaken holiday on termination of the Claimant's employment to cover part of what was overpaid.

Time limits

46. ACAS Early Conciliation started on 17 October 2022 and ended on 28 November 2022. The Claim Form was presented on 18 December 2022. The Claimant said she did not know why the Claim was not presented earlier and in time.

Law

Burden of proof

47. Section 136 of the Equality Act 2010 ("the Act") provides as follows:

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

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

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

48. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage".

49. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

50. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation be adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

51. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination. The EAT commented on **Hewage** in **Field v Steve Pye and Co (KL) Ltd and others [2022] EAT 68**. It said that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored. In such a case, where a tribunal moves straight to the "reason why" question it could only do so on the basis that it has assumed the claimant has passed the stage one threshold, so that the burden was now upon the respondent in the way described above. The EAT went on to say that if at the end of the hearing the tribunal concludes that there is nothing that can suggest that discrimination has occurred and the respondent has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but in fact the complaint would fail at

the first stage. If having heard all of the evidence the tribunal concludes that there is some evidence that could indicate discrimination, but nonetheless is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible to reach a conclusion at the second stage only, but there is much to be said for properly grappling with the evidence and deciding whether it is sufficient to switch the burden of proof. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage.

52. Much of the above case law concerns complaints of direct discrimination. We will reflect on the implications of the burden of proof for the other complaints under the Act with which this Claim is concerned when we come to our conclusions.

Direct discrimination

53. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)—* …

(d) by subjecting B to any other detriment".

54. Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The protected characteristic relied upon in this case is disability. Section 6(2) makes clear that this means the Claimant's particular disability. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*" and "*(2) The circumstances relating to a case include a person's abilities [in a direct disability discrimination case]*".

55. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than a (in this case, hypothetical) comparator, and whether this was because of the Claimant's disability. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Less favourable treatment and a difference in protected characteristic is not enough – **Madarassy v Nomura International plc [2007] WECA Civ. 33**. Disability being part of the circumstances or context leading up to the alleged act of discrimination is also insufficient.

56. Most often, the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to

be significant in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

57. In **Amnesty International v Ahmed [2009] ICR 1450** the EAT made clear that a benign motive on the part of an employer (there, not to send an employee to a particular country because her race would put her at risk there) was irrelevant, and the sole question (whatever the form of discrimination) was the ground of the treatment. In **Owen v Amec Foster Wheeler Energy Limited and another [2019] EWCA Civ. 822**, the Court of Appeal considered **Amnesty** in the context of direct disability discrimination. Mr Owen lost the opportunity for an overseas assignment because his multiple disabilities were thought to give rise to a high risk of medical complications when working in a remote location. The Court referred approvingly to another EAT decision, **High Quality Lifestyles Ltd v Watts [2006] IRLR 850**, in which it was held that a causal connection between the disability and the treatment complained of was insufficient, if someone else with a medical illness or injury of the same gravity as the claimant's but not having his or her particular disability would have been treated no more favourably. The Court said that in **Owen** the complaint should have been brought under section 15. It was not analogous to **Amnesty** as there was no proxy for the protected characteristic (the particular disability) which was used as the ground for how Mr Owen was treated. The Court said, that "the concept of indissociability cannot be readily translated to the context of disability discrimination" because the concept of disability is not a simple binary one like race or sex, and a person's health is not always entirely irrelevant to their ability to do the job.

Reasonable adjustments

58. Section 20 of the Act provides as far as relevant:

"*(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 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".

59. Section 21 provides:

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with the 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".

60. The only question we were required to answer in this case was whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage,

whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to the employer. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

61. In **Project Management Institute v Latif [2007] IRLR 579**, specifically paragraphs 54 to 57, the EAT held that for the burden of proof to pass to the respondent, a claimant must establish not only that the duty to make reasonable adjustments was engaged (here it is accepted that it was), but that it was breached. A respondent must understand at least the broad nature of the adjustment proposed and be given sufficient detail to enable it to engage with whether it could reasonably be achieved or not. The EAT made clear that the nature of the proposed adjustment may not be identified until after the alleged failure to implement it, and possibly not until the tribunal hearing, but a respondent must have a proper opportunity of dealing with the matter. Mr Price expressed himself satisfied that the Respondent had been given that opportunity in relation to all suggested amendments.

Section 15: justification

62. The only issue for us to determine in relation to the section 15 complaint was whether the unfavourable treatment was a proportionate means of achieving a legitimate aim – justification for short. We drew the following principles from the relevant case law, some of which concerned justification of indirect discrimination though we see no reason for a difference in approach in the context of section 15:

62.1. The burden of establishing this defence is on the Respondent.

62.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

62.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

62.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

62.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

62.6. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Time limits

63. Section 123(1) of the Act provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.

64. Section 123(3) says:

"*For the purposes of this section –*

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

65. A continuing effect on an employee is not of itself sufficient to establish conduct extending over a period. In **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96** it was said that the question is whether there is an ongoing situation or continuing state of affairs in which the claimant was less favourably treated and for which the respondent is responsible. The Court of Appeal acknowledged that the burden is on a claimant to prove a continuing act. The Court's decision in **Sougrin v Haringey Health Authority [1992] ICR 650** concerned a decision not to regrade a nurse, which she said was an act of race discrimination and which had an ongoing effect on her pay. The Court drew a distinction, rehearsed in several authorities, between the act complained of (the refusal to upgrade) and a policy or rule not to upgrade black nurses; there was no complaint alleging the latter. The refusal to regrade was therefore a one-off event, which took place at a particular point in time, and the lower pay was simply a continuing consequence of that refusal. Ascertaining the act(s) complained of is therefore clearly crucial.

66. Section 123(4) says that in the absence of evidence to the contrary a person is to be taken to decide on failure to do something, (a) when they do an act inconsistent with doing it or otherwise (b) "*on the expiry of the period in which [they] might reasonably have been expected to do it*". In **Matuszowicz v Kingston Upon Hull City Council [2009] ICR 1170**, the Court of Appeal distinguished, as the Act evidently does, between when an employer deliberately fails to make a reasonable adjustment on the one hand and on the other a situation where there is a failure for a reason that is not conscious, in which case one of the alternatives in section123(4) applies. Subsection (b) requires consideration of when, if the Respondent had been acting reasonably, it would have made the reasonable adjustment. The Court's further decision in **Abertawe**

Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ. 640 makes clear that when determining the point by which the Respondent might reasonably have been expected to make the adjustment, account should be taken of how the facts would reasonably have appeared to the Claimant, including what the Respondent told her.

67. These cases were recently considered by the EAT in **Fernandes v Department for Work and Pensions [2023] EAT 114**, referred to in Mr Price's submissions. The EAT summarised the key principles as follows at paragraph 16:

"*(b) Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.*

(c) That notional date will accrue if the employer does an act inconsistent with complying with the duty.

(d) If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee".

68. At paragraph 34, the EAT said:

"*In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional date. It appears to me that this analysis must begin with the identification of the feature which causes disadvantage … This will be a fact which dates the start of disadvantage. The next element to be considered is when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This is a factual finding and will vary. For instance, the date by which it would be reasonable to have to provide a chair could depend on whether a chair is already commercially available or the chair in question must be purpose built. That date would also amount to a finding of fact as to when a breach occurred. As such it would also assist the judge in identifying the notional date. The ET would then have to ask if there are facts which would allow it to conclude that the employer has acted inconsistently with the duty to make adjustments, if there are, then the notional date would arise at that point. Finally, if there is no inconsistent act, there will come a time when it would be reasonable for the employee, on the facts known to them, to conclude that the employer is not going to comply with the duty*".

69. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**, though extending time does not require exceptional circumstances. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the

extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

70. In **Morgan** Leggatt LJ said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Holiday pay

71. In **King v Sash Window Workshop Ltd [2018] ICR 693**, Mr King worked for the company on a 'self-employed commission only contract'. Whenever he took annual leave, it was unpaid. The European Court of Justice said that a worker was not able to fully benefit from annual leave when faced with circumstances liable to give rise to uncertainty about his remuneration during that leave and was likely to be dissuaded from taking it. The Court said that any practice or omission adopted by an employer that might have such a deterrent effect was incompatible with the purpose of the right to paid leave. In **Smith v Pimlico Plumbers Ltd 2022 IRLR 347**, the Court of Appeal considered **King** and held that the right to annual leave and to payment for that leave were two aspects of a single right.

Wages

72. Section 13 of the ERA provides:

(1) "*An employer shall not make a deduction from the wages of a worker employed by him unless – (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised – (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of

the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

73. Mr Price drew to our attention **Gregg v North West Anglia NHS Foundation Trust [2019] EWCA Civ. 387**. This was a case where the employer failed to pay the employee during a suspension whilst disciplinary issues were investigated. At paragraph 54, the Court of Appeal said that the starting point was what the contract provided, by its express or implied terms. If the contract did not permit the deduction, the related question was whether it was permitted by custom and practice. If not, then the common law principle of whether the employee was ready, willing and able to work fell to be considered. As will appear from our conclusions, it was not necessary for us to consider further the principle of being ready, willing and able to work.

Analysis

Reasonable adjustments

74. The single issue for us to decide was whether the Respondent failed to take a reasonable step to overcome the agreed substantial disadvantage occasioned by the agreed PCP. The initial burden was on the Claimant to prove facts from which we could conclude that there was a reasonable step the Respondent could have taken and failed to take. If she could, the burden would shift to the Respondent to show otherwise.

75. As indicated in our summary of the law, the question was how any particular adjustment might have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with persons who are not disabled. The test is objective, it was for the Tribunal to decide and of course, it is appropriate to consider whether a combination of reasonable steps taken together would have avoided the substantial disadvantage in question. The Respondent did not raise for our consideration questions of cost or resources in relation to any of the steps which the Claimant identified for Tribunal's consideration, except in one implicit respect we will come to below. Rather, the focus of the evidence and argument was on whether a step would have helped overcome the disadvantage and whether it was practicable to take it.

76. The first step set out in the list of issues, considered at length in the evidence, was arranging for colleagues to help the Claimant whenever lifting was required in carrying out her warehouse operative role. OH's view, endorsed by the Claimant throughout the relevant period, was that she could not engage in rotational movements, nor twisting and turning, nor could she lift above 5kg.

77. We began by considering what it would have meant in practice for the Claimant's colleagues to assist her whenever she was required to carry out lifting, specifically lifting above 5kg. In other words, we considered what parts of the role she could have fulfilled with such assistance. Taking each key part of the Inbound process in turn, given that this is where all of the Claimant's active employment took place, we concluded as follows:

77.1. Beginning with unloading pallets from lorries, whilst doubtless a number of operatives worked on the task together, one can either engage in this work or not. It is not something one can be assisted in doing. The Claimant says she could have used an EPT for this purpose, but in our view she could not have

done that safely, because she could not do the looking over one's shoulder and the twisting and turning that using this machine would have required had it been available.

77.2. The Claimant accepted that she could not do the breaking down of mixed pallets without assistance. This is essentially a lifting task and so it is clear that deploying the Claimant in this work would have meant many boxes having to be lifted by her colleagues. In other words, she would have required substantial assistance.

77.3. She could of course have done scanning work. This would have required some moving of boxes, and quite probably some level of lifting, but we were satisfied that she could have done this part of the role effectively, with colleagues' assistance as and when needed, both because the Respondent essentially conceded that she could and because she had done it for a substantial period of time in 2019/20 and indeed again in August/September 2021.

77.4. Weighing was not such a material part of the role, given that only 5% of incoming products were weighed, but the Claimant could not have carried it out given the need for lifting. Again, she would have required substantial assistance.

77.5. Stacking boxes on to pallets ready for moving to storage is the mirror image of pallets being broken down. Again therefore, the Claimant would have required substantial assistance to participate in this task.

77.6. Moving and storing the products does not of itself require manual lifting, so that no assistance would have been required had the Claimant been engaged with that specific task. The Claimant could not have done this using an EPT for the reasons we have given.

78. In summary, the only task for she would not have required substantial help would have been scanning. As Mr Lawrence submitted therefore, the suggested step of being assisted by colleagues whenever lifting was required raised for consideration the additional suggested step the Claimant contended for during the course of the evidence, namely giving her a role doing scanning only, with the addition at some point of driving the PPT, although at best this would have been relatively late in the period with which we are concerned as our findings of fact make clear.

79. Both of these steps – getting colleagues to assist with any lifting tasks or giving the Claimant a scanning-only role – would have overcome the disadvantage to the Claimant occasioned by the PCP in that they would have resulted in her working and getting paid. The question is whether it was practicable to take them.

80. Mr Price submitted that we should be very careful about comparing the Claimant's situation during 2019/2020 with that which prevailed in late 2021 and 2022. We will come back to that below, but as a starting point we concluded that the fact that the Claimant did an amended role for over a year in 2019/20, coupled with Mr Koblasa's comment, made to her on more than one occasion, that the Respondent had to treat everyone the same (which, without criticising Mr Koblasa, we agreed with Mr Lawrence was a misconception of what the duty to make reasonable adjustments entails) was enough to shift the burden of proof to the Respondent to show that the steps were not reasonable.

81. The Respondent put forward a number of grounds on which it said that they were not.

82. The first was the need for full flexibility from the Claimant as a warehouse operative. This was the purported requirement that she be able to work in all parts of the warehouse as and when required. We did not find this to be a satisfactory explanation for why limiting the Claimant's role or requiring colleagues to provide her with substantial assistance were not reasonable adjustments. As we have said, in three years of active service, she only ever worked in the Inbound area. Our focus was therefore on the work required in that specific context.

83. The second issue was the extent to which the Claimant would have been occupied if either step had been taken. Mr Price used the phrase that she would have been redundant for long periods, the corollary of this point being very obviously that, if this was right, the Respondent would have been paying her in full for a role she was not fully performing.

84. The essential conflict of evidence between the parties on this point was that Mr Koblasa said that at best the Claimant would only have been occupied for 4 or 5 hours on an early shift (as we have said, he accepted that the Respondent could have accommodated the Claimant working early shifts only, when typically more Inbound work is required), whereas the Claimant said that both in 2019/20 and in August/September 2021, she was fully occupied for her full 8 hours. We noted that what the Claimant said on this subject was direct evidence and that Mr Koblasa's was in the nature of hearsay evidence because he was telling us what he was told by Ms Siriut. We also took into account that the Respondent never spelt out explicitly in the review meetings it held with the Claimant the logistical issues and concerns about her being fully occupied which having her on amended duties would raise (though it consistently made clear it was not a long-term solution). Nevertheless, applying in particular the considerable industrial experience of both lay members of the Tribunal, we preferred Mr Koblasa's account.

85. We concluded that it cannot have been the case that the Claimant would always have been fully and continuously occupied with scanning in a single bay, because whilst scanning could commence as soon as the first products were unloaded from a lorry, it would not be completed in that bay until all the product had been unloaded and where necessary broken down, and no further load could be taken into that bay whilst the first load was being taken through that process because of floorspace issues. There was a discussion during the course of her evidence about whether the Claimant could have moved between different bays in a scanning-only role. We concluded this that too would either have created serious floorspace issues if the products were unloaded and were left waiting for the Claimant to scan, or alternatively resulted in inefficiency and delay if unloading and breaking down were stalled until the Claimant was ready to do the scanning work. We therefore accepted the Respondent's evidence as to the logistical challenges these types of arrangements would have created and in view of that analysis, preferred the Respondent's evidence that at best the Claimant was occupied for 4 or 5 hours on an early shift in August and September 2021, and fewer on a late shift. It seemed to us that this is most likely to have been the case in 2019/20 as well.

86. That leads naturally into the third issue raised by the Respondent, namely questions of efficiency, disruption and concerns about floorspace. Whilst colleagues doing any lifting required to assist the Claimant with scanning duties would of itself have caused minimal disruption, what we have just outlined identifies the efficiency issues which would have been encountered by the Respondent had it sought to fully occupy the Claimant for an 8-hour shift on scanning only. We accepted that this would not have been practicable for the reasons we have given. There was the additional question of the disruption that the Respondent says would have been encountered had she worked on more than just scanning, obtaining assistance from colleagues to lift weights above 5 kg. On the basis of the evidence that we were taken to, and again applying the industrial experience of the lay members, we concluded that this too would have been impracticable. At the breaking down stage, the Claimant would have needed to wait for someone else to remove from the pallets any boxes over 5kg, but first, as we have already identified, that would have meant that she would not have been fully engaged in the task and, secondly, we could also see how accommodating this arrangement would have substantially slowed down the breaking down process overall. As to the process of stacking pallets to ready products for storage, again the Claimant would have required assistance with any (or most) of the lifting. Just as with the breaking down process, this would have meant that on a regular basis she was not substantially engaged in the task and again, if she were only stacking 5kg weights, the stacking process would have been substantially slowed. We could readily see that there would have been similar issues with the weighing of new products.

87. The fourth point the Respondent raised was the impact on the Claimant's colleagues, specifically that requiring colleagues to assist the Claimant with any lifting would have been unfair on them. This was a separate point to the logistical issues addressed above. It is clear that deploying her in a broader range of duties would have led to her colleagues doing extra lifting. That said, it is equally clear that colleagues were willing to assist the Claimant in this way both in 2019/20 and in August/September 2021 by lifting weights that she could not. As we have said, Mr Pires' concerns were not entirely clear and do not undermine that broad conclusion.

88. The final point the Respondent raised was the Claimant's health and safety. This would not have been of particular concern had she just engaged in scanning work, because of the availability of colleagues to assist with moving boxes when needed. As we have said, lifting was not as fundamental to that task as to others. The question was, if she had been permitted to carry out a broader set of duties with colleagues' assistance, where lifting is more fundamental to the work, would there would have been a risk to her health and safety in identifying what she could and could not lift before she lifted it? It followed from our finding that the Claimant could not identify the weight of all boxes she might consider moving or lifting that there would have been some risk of further injury or setting back of her recovery if a broader range of duties had been permitted.

89. In summary, the legitimate issue raised by the Respondent in response to the suggestion that the Claimant might have carried out a scanning-only role was that she would not have been fully occupied for an 8-hour shift, with the corollary that she would have been paid for more hours than she was working. The additional legitimate issues if she had been given the opportunity to carry out a broader set of duties (involving more lifting) were those related to efficiency and logistics and to the Claimant's health and safety.

90. We did not think that it was a reasonable step to keep the Claimant in a role – the scanning-only role – on full pay, that would not have fully occupied her even on an early shift. It is important to make clear that the Claimant did not seek to persuade us that she should have been given a role where she worked for reduced pay. On the contrary, she was clear throughout that she should have been paid in full whilst doing amended duties – that was the core of her case. We agreed with the Respondent that this would not have been reasonable, even though it is a large employer: it is the essence of an employment relationship that an employee should be paid for the work that they do. Equally, we did not think it would have been a reasonable step to accommodate her doing a broader role lifting only up to 5kg. Efficient process is the essence of the Respondent's business at the Rugby warehouse, and in our view, this would have entailed the risk of substantial compromise of key parts of that process as we have set out above. Further, the Respondent was right to say that there remained health and safety risks in the Claimant doing a broader role, for the reasons we have given.

91. The burden of the Claimant's case, ably outlined by Mr Lawrence, was that the Respondent had previously allowed her to carry out amended duties for a year or more, and that nothing had changed, whether in relation to the Claimant's health or the Respondent's operations – other than the production of the Roles and Requirements document – to indicate she could not do this again. We saw the force of that submission, which as we have noted above was essentially why we concluded that the burden of proof passed to the Respondent in relation to these proposed adjustments, but we also acknowledged the caution urged by Mr Price on this point:

91.1. Whilst the Claimant doing amended duties was accommodated for a long period in 2019/20, it is evident from the relevant meeting notes that the managers discussing this with her at the time made clear that it was not a long-term solution. What the Roles and Requirements document did from late 2021 was to crystallise that position.

91.2. Furthermore, it is obviously the case that having allowed the Claimant to carry out amended duties for a year in 2019/20 does not necessarily mean that it was reasonable for her not to be fully occupied in that period, still less that it was reasonable to permit her to not be fully occupied in 2021/2022. A variation of the same point is that having accommodated amended duties for a year, it was reasonable for the Respondent not to accommodate it any further.

91.3. We particularly noted the caution urged by Mr Price in equating the Claimant's health situation in 2019/20 with that in 2021/22. We do not know the severity of the earlier health issues, though given the respective absences we can assume the September 2020 accident, from which the Claimant returned to work in August 2021, was far more serious than that in 2019. Perhaps particularly given that shortly after that return to work the Claimant had been involved in another accident, the health and safety considerations in 2021/22 may very well have been more pressing.

92. That is a long analysis, but it is the issue at the heart of this case. In conclusion, we were satisfied that the Respondent had discharged the burden of showing that neither giving the Claimant a scanning-only role, nor arranging for colleagues to assist her with lifting whilst she carried out a broader role, was a reasonable adjustment.

93. We can deal with the other proposed adjustments more quickly. In relation to both, we concluded that the Claimant had not proved facts which would shift the burden of proof to the Respondent.

94. The first of these further adjustments was redeploying her to a job that did not require lifting (that is to a role other than the scanning-only role, which we have dealt with above). We made clear at the start of the Hearing that it was crucial to identify precisely what role the Claimant was saying she could have been redeployed to so that both the Tribunal and the Respondent could consider her case. She helpfully identified the role undertaken by Christina, and Mr Lawrence confirmed in closing submissions that this was the role in question.

95. As to that role, first, the Claimant did not establish that there was a chance this adjustment would have overcome the disadvantage, as it would still have required some lifting which she accepted she could not do. Secondly, she did not establish a prima facie case that it was practicable to take this step, as because there was no vacancy it amounted to the Respondent creating a role it did not need (the Claimant was clear she was not saying that she should have replaced Christina). In our judgment that would self-evidently not have been a reasonable step. There is no suggestion the Respondent was willing to take it, thus distinguishing this case from **Southampton City College v Randall [2006] IRLR 18**.

96. The second additional adjustment was the provision of an EPT. Again, the Claimant did not establish that there was a chance this would have helped overcome the disadvantage. It would not have helped broaden her duties, as she could not do the twisting and turning which using it required. Contrary to the Claimant's assertion, we have found as a fact that this was the case in March 2022 (in the context of assessing whether she could have used a PPT at that point). The unreliability of her assertion calls into serious question whether she could have used an EPT at all in the period with which this Claim is concerned. We noted in that regard the May 2023 OH report which referred to right shoulder pain in almost all planes of movement. Furthermore, even if provision of an EPT had broadened the Claimant's duties somewhat, it is unlikely it would have broadened them sufficiently to enable her to work on a fully occupied basis for 8 hours, given that she still could not have engaged in breaking down or stacking pallets for storage, weighing or wrapping using the wrapping machine. An EPT could not assist with any of those tasks.

97. In closing our conclusions on the substantive complaints of failure to make reasonable adjustments, we should mention that we considered two other features of the evidence to determine whether they called into question the conclusions we have outlined above.

98. First, Mr Lawrence emphasised Mr Koblasa's comment that he was thinking about the practicalities of what the Claimant was suggesting by way of reasonable adjustment during his evidence. Mr Lawrence's point was that this shows he did not think about what adjustments might have been made at the time. We took that into account, but at best it might be said to be another fact which helped shift the burden of proof. It is clear that it is quite proper for a respondent to give reasons post-event why proposed steps are not reasonable, and of course it is the Tribunal's assessment that counts.

99. Secondly, and in support of our conclusions, as Mr Price pointed out, the Respondent was not closed to the idea of assisting the Claimant – it accommodated amended duties twice, sought OH advice, held regular meetings with her to review her progress and arranged physiotherapy.

100. The complaints of failure to make reasonable adjustments failed.

Time limits for the complaints of failure to make reasonable adjustments

101. For completeness, we went on to consider the question of time limits relating to the complaints of failure to make reasonable adjustments. It was plainly right to leave this matter to be determined at the Final Hearing, given that it could not be properly determined until all of the evidence was out, but had any of the complaints succeeded substantively, we would have found that we did not have jurisdiction to uphold it and it would have failed on this basis also.

102. The first question was, if it had been a reasonable adjustment to do any of the things the Claimant contended for, when did the time limit start to run?

103. Mr Lawrence contended that every time the Claimant had a review meeting between January and August 2022, there was a fresh breach of the duty, starting time running afresh, so that there was conduct extending over a period for the purposes of section 123(3) and all of the complaints were in time. Mr Price submitted that on the contrary the case law makes clear that where there is no change in circumstances, so that there is the same PCP and the same substantial disadvantage, time starts running on a single occasion to be determined in accordance with section 123(4), that is (a) when the Respondent did an act inconsistent with doing what it is said to have failed to do, or (b) if it did no inconsistent act, when it might reasonably have been expected to do it.

104. Taking account of **Matuszowicz, Morgan** and **Fernandes**, in our judgment, Mr Price's submissions were to be preferred. Complaints of failure to make reasonable adjustments are more readily recognisable as relating to omissions rather than acts (see **Kerr v Fife Council [2021] UKEATS/0022/20**). That seemed to us to be plainly the case in this Claim, given particularly that there were also complaints of direct discrimination and discrimination arising from disability in relation to the initial act of requiring the Claimant to go home on 4 October 2021. The reasonable adjustments complaint was clearly a variation on that theme and related to the Respondent's failure to take steps to enable the Claimant to return to work after that date without having to do manual handling of up to 20kg. That was the PCP relied upon.

105. Accordingly, as Mr Price said, in a case such as this, where the PCP and the substantial disadvantage remained unchanged, a case which it must be said is typical of many reasonable adjustment complaints, if Mr Lawrence were right, all a claimant would have to do would be to raise the question of adjustments again, time would begin to run afresh and they would never be out of time.

106. In this case, it seemed clear to us that there was a deliberate decision by the Respondent not to take notional reasonable steps to get the Claimant back into the workplace, from 4 October 2021. That was the position set out by Mr Price in his written submissions. Alternatively, and adopting the sequential approach set out in **Fernandes**, the disadvantage clearly started from 4 October 2021, and it is arguable that the notional reasonable steps should have been

taken immediately given that the Claimant had already been doing reduced duties in August and September. In the further alternative, they should have been taken within a month of the OH report in November 2021 which made clear that light duties were required. In the still further alternative, we agreed with Mr Price that the latest date on which they should have been taken was shortly after 7 January 2022 when the Claimant raised that she was being discriminated against by the failure to get her back to the position she had been in before. At that point, it was more than reasonably evident to the Claimant that the Respondent was not going to take the notional reasonable steps.

107. For completeness, we would say that even if Mr Lawrence were right and this was a case about an act rather than an omission, Mr Price was correct in saying that it was a single act with continuing consequences, not a repeated act, so that the analysis would not much change. Accordingly, even on a best-case scenario for the Claimant, ACAS Early Conciliation having taken place in October 2022, she was 9 months out of time.

108. Were the complaints presented within such further period as we thought just and equitable? They were not. This was a long delay – three times the statutory time limit. When we asked for an explanation of the delay, carefully and repeatedly outlining the question we were asking, the Claimant said that there was no reason she could give. Mr Lawrence said she was waiting for the Respondent's decision, but she did not say that in her evidence and by her email of 7 January 2022 she was clear that she was being discriminated against in this respect and knew that no such steps were going to be taken.

109. As to the balance of prejudice, of course if the complaint had succeeded, the Claimant would have been deprived of a remedy she would otherwise have been entitled to. Conversely of course, the Respondent would have been required to meet a remedy it would not otherwise have been required to. Discrimination is rightly recognised as a social evil and so it could be said that in terms of the outcome the prejudice to the Claimant would have been greater, but we would also have to have taken into account forensic prejudice to the Respondent. This related to it being required to meet the Claimant's case about what happened in 2019/20 which was an important consideration in relation to this complaint. The forensic prejudice was not quite as pronounced as Mr Price suggested, given that Mr Koblasa was involved in some of the meetings with the Claimant in that period but, as Mr Price pointed out, a substantial further period of time had expired occasioned by the delay in bringing the Claim, with the impact on Mr Koblasa's memory that evidently entailed.

110. Weighing up all of those factors – the length of the delay, the complete absence of any explanation for it and the balance of prejudice – we were clear that it would not have been just and equitable to extend time.

Section 15

111. The single issue for us to determine in relation to this complaint was that of justification, where the burden was on the Respondent.

112. Mr Lawrence agreed that the Respondent had a legitimate aim – to ensure employees who are at work are fit to perform the roles they are employed to do. That is an aim which can properly be said to encompass both considerations of

employee health and safety and the requirement to have employees properly occupied.

113. As to proportionality, Mr Lawrence agreed that the aim represented a real need on the Respondent's part. That is obviously right – ensuring employees are not exposed to unnecessary risks to their health and safety and thus managing risk for the Respondent, as well as ensuring employees are fully occupied are obviously important considerations for the operation of the Respondent's warehouse. Mr Lawrence also agreed that what the Respondent did was rationally connected to achieving its aim. That is also obviously correct, because not permitting the Claimant to work in a warehouse where her duties required her to lift weights that she could not safely handle was obviously a means of protecting her health and safety and a means of ensuring that she would only be paid in full where she could do what the Respondent required.

114. The parties essentially agreed therefore that the question to be decided was whether what the Respondent did was no more than was necessary to achieving its aim, which in turn involved balancing the needs of the Respondent against the discriminatory effect on the Claimant of the decision not to allow her to work, and whether a lesser measure could have achieved the aim. Mr Lawrence said explicitly, and Mr Price implied that he shared the view, that the outcome of this complaint would follow that of the reasonable adjustment complaints.

115. Of course, the effect on the Claimant was marked – she was not permitted to work and this had a substantial effect on what she was paid. Having undertaken the assessment of the Respondent's needs and business practices that we have outlined when dealing with the complaints of failure to make reasonable adjustments however, it was clear that the only alternative measures the Respondent could have adopted identified to us in the course of the evidence, were those we have addressed at length already. The first was having the Claimant work and be paid for a full shift when she was not fully occupied – as we have said, the Claimant was uncompromising on that. The second was engaging her in a broader set of duties with assistance in lifting. We have found that neither of those would have been reasonable steps. For the same reasons, what the Respondent did was no more than was reasonably necessary to meet the aim in question.

116. In any event, this complaint would have failed on the basis of time limits. The question of the section 15 complaint being conduct extending over a period ending with a failure to make a reasonable adjustment does not assist the Claimant for the reasons we have set out, namely that none of the complaints of failure to make reasonable adjustments succeeded and none were presented in time. Further, we would not have found that it was just and equitable to extend time in relation to the section 15 complaint. What the Claimant complained of in this respect was a single act, following which more than a year passed before she contacted ACAS. Our analysis as to why she did not present her complaint within such further period after expiry of the time limit as we considered just and equitable was the same as for the complaints of failure to make reasonable adjustments. The fact of an even longer delay, with no explanation, the prejudice to the Respondent of having to meet a remedy that it would not otherwise have to meet, plus the obvious forensic prejudice to the Respondent of the difficulty of securing evidence from Mr Tanner as the alleged discriminator, would have substantially outweighed the prejudice to the Claimant of not securing a remedy for a successful complaint.

Direct discrimination

117. Like the complaint of discrimination arising from disability, this complaint concerned Connor Tanner's decision to send the Claimant home on 4 October 2021.

118. As both representatives said, Mr Tanner was not present at this Hearing to give an explanation of his thought processes. We were satisfied however that this did not prevent us from determining what those thought processes were. The meeting notes show his reasons – "I do not want you to hurt yourself more as we have a duty of care to make sure you are safe whilst in the workplace" and he also raised the point about the Claimant not being able to carry out her full role. We further agreed with Mr Price that Mr Koblasa's evidence was supportive of the fact that this is what led to Mr Tanner's decision. All of the further meeting notes, whether with Mr Tanner or Mr Koblasa, also bear this out.

119. Those were thus Mr Tanner's reasons for his decision, not the Claimant's particular disability. Especially given the development of the Roles and Requirements document, it was plain to us that anyone unable to lift up to 20kg, for example because of a different disability, would have been sent home. How pregnant employees are treated is consistent with that conclusion. Mr Tanner's view of the Claimant's inability to do the job was not indissociable from her disability, as per the decision in **Owen**.

120. The Claimant did not prove facts therefore from which we could conclude that she was directly discriminated against. Even if she had, it is clear that Mr Tanner's reasons for sending the Claimant home related to her health and to her not being able to fulfil the full duties of the role, so that the decision was not in any sense whatsoever because of her particular disability. Either way, the complaint did not succeed.

121. In addition, we would have concluded that the complaint could not have succeeded on the basis of time limit issues, for the reasons we have already given.

Holiday pay

122. It was common ground between the parties, and of course we agreed, that the Working Time Regulations 1998 ("WTR") give workers a composite right to take annual leave and be paid for it, the pay being in accordance with what they would normally receive when working. This is a somewhat unusual case, and neither counsel was able to identify any relevant authority that was directly on point, but we concluded that the proper analysis of the complaint was not especially complicated.

123. Mr Koblasa granted the Claimant's request to take leave whilst she was away from work; he was very clear about that. He did not say that the Respondent was not willing for her to take leave, nor that she could only take it on an unpaid basis. What he said was that there was the separate issue of making a deduction from the pay due to the Claimant for the annual leave to meet what she owed the Respondent because she had previously been overpaid. In other words, this was emphatically not a **King v Sash Window** scenario. The Claimant was to be remunerated for the leave, and against that remuneration, part of what she owed the Respondent was to be recovered. The

Respondent did not refuse the Claimant the opportunity to exercise her statutory right, whether explicitly by saying she could not take the leave or implicitly by saying she would not be paid for it if she took it. Rather, it acted in accordance with her contract by informing her it would be deducting the overpayments from what it acknowledged was due to her.

124. One can understand the Claimant's unwillingness to take the holiday as a result. It must be pointed out however, first that it would have given her some money given that Mr Koblasa offered the option of not recovering the full amount of the pay, and secondly that the Respondent would have required her to refund the overpayment at some point, had her employment continued, so that in the normal course of events the position was that she was either to be paid more in the short-term and less in the medium-term, or the other way round. It is relevant to add in this regard that Mr Lawrence did not seek to advance an argument that it was unlawful for the Respondent to seek to recover the overpayment from the Claimant's pay whenever it might have sought to do so. Indeed, he fairly acknowledged that it might be said to be unfair to the Respondent not to be able to deduct what was owed from the annual leave payments and to have to wait to see if it could do so later.

125. The complaint of breach of regulation 16 of the WTR was not well-founded.

Wages

126. This complaint was concerned with the fundamental question posed by section 13(3) ERA, namely whether the Claimant was in the period in question paid less than was properly payable to her. It is clear that this required an analysis of the contractual position. That was the starting point, as was made clear in **Gregg**.

127. Our conclusions were as follows:

127.1. The contractual position was clear: the Respondent was under no obligation to pay the Claimant as normal when she was not carrying out her full contractual duties for reasons related to her health.

127.2. Notwithstanding the Claimant's failure to provide regular fit notes, we were amply satisfied that this was the position she was in during the period with which this complaint was concerned. We observed that she obtained a 6-month fit note from her consultant and that this expressly confirmed (as did OH) that she was not fit to do her full role. We also noted that the Respondent on more than one occasion reminded her of the need for fit notes to be provided.

127.3. Accordingly, the failure to provide regular fit notes did not alter the position that the contractual provisions governing her pay during the period she was absent from work were those relating to sick pay.

127.4. It followed that the correct analysis was that the Claimant was paid in accordance with her contract of employment for the period in question, indeed much more than that.

127.5. We noted too that her payslips in 2022 clearly itemised that she was being paid SSP, and we were not told that the Claimant said to the Respondent at the time that she was not entitled to it, even though she says that now.

128. For all those reasons, we concluded that the Claimant was not paid less than was properly payable to her. Mr Lawrence at no point sought to advance any argument based on custom and practice, and it was not necessary for us to consider the question of whether the Claimant was ready, willing and able to work. In fairness to Mr Lawrence, he acknowledged during his oral submissions the difficulties faced by the Claimant in advancing this complaint. We concluded that it was not well-founded.

Conclusion

129. For the reasons we have set out, none of the Claimant's complaints succeeded. They were dismissed accordingly.

Employment Judge Faulkner
Approved on: 24 January 2025

Annex
LIST OF ISSUES

1. **Time limits**

    1.1 Given the date the Claim Form was presented and the dates of ACAS Early Conciliation, any complaint about something that happened before 18 July 2022 may not have been brought in time.

    1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

        1.2.1 Was each complaint made to the Tribunal within three months (plus ACAS Early Conciliation extension) of the act to which the complaint relates? In relation to any complaint about a failure to do something, the Tribunal will need to consider when the Respondent did an act inconsistent with doing it, or otherwise when the Respondent might reasonably have been expected to do it (section 123(4) of the Equality Act 2010).

1.2.2 To the extent any complaint was not made within three months (plus ACAS Early Conciliation extension) of the act to which the complaint relates, was there conduct extending over a period?

1.2.3 If so, was the complaint about the last act in that period made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period?

1.2.4 To the extent not, was the complaint made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why was the complaint not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 It appears that the holiday pay complaint was made within the time limit in regulation 30 of the Working Time Regulations 1998. The Respondent accepted that was so. As for the unauthorised deductions complaint for the period to 18 December 2022, it is clear that the complaint about the last alleged deduction was made within the time limit in section 23 of the Employment Rights Act 1996. As for earlier alleged deductions, the Respondent accepted that there was a series of deductions ending with the last one.

2. **Disability**

2.1 It is accepted that the Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the Claim is about, namely her spinal injury.

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

3.1 The Claimant's disability was as set out above.

3.2 Did the Respondent do the following things:

3.2.1 On 4 October 2021, suspend the Claimant from duty (or if it was not a formal suspension, send her home and/or refuse to allow her to continue working and/or place her on sick leave)?

3.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material

difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated (a hypothetical comparator).

The Claimant has not named anyone in particular who they say was treated better than she was. She therefore relies on a hypothetical comparator, who must be someone who could not lift 20kg, was seeking to return to work and did not have the Claimant's disability.

3.4 If so, was it because of her disability?

3.5 It was not contested that the Respondent's treatment amount to a detriment.

4. **Discrimination arising from disability (Equality Act 2010, section 15)**

4.1 It was accepted that the Respondent treated the Claimant unfavourably, on 4 October 2021, by suspending her from duty (or if it was not a formal suspension, by sending her home and/or refusing to allow her to continue working and/or placing her on sick leave).

4.2 It was accepted that both of the following things arose in consequence of the Claimant's disability:

4.2.1 The Claimant's inability to lift 20kg.

4.2.2 The Claimant's inability to carry out her contractual role.

4.3 It was also accepted that the unfavourable treatment was because of one or both of those things.

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was to ensure that its employees who are at work are fit to perform the roles that they are employed to do (with reasonable adjustments where applicable), which Mr Lawrence accepted in submissions was a legitimate aim.

4.5 The Tribunal will decide in particular:

4.5.1 Was the treatment an appropriate and reasonably necessary way to achieve the aim?

4.5.2 Could something less discriminatory have been done instead?

4.5.3 How should the needs of the Claimant and the Respondent be balanced?

4.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? This was not disputed.

5. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

5.1 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? This was not disputed.

5.2 A "PCP" is a provision, criterion or practice. It is agreed that the Respondent had the following PCP:

5.2.1 From 4 October 2021, requiring warehouse operatives and other employees in manual roles (or roles which were potentially suitable for the Claimant) to be able to lift up to 20 kg.

5.3 It was accepted that the PCP put the Claimant at a substantial disadvantage compared to persons who were not disabled, in that she was unable to lift up to 20kg and was thus unable to work and in consequence suffered a reduction in her pay.

5.4 It was also accepted that the Respondent knew, or could reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage.

5.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

5.5.1 Arranging for colleagues to assist her with any lifting required to carry out her role.

5.5.2 Provision of an electric pump truck to move heavy pallets.

5.5.3 Allowing her to do a job which did not require her to lift heavy weights, and thus redeploying her if necessary.

5.6 Was it reasonable for the Respondent to have to take any of those steps, and by when?

5.7 Did the Respondent fail to take any of those steps?

6. **Holiday Pay (Working Time Regulations 1998)**

6.1 Did the Respondent (by Thomas Koblasa) refuse to permit the Claimant to exercise her right to paid annual leave under regulation 13 and/or regulation 13A of the Working Time Regulations 1998, for the 8 working days from 22 September to 3 October 2022? The Claimant says that she was told that she would not be paid in full for the whole of this period of leave.

6.2 Alternatively, did the Respondent fail to pay the Claimant the whole or part of any amount due to her for this period of leave in breach of regulation 16 of the Working Time Regulations 1998? Mr Lawrence confirmed on day 2 that the case was not pursued in this way.

6.3 If the Respondent was in breach of regulation 13 and/or 13A of the Working Time Regulations 1998, what amount is it just and equitable to award the Claimant in all the circumstances, having regard to the Respondent's default in refusing to permit her to exercise her right and any loss sustained by her which is attributable to the matter complained of?

7. **Unauthorised deductions (section 13, Employment Rights Act 1996)**

7.1 Were the wages paid to the Claimant from 4 October 2021 to 18 December 2022 less than the wages properly payable to her?

7.2 Was any deduction required or authorised by a written term of the Claimant's contract? The Respondent says that she was paid her company sick pay and statutory sick pay entitlement in accordance with her contract.

7.3 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

7.4 If not, did the Claimant agree in writing to the deduction before it was made?