EMPLOYMENT TRIBUNALS

Claimant: **Mr S Tatinger**

Respondent: **Wincanton Group Ltd**

Heard at: **Sheffield** **On:** **20 to 23 February 2017**

Before: **Employment Judge Brain**

Members: **Mr G Harker**

Mr D W Fields

Representation

Claimant: Mr M Kozik, legal representative

Respondent: Ms K Moss, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The Claimant's complaint of unfair dismissal fails and stands dismissed.
2. The Claimant's complaints of disability discrimination fail and stand dismissed.

REASONS

1. The Tribunal heard evidence in this case over three days on 20, 21 and 22 February 2017. On the morning of 23 February 2017 we heard helpful submissions from each representative. The Tribunal then deliberated in chambers for the remainder of that day.
2. It is the Tribunal's Judgment that all of the Claimant's complaints fail and stand dismissed. As we reserved our decision we shall now set out our reasons.
3. By a claim form presented on 22 June 2016 the Claimant brought complaints of unfair dismissal, failure to make reasonable adjustments and disability related discrimination. He also brought a complaint of victimisation which was subsequently withdrawn and dismissed pursuant to a Judgment dated 28 September 2016.

4. The case benefited from two Preliminary Hearings. The second of these came before Employment Judge Jones on 26 October 2016. There, the Claimant's complaints were identified as being of unfair dismissal and disability discrimination. The Claimant contended that the Respondent was in breach of the duty upon it to make reasonable adjustments and discriminated against him for something arising in consequence of disability. The issues that arise in the case were identified in paragraph 4 of Employment Judge Jones' minute which is at pages 38 to 40 of the hearing bundle. We shall come back to this in due course.

5. Employment Judge Jones recorded the Respondent's concession that the Claimant was at all material times a disabled person by reason of the physical impairment of a degenerative back condition. Ms Moss confirmed for the benefit of the Tribunal that the Respondent raised no issue that it had actual knowledge of the Claimant's disability at all material times.

6. The Tribunal received evidence from the Claimant. He called evidence from Joanna Marzec. Ms Marzec is the Claimant's former partner. She also worked alongside the Claimant. She was employed in the same capacity as him.

7. The Respondent called evidence from:-

   7.1. Paul Wilson. He is employed by the Respondent as a first line manager.

   7.2. Helen Lamb. She was employed by the Respondent as a HR officer between November 2013 and December 2016.

   7.3. Ian Abbott. He is employed by the Respondent as operations manager. He chaired the capability hearing at which the Claimant was dismissed.

   7.4. Stuart Richardson. He is employed by the Respondent as site operations manager. He chaired the Claimant's appeal against his dismissal.

8. The Respondent is part of the Wincanton Plc group. It is a supply chain provider. According to the Respondent's notice of appearance (in the bundle at pages 17 to 30) the Respondent employs 18,000 people. 500 of those work at the Wincanton B&Q Distribution Centre at Redhouse Interchange in Doncaster ('Redhouse'). Redhouse was at all material times the place of work of the Claimant and Ms Marzec.

9. The workforce at Redhouse had been employed by DHL Services Ltd. There was a transfer of the undertaking from DHL to the Respondent on 1 August 2015.

10. The Claimant and Ms Marzec worked as 'warehouse colleagues'. The Claimant's continuity of employment commenced on 3 March 2008. He and Ms Marzec had in fact worked at the B&Q warehouse site in Worksop. They were both transferred to Redhouse in August 2014. The reason for this transfer was in connection with the grievance raised by the Claimant on 26 April 2016 (pages 136 and 137). This grievance formed the basis of the victimisation complaint to which we have already made reference. We need not go into the contents of the grievance.

11. Redhouse operates 24 hours a day. It employs a shift system. The Claimant and Ms Marzec worked on the nightshift. The nightshift is

managed by Mr Wilson. He refers in paragraph 3 of his witness statement to leading a team of around 40 workhouse colleagues some of whom are employed by the Respondent and some who are agency workers. Mr Abbott also works on the nightshift in his capacity as operations manager. He refers to there being around 85 to 90 warehouse colleagues in total who are employed on the nightshift. Some of these are full time, some part time and some are agency workers.

12. It is Mr Abbott's responsibility to oversee the intake of goods to the site, the picking of goods from various locations in the distribution centre and the loading of goods. He also covers the regional consolidation centre ('RCC') which is a separate department at Redhouse that deals with straight-to-store deliveries. Mr Abbott told us that around 30 employees plus agency workers staff the RCC.

13. The warehouse is, plainly, central to the Respondent's operation at Redhouse. The dimensions of the warehouse assume some importance in this case. Mr Abbott told us that it measures around 750,000 square metres. We were provided with a number of photographs showing the site layout and dimensions. These were added to the bundle at pages 285 to 294.

14. It is Mr Wilson's task to deploy warehouse colleagues to various duties. He describes these in paragraph 4 of his witness statement. He says that these duties, "can include picking goods and loading them on to pallets or cages for distribution to B&Q stores, cleaning the areas around the pick slots in the warehouse (what we call "hygiene duties"), managing goods coming into the warehouse and marshalling vehicles. Warehouse colleagues are expected to be flexible and to perform a range of duties as and when required. Before each nightshift I meet with my manager, Ian Abbott (operations manager) at 20.45 to discuss any changes to the shift. I then meet with the team leader at reception at 21.20 to deploy the warehouse colleagues to the various duties".

15. It is unfortunate that the Respondent did not lead evidence with a straightforward description of its operation as a whole and the roles within it. A great deal of time was occupied with the Tribunal endeavouring to understand the operation and the various roles.

16. What was ascertained, from the oral evidence given by the Respondent's witnesses was that Redhouse is staffed by senior management who are based in the general office area. There are a small number of office based staff. We were told that there are six office based staff in total dealing with finance and HR issues. Reception duties and IT roles are outsourced to third parties.

17. The warehouse operatives are supported in their roles by systems clerks. Mr Richardson told us that there are 54 systems clerks spread over the three shifts. Twelve system clerks work on the nightshift (according to Mr Abbott). Mr Richardson's evidence was that all of the systems clerks are trained to do all aspects of the systems clerk role. That said, some may specialise (for example in the control of inventory inbound and outbound goods).

18. The systems clerk role became one of the most controversial issues in the case, particularly upon the issue of the extent of heavy lifting entailed in the role. The nearest we had to a job description was the vacancy notice

for a systems clerk at page 185. This document in fact features in the story and it will be referred to later. In this notice the role is described thus:

- General administrative duties under the control of a systems team leader or systems FLM.
- Checking accuracy of files and data.
- Working to tight deadlines to ensure that stock is accurate and work levels are in line with labour flows.
- Ensuring that the company's health and safety policies are adhered to and that all relevant legislative requirements are fulfilled at all times.

19. The attributes required of systems clerk are then set out. We need not set them out here save to say that the individuals fulfilling the role are required to have a very good standard of IT skills in Microsoft Office and WMS (which we learned stood for 'Wincanton Management Systems').

20. In paragraph 19 of his witness statement, Mr Richardson refers to the systems clerk role as "management level". As Mr Kozik pointed out, Mr Richardson made no reference in his witness statement to the role requiring any heavy lifting nor is any mention made of the physical demands of the job in the vacancy notice at page 185.

21. This is to be contrasted with Mr Richardson's evidence before the Tribunal. He told us that the systems clerk role required a great degree of what he referred to as *"handballing"*. This was simply a reference to a need to physically check the deliveries of in-bound goods upon pallets. Physical checks may be required at both goods in and goods out stages. Mr Richardson's evidence is that the role is office based but can entail the systems clerk being on his or her feed for three to four hours at a time undertaking the "handballing". The requirement to do a count of the goods in may arise when errors come up on the computer entailing a physical check. He also spoke of a *"cycle count"* undertaken four times a year which is one of B&Q's requirements of the Respondent.

22. Mr Richardson said that the systems clerk role is unpredictable. Day to day duties is very much dictated by events. There would be practical difficulties in hiving off parts of the systems clerk role such as data entry and stock control from those aspects of the role that entail physical activity.

23. Mr Wilson gave a similar count to Mr Richardson when he (Mr Wilson) sought to describe the systems clerk role. The unloading of the items from the wagons is not undertaken by the systems clerks. Warehouse colleagues operating fork lift trucks undertake that task. However, the systems clerks then scan the delivery on to the computer and may have to physically check should a problem be encountered. Pallet trucks are available to move things around in order that warehouse colleagues can undertake their checks. Physical checks may also be required in the event of picking errors to which the systems clerks may be alerted by the computer.

24. Mr Abbott made mention of the systems clerk role at paragraph 27.3 of his witness statement. However, he gave no description of the role in that statement. In particular, as was put to him in cross-examination, he made

no reference to there being a significant amount of heavy lifting entailed by it.

25. In our judgment, there is much force in Mr Kozik's submission that the Tribunal should treat with scepticism the Respondent's evidence about the volumes of heavy lifting involved in the role of systems clerk. The evidence about this only emerged in oral evidence before the Tribunal and was, in our judgment, influenced by the significance that physical activity had in the context of the case (and in particular the Claimant's suitability to undertake the role). Further, Ms Moss accepted in her submissions that (based upon Mr Richardson's evidence) particularly heavy lifting could be assigned to particular individuals. We also take account of Mr Richardson's evidence that it was possible for there to be specialisation within the systems clerk role (notwithstanding that all of them were trained for all aspects of it).

26. In addition to reception and IT duties, security is also outsourced. Security operations are centred upon a manned gatehouse. Photographs of the gatehouse are at pages 290 to 294. The front of the gatehouse is approached by surmounting two steps and then a further three steps. Each flight of steps has banisters. The surmounting of the two steps at the lower level enables the security operative to look into the window of a HGV.

27. Ms Marzec told us that there are two entrances to the gatehouse. The photograph at page 268 is of the rear entrance. She also told us that there is a kitchen, annexe and toilet within the gatehouse.

28. Mr Richardson's evidence is that there was at the material time (and continues to be) a dispute between the Respondent and the third party security company about the extent of the latter's duties. At paragraph 17 of his witness statement he says, "while this dispute was ongoing *[we interpose here to say that his evidence before us was that it continues to this day]* we were using Wincanton warehouse colleagues to provide cover manning the gatehouse as and when required. This was not a permanent role, it was just a temporary solution to plug a gap in a service that should have been covered by the security company. It was not a full time role".

29. Mr Richardson describes the duties at the gatehouse as involving walking out of the gatehouse building to meet the lorries when they come or go off the site. The photograph at page 268 showing the rear of the gatehouse is a poor photograph. However, Mr Richardson, by reference to it, drew our attention to there being four or five concrete steps leading up to it. His evidence is that, "each time a lorry comes on or off site, which would be around 40 to 50 times per eight hour shift, the person in the gatehouse needs to walk down the steps to the weigh bridge".

30. Mr Richardson also said that the gatehouse is located outside the main building and "the point where staff need to swipe in *[located within the warehouse itself]* at the start of each shift for payroll purposes is a 300 to 400 metre walk away". Mr Richardson clarified this evidence at the outset when he was called to give evidence. What he had meant to say was that the employee manning the gatehouse would have a <u>return journey</u> from the car park shown on the photographs to the swipe-in location and then to the gatehouse of around 300 to 400 metres twice a day.

31. The disputes to which Mr Richardson referred centred upon the extent of the duties to be carried out by the third party security company. It was (and remains) their position that it is no part of their role to manage the stock and to book and check HGVs into the yard. Thus, to plug the gap pending resolution of the dispute, the Respondent has had to deploy workhouse colleagues to operate the yard plan (essentially to tell the HGVs where to go), to check the HGVs and the paperwork. This entails walking around the trucks when they arrive and depart and can involve physical activity (particularly when dealing with curtain sided vehicles). Ms Marzec had some limited experience of her being deployed to gatehouse duties. She was being trained for the role but had not completed the training prior to her resignation with effect from 18 June 2016.

32. We find as a fact that the gatehouse duties undertaken by the Respondent's employees are temporary in nature (in the sense that they will come to an end as and when the resolution of the dispute occurs). That said, the dispute has been going on for a long time now. Further, we accept that there is some physical activity involved in undertaking the security duties. These physical duties are in addition to operating the yard plan from the computer within the gatehouse and checking the paperwork. The physical activity involves walking around 40 or 50 HGVs over an eight hour shift and undertaking physical checks.

33. The half a dozen office staff based in the general office area are supplemented from time to time by female members of the Respondent's workforce who are pregnant. The Respondent undertakes risk assessments of pregnant employees. The pregnant employees are, for obvious reasons, removed from the shop floor to undertake more sedentary work within the office. The Claimant identified two female employees who had been assigned work in the office pursuant to this policy. One of these was Magdalena Michalik. The other employee's name was not known to the Claimant and Ms Marzec. However, from the Claimant's description of her the Respondent identified her as Din Liu. The Respondent's evidence is that Din Liu was a systems clerk. When she went on maternity leave she was not replaced. Mr Richardson told us that there was a recruitment freeze in place after December 2015 under a proposed restructure.

34. There was no issue that the Claimant could not undertake the role of warehouse colleague after 20 April 2015. It was upon that date that he went on sick leave. He never returned to work. The Claimant and Ms Marzec each describe the warehouse colleague role in their witness statements. Each refers to the degree of heavy lifting involved. It formed no part of the Claimant's case that he was at any stage after 20 April 2015 fit to return to the warehouse colleague role or that there were any reasonable adjustments that the Respondent could have made to it to enable him so to do.

35. The issue therefore centres upon the question of alternative roles. This explains the focus upon the systems clerk and gatehouse roles. It is against this background that we now turn to the chronology of events.

36. Before doing so, however, we ought to make reference to the Claimant's impact statement which is within the bundle at pages 34 and 35. In the bundle index this is said to be dated 28 September 2016. In particular the Claimant said:-

(4) "I'm not able to walk long distances, walk fast or run. I'm not able to lift heavy objects, perform rapid movements. I constantly feel pain so I have to change position very often. I feel depressed. I do not leave the house, I do not have a will to see or visit anybody. I am all the time irritated – small things make me nervous".

(5) "Nothing makes me happy. I used to play instruments, meditate, read books, ran my own channel on You Tube, enjoy my intimate life. Now I just sleep most of the day".

(13) "Because of my illness and all the aftermath of lodging a grievance in 2014, I am no longer in a relationship with my partner Joanna Marzec what only makes me feel more devastated".

(14) "She still helps me with doing shopping, filling in all necessary forms, dealing with formalities regarding various payment etc. Joanna also helps me with washing me when the pain intensifies. After the operation *[to which the Claimant refers at paragraph 10 of the impact statement] s*he helped me with actually everything including turning me from one side to another".

37. The Claimant was signed off by his General Practitioner as unfit for work by reason of back pain between 1 October and into November 2014. We refer to the sick notes at pages 138, 140 and 142. He underwent physiotherapy between 14 October 2014 and 20 January 2015 (pages 144 and 145). He was discharged on the latter date having made "excellent progress".

38. The Claimant made a flexible working request on 11 January 2015 (page 124). He said, "My request is due to health problems. I am experiencing continuous strong low back pain which does not allow me to function normally what finds its reflection in my workplace as well as in my private life". The flexible working request form is at pages 126 to 128. A meeting was held on 13 January 2015 between the Claimant and Mr Wilson to discuss the flexible working request.

39. The Respondents agreed to a trial period. Therefore, upon that basis, the Claimant's working shift pattern of 40 hours per week (between 10 o'clock in the evening and 6.00 o'clock in the morning Sunday to Thursday) was changed to a 24 hour week between Monday and Wednesday (again between 10 o'clock in the evening and 6.00 o'clock in the morning).

40. The Claimant asked for this arrangement to be made permanent. We refer to page 135A. The Respondent again agreed to the Claimant's request. The arrangement therefore was that the Claimant would work his shorter working week upon a permanent basis with effect from 2 March 2015.

41. The Claimant was signed off work by his GP on 20 April 2015. The reason for this was described as "back pain and testicular pain". This was the commencement of the long period of ill health absence from which the Claimant did not return to work.

42. Mr Wilson undertook an absence review meeting on 28 May 2015 (pages 151 to 156B). The Claimant underwent testicular surgery on 1 June 2015.

43. On 9 June 2015 the Respondent wrote to the Claimant (pages 160 to 161A). Mr Wilson, the author of the letter, expressed sympathy with the

Claimant. It recorded the fact that the Claimant was unable to work or return to work due to ill health.

44. Mr Wilson convened a further welfare meeting. As with that of 28 May 2015, Ms Marzec was present to support the Claimant. Mr Wilson was informed that the Claimant was unable to lift anything and that he needs to rest for the day if he walks more than 400 metres. The Claimant was unable to suggest anything that the Respondent could do for him at that time.

45. A further welfare meeting was held on 30 July 2015. Again, Ms Marzec was there as the Claimant's companion. The notes of this meeting are at pages 175 to 178. The Claimant reported being "in a lot of pain with my back on right hand side. Nothing has changed at all in my condition apart from results of non-cancer in the testicle they removed". Again, the Claimant was unable to suggest anything that the Respondent could do to help him at this stage.

46. Mr Wilson convened a further welfare meeting on 27 August 2015 (pages 181 to 184). Again, Ms Marzec was present. Happily, it appears that the cancer tests proved negative. Mr Wilson thus asked the nature of the Claimant's current problems. The Claimant complained of chronic back pain to the right side which causes pain to shoot down his left leg to the back of his calf. The Claimant said that the physiotherapy that the Respondent had arranged (as recorded at pages 144 and 145) had helped at first but his back condition had slowly got worse again. The Claimant ruled out the possibility of any return to work at the present time.

47. It was at around this time that the systems clerk vacancy was notified. This is the document at page 185 to which we have already made reference when considering the evidence about the nature of the systems clerk role. The closing date to apply for the vacancy (which was advertised only internally) was 14 September 2015. Mr Wilson's account is that he was aware of the Claimant's interest in moving to an office based job and that he knew this because the Claimant had expressed an interest in the systems clerk role. Mr Wilson's evidence is that he gave the document at page 185 to Ms Marzec to pass on to the Claimant as he thought he may be interested in applying. He was aware that the Claimant was running a graphic design T-shirt business in his own time. Mr Wilson therefore surmised that the Claimant would have administrative and IT skills suitable for the role.

48. Ms Marzec's account is that she was not given the vacancy notice by Mr Wilson to pass on to the Claimant. On the contrary, she had seen it herself, asked for it and then decided to apply for the vacancy.

49. It was suggested to her by Ms Moss that Mr Wilson's account was credible as he had used her as an intermediary for the passing on of the Claimant's sick notes.

50. Upon this issue we prefer the evidence of the Claimant. Firstly, the impression that the Tribunal had of Mr Wilson was that he was very conservative in his dealings with the Claimant. As we shall see when we come on to the consideration of events in the middle of November 2015, Mr Wilson was very cautious not to act without authority. That being the case, it is, in our judgment, unlikely that Mr Wilson would have taken it upon himself to recommend a vacancy of any sort to the Claimant without

being satisfied that the Claimant was fit to return to work in any capacity. It was not until 18 September 2015 that the Respondent even made a referral to occupational health for an assessment of the Claimant. That, in our judgment, tells against the Mr Wilson drawing the Claimant's attention to a vacancy at the closing date of which was prior to that referral.

51. Further, in our judgment, it is unlikely that Ms Marzec would have been given the vacancy notice specifically to pass on to the Claimant and then take it upon herself to jeopardise the Claimant's chances by applying for the job herself. At the time, Ms Marzec was the Claimant's partner. She provided a great deal of support to him as demonstrated by her attendance at each welfare meeting. Although the unfortunate circumstances that had befallen the Claimant have led to their separation it is evident (from the support that she has given to him) that the Claimant and Ms Marzec continue to enjoy a valuable friendship. That this is mutual was demonstrated when this matter was before the Tribunal last month and the Claimant wished to support Ms Marzec given difficult family circumstances for her that had arisen in Poland. It is our judgment therefore that it would have been out of character and therefore unlikely that Ms Marzec would have thwarted the Claimant by applying for the job herself had it been the case that the Claimant had had it drawn to his attention by the Respondent with a view to the Claimant applying for it.

52. In the event, Ms Marzec did draw the Claimant's attention to the vacancy but he did not apply for it. Ms Marzec was unsuccessful in her application.

53. There was a further welfare meeting held on 8 October 2010 (pages 190 to 193). The Claimant said that he was looking to return to work on 19 October 2015 and had been advised to look for light duties. This was because the Claimant was only able to walk for about 45 minutes before becoming tired and requiring rest. The Claimant said that he would be able to undertake office work but would have to get up and walk about to alter his position as otherwise he would become stiff. He was unable to stay on his feet for too long.

54. The Claimant informed Mr Wilson of these restrictions at the time when he had been signed off as unfit for work for a period of 4 weeks from 15 October 2015 with chronic low back pain (page 194).

55. During the currency of that fit note, the Claimant had a consultation with his consultant orthopaedic surgeon (pages 197 to 198). He saw the orthopaedic surgeon in clinic on 22 October 2015. In a report to the Claimant's GP of the same date Mr Kheuffash reported the Claimant as complaining of low back pain of three years duration. The Claimant gave a description of pain in the lower back, mainly on the right side and shooting pain into both legs. Following a review of a scan, Mr Khuffash's opinion was that the Claimant's symptoms were "likely to be related to degenerative disc disease in his lumbar spine". He went on to opine that the Claimant "may need to consider changing his job and avoid heavy lifting and he should avoid prolonged sitting". It is recorded that the Claimant discussed the prospect of an epidural injection with Mr Khuffash.

56. The Claimant reported the outcome of that consultation to Mr Wilson on 24 October 2015 (page 199). He also sent a copy of the orthopaedic surgeon's report to Mr Wilson on 26 October 2015 (page 200).

57. On 11 November 2015 the Claimant received a sick note from his GP certifying him as fit to work with amended duties. The Claimant was advised that this would be the case for a period of 12 weeks (page 201).

58. The next document on the file (at page 202) is an email from Mr Abbott to the Claimant dated 13 November 2015. This makes reference to Mr Abbott having sought advice from HR. In order to cover his continued period of sickness absence Mr Abbott required the Claimant to obtain another fit note from his GP. This was because the Claimant was not permitted to return to work at this time but had no current note certifying him as unfit to work. He told the Claimant that when Mr Wilson returned to work on Monday 16 November 2015 he would ask Mr Wilson to arrange an occupational health appointment. He concluded "I have informed HR that I don't believe we have any position in the operation that would fit the restrictions you have asked for".

59. In compliance with that request the Claimant procured the sick note at page 203. This certified the Claimant as unfit for work for a period of 4 weeks from 11 November 2015 (by reason of a back disorder). (It was unnecessary for the Respondent to have asked this of the Claimant as if no amended duties were unavailable he would have been covered under the note at page 201 anyway).

60. An issue of fact arose between the parties as to whether or not a meeting had been held between the Claimant and Mr Wilson (which Mr Abbott subsequently joined) on 11 November 2016. Mr Wilson said he had no recollection of such a meeting and had there been one it would have been documented.

61. It is the Claimant's case that it was at this meeting that Mr Wilson alluded to the possibility of the Claimant covering the maternity leave of Magdalena Michalik or Din Liu. In his witness statement the Claimant refers to there having been an informal meeting to this effect on 12 November 2015. Mr Wilson denied this to be the case upon the basis that he was on annual leave on 12 and 13 November 2015 only returning to work on Monday 16 November.

62. For his part Mr Abbott said (in paragraph 11 of his witness statement) that he had no recollection of Mr Wilson discussing these roles with him and that he did not speak to anyone in HR about those roles.

63. Within the bundle (at pages 271 to 274) is a long term sick action plan. There is an entry in this document dated 13 November 2015 and which refers to a review meeting the outcome of which was to invite the Claimant to attend an occupational health appointment and obtain a "four week sick note". Responsibility for this was assigned to Mr Wilson.

64. The evidence from each side upon this issue is not entirely satisfactory. The email at page 288 is good evidence that Mr Wilson and the Claimant had agreed to meet on 11 November. Against that, there is good evidence that the Claimant and Mr Abbott actually met on 13 November 2015 (by reference to pages 202 and 273).

65. From this material we are satisfied that the Claimant and Mr Abbott met on 13 November 2015. Mr Abbott must have had some involvement with the Claimant to know to contact HR to discuss the Claimant's case and then email him with the advice that he had obtained from HR. That is equally consistent with the entry at page 273 and which assigns to Mr Wilson

responsibility for taking the necessary action upon his return to work from his period of leave.

66. It is not entirely clear what became of the meeting that Mr Wilson and the Claimant had arranged for 11 November. Mr Wilson was on annual leave on 12 November and therefore the date in the Claimant's witness statement is plainly an error.

67. We are satisfied that Mr Wilson would not have made a suggestion of the Claimant taking the place of the female employees due to go on maternity leave without authority. As we have said, we formed the view that Mr Wilson was very conservative and cautious in his management of the Claimant. He said several times in evidence that he had no authority to offer alternative roles to the Claimant without the approval of Mr Abbott.

68. We are satisfied from the evidence that were heard from the Respondent upon this point that Mr Abbott did not offer the Claimant the prospect of replacing Magdalena Michalik or Din Liu. That is not consistent with the email sent by Mr Abbott to the Claimant at page 202. The Claimant did not respond to Mr Abbott's email making reference to the alleged offer made by Mr Abbott of covering maternity leave for female employees. It is credible that the Respondent has a policy of removing female employees from the shop floor for health and safety reasons in the light of risk assessment. This is a cost that the Respondent bears. In effect, those female employees removed from the shop floor are supernumery pending them going on maternity leave. It would be inconsistent with the Respondent's practice for the promises to have been given as alleged.

69. The Respondent then received the occupational health report that we see at pages 207 to 209. This is dated 21 December 2015 and was addressed to Miss Lamb.

70. After reciting the history of the matter the consultant occupational health physician reports:-

"Functionally at the moment, he describes that the pain affects all aspects of his life and he has markedly broken sleep. He informed my colleague that the best position to be in is lying on his left side. He gives a pain score of between 3 and 7 most days. He describes that he has difficulty getting out of the bath and finds lying in the bath helps to relieve the pain. He also has difficulty going down the stairs when he needs to have support from banisters.

He also advised that he is unable to do his other job as a self employed graphic designer as he is unable to sit for more than 30 minutes at any time without getting up for a 10 minute break to stretch. My colleague reports that on the day of the examination, Mr Tatinger sat with difficulty in the waiting room and had difficulties standing. He walked slowly to the consulting room and clearly his gait demonstrated that he was in pain.

In my colleague's opinion, Mr Tatinger is currently temporarily unfit. It may well be that following the spinal injections there could be some improvement. However, it is difficult to predict a return to work date at this point in time".

71. There then followed seven specific questions. Mr Kozik's point was well made when he suggested to Ms Lamb in cross-examination that all of these were around the Claimant's substantive role as a warehouse

colleague. There were no questions directed at the possibility of alternative roles.

72. Ms Lamb explained that this was because the Respondent had entered into an arrangement with a new occupational health provider. Instructions were sent electronically. The system provided for specific questions to be answered from a drop down box. Ms Lamb therefore explained that there was no scope to ask questions other than those programmed into the system. We have no reason to disbelieve Ms Lamb, of course, but based upon what she says this is a most unsatisfactory state of affairs. In any event, it appears that there was nothing to stop the Respondent from emailing the occupational health provider with a supplementary letter containing questions about alternative roles or telephoning the consultant occupational health physician (as the Respondent was invited to do in the final paragraph of the report at page 209).

73. The occupational health physician's opinion was that the prospects of a return to work depended upon the outcome of the spinal injections. The Claimant was considered to be temporarily unfit to be in his post but there was a prospect of improvement with treatment.

74. There then followed a welfare meeting held on 21 January 2016. This was attended by Mr Wilson, Ms Lamb, the Claimant and Ms Marzec. The notes are at pages 210 to 212.

75. The Claimant informed Mr Wilson and Ms Lamb that he was reluctant to undergo spinal injection because of the risks involved. He appeared therefore to have resigned himself to having to live with the pain. He complained that his back was very stiff and the pain was permanent.

76. He said that he was unable to lift anything. He can sit for 30 minutes until he gets painful and he then has to stretch for 10 minutes. He can walk for 15 to 30 minutes then has to sit down. He was unable to walk with shopping bags in both hands.

77. Ms Marzec said that the Claimant was unable to do anything at home and that movement and lifting was causing the Claimant pain.

78. The Claimant was unable to contemplate a return to working on a 'Reach truck' (being a vehicle upon which he had previously worked). The Claimant reiterated that he was unable to contemplate a job involving driving at the appeal hearing held with Mr Richardson on 11 April 2016. We refer to page 247.

79. He ruled out anything that involves lifting. When Mr Wilson suggested the Claimant may be able to undertake office work the Claimant said that he has to stretch for five or 10 minutes after sitting for 30 minutes.

80. The topic then turned to the Claimant's printing business. The Claimant said that he was unable to use his laptop "whilst laying down". This prompted Ms Marzec to say that the Claimant could work in the office as he would then be able to move about and switch positions.

81. The reference to the Claimant lying down to operate his laptop in conjunction with his graphic design business was the subject of some controversy between the parties. This appears to have been interpreted by the Respondent at times as the Claimant lying down to operate the laptop whereas the Claimant said he was able to operate the laptop when sitting but would sometimes be able to continue his work when he became

uncomfortable by lying on the floor. The Claimant was not saying that he was lying on the floor at all times to operate the laptop. In submissions, Ms Moss fairly accepted that the Claimant's interpretation of this passage (at page 212) was probably the correct one but even then the Respondent could not contemplate allowing the Claimant to lie down on the floor in an office environment if he became uncomfortable.

82. Mr Wilson's evidence (at paragraphs 47 and 48 of his witness statement) is that it was difficult to think of any job in the warehouse that may be suitable for the Claimant. His focus therefore was upon alternative roles "in an office environment or data input" and he makes reference to Ms Lamb confirming that "she would put something together with Ian's input (page 212)."

83. Mr Wilson said that he met with Mr Abbott after the meeting of 21 January 2016. They decided it was time "to move Slawomir's case to the formal capability disciplinary procedure given the length of his absence from work and the fact that it was now clear it would not be possible to make adjustments to allow him to return to his warehouse colleague role."

84. We observe in passing that it is not helpful for the Respondent to have referred in correspondence with the Claimant that these issues gave rise to a disciplinary issue. They plainly do not. Through no fault of his own the Claimant found himself unable to work. There was no suggestion that the Claimant had given anything less than satisfactory service throughout his time with the Respondent and its predecessor.

85. Ms Lamb's evidence (at paragraph 18 of her witness statement) is that, "after the meeting I got a list of every vacancy at Redhouse and put a tick or a cross next to each role, based on what Slawomir had told us he could and could not do at the meeting. I did not keep a copy of this list and I did not send it to Slawomir, however, he could have accessed all of the vacancies himself via the website. Where I had placed a cross against a role I went back and considered whether we could make adjustments to accommodate Slawomir's condition but it was very difficult to find anything that could be adjusted to the extent he required. Even the people who work in the 'systems' part of Wincanton's business have to walk around the warehouse. Redhouse is a big site, as an example it took me 20 to 25 minutes to walk from my desk to the warehouse".

86. To say the least, it is unfortunate that Ms Lamb did not keep a copy of the list to which she refers. It is evident from her account that there were some roles that she thought may be suitable for the Claimant. This is in fact reinforced in paragraph 20 where she refers to a meeting with Mr Wilson and Mr Abbott and at which she produced her "marked up list and suggested the roles I thought could potentially be suitable for Slawomir". Mr Wilson discounted these options "as they all required some activity that Slawomir would be unable to do. For example, I suggested offering him hygiene only duties as I knew these were light tasks because we often use them to facilitate a phased return to work for warehouse colleagues. However, Paul said that even hygiene involved some bending to pick up rubbish and sweep. We agreed that there were no available options which would have enabled us to bring Slawomir back to Redhouse at that time without making his condition worse".

87. Mr Wilson does not make any reference to having a meeting with Ms Lamb and going through a list of vacancies that she had compiled. Mr Abbott makes no reference to such a meeting either. It formed no part of the Respondent's case that the Respondent had gone through a list of vacancies with the Claimant.

88. A capability hearing was convened for 10 February 2016. It was attended by Mr Abbott, Ms Lamb, the Claimant and Ms Marzec. The notes are at pages 218 to 222.

89. The Claimant informed the meeting that nothing had changed so far as his back was concerned. He considered an epidural injection too big a risk. He was taking painkillers. He said that it was hard to cope with the condition on a daily basis. He said that when either sitting or standing for 30 or 40 minutes he needs to change positions.

90. When asked about his home life, he said he was able to do certain things on his own but was unable to stand in the bath and needs help with washing. He was able to carry shopping if the pain was not bad but some days he was bedridden. This would occur once or twice a month. He said he even got pain when not lifting and had difficulties at times going to the bathroom. Ms Marzec said that the pain had caused him sweating and screaming. The Claimant returned to this issue at the meeting with Mr Richardson of 11 April 2016 when he referred to experiencing fever by reason of bone pressing upon his nerves. This caused a rise in his body temperature.

91. The meeting turned to the question of alternative roles. Ms Lamb is recorded as having said that administrative jobs are desk based and it was not an option for the Claimant to move to such a role. When asked about this comment by the Employment Judge, Ms Lamb said that the administrative roles all involved some element of lifting and there was no option for him to get up and stretch every so often.

92. It was difficult to understand Ms Lamb's evidence upon this point given that there were half a dozen office based roles in HR and finance. There is no evidence from any of the Respondent's other witnesses that any of these roles involved lifting on the warehouse floor.

93. Ms Lamb was also questioned about her evidence in paragraph 18 that it would take her 20 to 25 minutes to walk from her desk to the warehouse. When pressed upon this issue by Mr Kozik, she said that it took her so long because she was waylaid by employees wishing to ask her about HR issues. If she went on to the shop floor upon her return colleagues would, she said, frequently comment that she had been about 45 minutes to an hour. From this it appears she deduced that it would take 20 to 25 minutes from her desk to the warehouse.

94. On any view, it would not take that long to walk a distance of around 390 metres (being the length of the warehouse as shown on the photographs). We can accept that it would take Ms Lamb as long as she said to get back to her desk once she went on to the shop floor but that was because she was waylaid by individuals making enquiries of her. Against that, we accept the Respondent's evidence (particularly from Mr Richardson) that seldom would those working upon the shop floor be required to walk in a straight line from one end of the warehouse to the other. Safe pathways would involve an indirect route from one end to the other. Further,

warehouse operatives would have to leave the safe pathways in order to undertake their picking duties.

95. Ms Lamb gave evidence about the impression she formed from observing the Claimant during the meeting held on 10 February 2016. She was concerned that the Claimant "looked like he was in so much pain sitting in the meeting that he would struggle to concentrate on work, even if there was something available". Mr Abbott gave similar evidence. He said that the Claimant "looked as though he was in pain all through the meeting and it seemed like he could not get comfortable, he sat right at the front of his chair and did not relax at all". He went on to say later on in his witness statement that, "my feeling, having met with him, was that Slawomir was not fit to be working at all as he seemed to be so uncomfortable".

96. Mr Richardson gave similar evidence in connection with the appeal hearing. He said, at paragraph 22, that "I was surprised by how much pain Slawomir appeared to be in at the hearing and I asked him whether this was a normal day for him. In his grounds of appeal he suggested he was fit to return to work and that things may have improved since his dismissal, but he could hardly walk the length of the room to get to the hearing and he did not sit still and was visibly shaking. He had to stand up from his chair every two minutes or so and, at one point, he stood at an odd angle for at least 10 minutes". He goes on to say that he remarked to Lesley Hall (from the Respondent's HR department) about how shocked he was by the Claimant's appearance.

97. None of this evidence was challenged in cross-examination. The observations of the Respondent's witnesses are consistent with the Claimant's impact statement (in particular at paragraph 4). The Respondent's witnesses' account

98. of their impressions of the Claimant is thus entirely credible and accepted by the Tribunal.

99. Mr Abbott adjourned the capability hearing. It was reconvened on 7 March 2016. It is Mr Abbott's evidence that in between times he investigated whether there were any alternative positions which may be considered for the Claimant. His evidence at paragraph 26 of his witness statement is that he checked the existing vacancies and there was nothing available that would fit the restrictions upon the Claimant's physical capabilities. It was the evidence of both Mr Abbott and Mr Richardson that there were simply no vacancies available at the material time. The Respondent's evidence upon this issue is unsatisfactory as the accounts of Mr Abbott and Mr Richardson do not sit easily with that of Ms Lamb who refers to having identified vacancies that the Claimant may have been able to fill.

100. The minutes of the capability hearing of 7 March 2016 are at pages 226 to 229. Mr Abbott asked the Claimant if anything had changed since the last meeting. The Claimant said that he had nothing to add and everything remained the same.

101. Mr Kozik drew to Mr Abbott's attention the contrast between the brevity of the meeting notes at pages 226 to 228 (in particular the relevant passage prior to the announcement of the decision to dismiss the Claimant) on the one hand with the pleaded case at paragraph 19 of the grounds of resistance (at page 26 of the hearing bundle) on the other. The latter suggests an explanation given to the Claimant by Mr Abbott of alternative

roles. Ms Moss submitted that the reference at paragraph 19 to the discussion of alternative roles was to the meeting of 10 February 2016 as it was at that meeting that Mr Abbott had considered a number of alternatives with the Claimant. We accept the Respondent's account but the Claimant's representative and the Claimant himself can be forgiven for the misunderstanding that they had around what, on any view, was a very poorly pleaded passage in the Respondent's grounds of resistance.

102. Mr Abbott's decision to dismiss the Claimant by reason of his unfitness to undertake any work was confirmed in the letter of 8 March 2016 (pages 230 to 231). The Claimant was dismissed with eight weeks' pay in lieu of notice.

103. The Claimant appealed against Mr Abbott's decision. His appeal letter is at pages 235 to 237. He referred to the Respondent's duty to make reasonable adjustments under section 20 of the Equality Act 2010. He then referred to a number of alternative roles that the Respondent may have considered as an alternative to his dismissal. These were:

- Data entry
- Gatehouse officer (typing data into computer and checking HGVs entering premises)
- Remote/distant work
- System clerk (this vacancy was recently advertised)
- Receptionist
- IT support
- Work within the RCC department

104. The notes of the appeal meeting held on 11 April 2016 are at pages 241 to 255. We have referred to some passages from these notes already upon a consideration of the Claimant's restrictions.

105. The notes show that Mr Richardson went through the alternative jobs suggested by the Claimant in his letter of appeal. Mr Richardson informed the Claimant that the reception and IT roles were contracted out to a third party company. There was discussion about the gatehouse role. Mr Richardson formed the impression that the Claimant knew little about it other than what he had been told by others (presumably by Ms Marzec based upon her limited experience of it).

106. There was discussion about the RCC department and the Claimant's IT skills. At page 245, the Claimant raised the issue of the provision by the Respondent of an adjustable chair to assist with his back pain. Mr Richardson then adjourned the hearing. It was reconvened for 22 April 2016.

107. On 22 April 2016 the Claimant said that he remained unable to lift heavy items and could not sit for long periods of time. The Claimant said he was "not trying to cheat". We refer to page 247. Mr Richardson had identified two available roles. One of these was in fact a warehouse role in Sherburn in Elmet similar to that which the Claimant was undertaking. The other position was a technical service adviser role in Doncaster but for which the Claimant did not possess the necessary qualifications. In evidence before us Mr Richardson said that he had produced these

opportunities at the meeting in order to demonstrate to the Claimant that nothing else was available.

108. The Claimant informed Mr Richardson that he had now shut down his graphic design business. It appears that he took this decision in February 2016. He told Mr Richardson that he was unable to “stand lifting heavy items”. He was unable to walk for more than 45 minutes or would start to get a fever.

109. Mr Richardson told the Claimant that no permanent roles had been filled in administration during the period of time that the Claimant was off work. Before us, Mr Richardson accepted that the systems clerk vacancy had been filled by an internal candidate. However, as Mr Richardson said, the Claimant was unfit for the role anyway at the time of the recruitment for that position (it will be recalled that the closing date for applications was 14 September 2015).

110. A further difficulty facing the parties was the Claimant’s inability to move geographical areas for an alternative role. The Claimant was asked by Lesley Hall whether he was tied to this area. The Claimant confirmed that he was as he was living with Ms Marzec at the time (pages 249 and 250).

111. Mr Abbott has gone through each of the positions referred to above and in the Claimant’s letter of appeal. Mr Abbott’s evidence in his witness statement is that:-

    108.1. There was no vacancy for an office clerk and it would in any event be unsuitable for the Claimant as it involves sitting for long periods of time.

    108.2. There were no gatehouse jobs available.

    108.3. There were no vacancies available for systems clerks and in any event the role would not have been suitable for the Claimant anyway “as it would involve sitting for long periods of time”. As we have said, this evidence leads us to treat with some scepticism the Respondent’s subsequent claims about the extent of heavy lifting involved in this role.

    108.4. Receptionist and IT support roles are outsourced.

    108.5. The RCC role involves both sitting for long periods of time and can involve lifting and therefore would be unsuitable for the Claimant given his physical health at the time. When asked to expand upon this comment about lifting in the RCC role, Mr Abbott said that items come on to the shop floor which needed to be checked against the inventory code.

112. It was suggested to the Claimant that the meeting with Mr Richardson was the first occasion upon which he had mentioned an adjustable chair. This the Claimant denied. He said that he had raised it at previous meetings. It was the Respondent’s position that the provision of an adjustable chair would not have been a difficulty had the difficulties caused by the Claimant’s condition been otherwise alleviated. We accept the Respondent’s account. There is no mention in any of the minutes prior to April 2016 of the provision of an adjustable chair. On any view, given the way in which the Claimant was presenting at the earlier meetings it is unlikely that the provision of an adjustable chair alone would have alleviated the Claimant’s difficulties. At no stage did the Claimant take

issue with the accuracy of the minutes of any of the meetings. There was no issue taken in the course of the hearing before us of the minutes being materially accurate in any other respect. We therefore conclude that the Claimant did not raise the issue of the chair until he met with Mr Richardson.

113. Mr Richardson dismissed the Claimant's appeal. The appeal outcome letter is at pages 264 to 266.

114. Finally, upon our findings of fact, we must consider the individuals mentioned in paragraphs 20 to 22 of Ms Marzec's witness statement. We have already dealt with Ms Michalik and Din Liu.

115. Ms Marzec also refers to Susan Edge who was said to be the fiancée of one of the Respondent's employees named Paul Ashmore. Ms Marzec said that Susan Edge (who, it subsequently transpired, was in fact named Gillespie) had acquired a position working in the gatehouse. This the Respondent denied. Mr Richardson said that there was no gatehouse position and the role was filled to plug the skills gap (left by the security company's refusal to undertake certain tasks) by means of the assignment of different warehouse operatives to the gatehouse from time to time. Upon this issue we accept the Respondent's account. The Respondent is the employer and will know the scope of its operations. In reality, the Claimant is left (quite reasonably) resting upon the evidence perceived by him and Ms Marzec. On balance we prefer the evidence of the Respondent for this reason.

116. Ms Marzec also makes reference to an office vacancy given to Jaroslav Scerbakov. He was not recruited until late 2016, well after the events with which we are concerned. The recruitment of him is therefore of little relevance.

117. Ms Marzec also mentioned Kinga Winnicki. She said that Ms Winnicki originally worked in the gatehouse and was trained to become a "WFM and JDA clerk" on 5 June 2016. Again, this was after the events with which we are concerned. The Respondent's case is that she was in fact a fully trained warehouse operative who occasionally did administrative tasks. Ms Marzec fairly accepted that she was not aware of this information.

118. We now return to the Case Management Order prepared by Employment Judge Jones (at pages 38 to 40). We shall start with a consideration of the discrimination complaints.

119. The statutory provisions as to prohibited conduct are to be found in Chapter 2 of Part 2 of the 2010 Act. The relevant sections for our purposes are:

    118.1 Section 15 (discrimination arising from disability); and

    118.2 Section 20 (duty to make reasonable adjustments)

This prohibited conduct is made unlawful in the workplace pursuant to the provisions of Part 5 of the 2010 Act.

120. Section 39 of the 2010 Act (to be found in Part 5) provides that an employer must not discriminate against an employee by (amongst other things) dismissing that employee. We shall not set out in full the relevant statutory provisions here. They are familiar to the parties' representatives.

121. The burden is upon the Claimant to show that the alleged discriminatory treatment actually happened. If there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provisions concerned then the Tribunal must hold that contravention to have occurred. The shifting burden of proof to be found in section 136 applies to the complaints of discrimination brought by the Claimant.

122. It is sensible to consider the complaint under section 20 of the 2010 Act first. In essence, the Claimant complains that the Respondent failed in its duty to make reasonable adjustments. As recorded by Employment Judge Jones, it is accepted by the Respondent that there was a provision, criterion or practice ('PCP') whereby pickers were required to travel to different sections, pick various items up at speed, including lifting and moving heavy objects, and that this PCP placed the Claimant at a substantial disadvantage because such activities caused pain, and his performance was impaired with the enhanced risk he may lose his employment for reasons of capability (sickness or poor performance). In essence, therefore, the Respondent conceded that its requirement for the Claimant to work as a warehouse operative (being the relevant PCP) placed the Claimant at a substantial disadvantage by reason of the physical impairment of his degenerative back condition. This was a substantial disadvantage in comparison with a non-disabled comparator who would be able to fulfil the requirements of the PCP.

123. As we have already observed, there is no issue raised by the Respondent that it did not know both of the relevant physical impairment and of the Claimant's substantial disadvantage in the application to him of the Respondent's PCP over the material time. Indeed, it is plain from our findings of fact that the Respondent knew full well both of the physical impairment and of the effect upon the Claimant of it.

124. The issue, therefore, is quite a narrow one:

Did the Respondent discharge its duty to make reasonable adjustments to avoid that disadvantage? As recorded by Employment Judge Jones at page 39, the Claimant contends that the adjustments which reasonably should have been made are those contained in paragraphs 10(b) to (f) of the claim form. These are at page 14 of the bundle and are:

(b) *Allocating some of the Claimant's duties to another person;*

(c) *Transferring him to fill an existing vacancy (including one at a more senior level);*

(d) *Swapping the Claimant's position with another employee;*

(e) *Altering the Claimant's hours of working or training;*

(f) *Assigning him to a different place of work or training.*

125. All of these are examples of steps that it might be reasonable for employers to have to take set out in the EHRC Code of Practice on Employment (2011). In this connection, a significant change brought about the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 stipulated (in section 18(B)(1)) that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with the duty, regard should be had to a number of factors. Those

factors are not mentioned in the 2010 Act. However, they are listed at paragraph 6.28 of the EHRC's Code as examples of matters that a Tribunal might take into account. The Code stipulates that what is a reasonable step for an employer to have to take will depend upon the circumstances of each individual case. Factors to consider include whether taking any particular step would be effective in preventing the substantial disadvantage, the practicability of the step, the financial and other costs of making the adjustments and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

126. Tribunals must therefore identify the nature of the substantial disadvantage suffered by the Claimant and identify steps which could have reasonably have been taken by the Respondent in order to prevent the Claimant suffering from the disadvantage in question. The onus is upon the Claimant and not the Respondent to identify, in broad terms, the nature of the adjustment that would ameliorate the substantial disadvantage. Having done so, the burden then shifts to the employer to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

127. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective one. As the reasonable adjustment provisions are concerned with practical outcomes rather than procedures, the focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about a proposed adjustment.

128. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. However, there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for a Tribunal to find simply that there would have been a prospect of it being alleviated. The focus of the Tribunal must be on whether the adjustment would be effective by removing or reducing the disadvantage the Claimant is experiencing at work as a result of his disability and not whether it would advantage the Claimant generally.

129. As has been said already, it is accepted by the Claimant that there were no steps that the Respondent could reasonably have taken to make adjustments to his substantive role as a warehouse colleague. The Claimant was simply unfit to undertake that role. That effectively disposes of the suggested adjustment of allocating some of the Claimant's duties to another person. That proposed adjustment carries with it the implication that the Claimant would remain working as warehouse operative. This was not the case advanced by him before us. Even had it been, in our judgment it would not have been reasonable for the Respondent to have adjusted the Claimant's duties as contended. The plain fact of the matter is that the Claimant was at the material time simply unable to stand for prolonged periods or do any lifting. Mr Richardson's account was that there were no seating facilities on the warehouse floor. The Claimant was

simply incapable of undertaking any part of the warehouse operative's role such as to make the position reasonably viable from the Respondent's point of view even with adjustments.

130. As Ms Moss said in her submissions, the nub of the entire case is whether there was an alternative position which should have been offered to the Claimant as an alternative to dismissal. Thus, the pleaded adjustments of transferring him to fill an existing vacancy and the assigning him to a different place of work or training may be pertinent.

131. The Respondent's answer to this is essentially two fold. Firstly, the Respondent says that there were no existing vacancies. Secondly, the Respondent says that in any event the Claimant was unfit for any of the duties at Redhouse in any event.

132. The Tribunal's judgment is that a position could have been found for the Claimant within the gatehouse. We accept entirely, of course, the Respondent's evidence that this was not a permanent position. The provision of workhouse operatives to man the gatehouse on an *ad hoc* basis was a temporary solution caused by reason of the dispute with the third party security company. That said, at the material time there was a need for workhouse operatives to man the gatehouse. No one was specifically assigned to that task. Rather than assigning operatives on an *ad hoc* basis the Respondent could have made arrangements for the Claimant to work at the gatehouse during the 24 hours per week that he was working following the flexible working request. This would have then released others to do their substantive role. With hindsight, of course, the need for workhouse operatives to man the gatehouse has lasted for longer than was envisaged in the early part of 2016. However, the fact remains that that was the situation that pertained at the time of the Claimant's dismissal in any event and (subject to the question of the Claimant's fitness for the role) is something that may have been considered. Taking into account the factors at paragraph 6.28 of the EHRC Code that would have been an objectively reasonable step for the Respondent to have undertaken. Were the Claimant to be fit for the role it would be an effective step in preventing the substantial disadvantage caused to him by the requirement to fulfil his substantive role. It would be a practical step. There would be no financial cost to the Respondent and in fact to the contrary would benefit the Respondent as it would release other workhouse operatives to focus upon their substantive roles.

133. On the face of it, such a role may have been attractive for the Claimant. As described by Ms Marzec, the gatehouse had a small canteen and toilet facilities. The Claimant may therefore have sat to work at the computer and stood when he needed to in order to relieve his symptoms. In our judgment, there was no difficulty with the Claimant's ability to surmount the small flight of steps shown in the photographs of the gatehouse.

134. The real difficulty for the Claimant however is the extreme picture that he was presenting between February and April 2006. These have been conveniently highlighted by Ms Moss at paragraph 6 of her closing written submissions. Objectively, would it be reasonable for the Respondent to assign the Claimant to work in the gatehouse given the picture that he was presenting at the material time? We also did take account of the impression of the Claimant formed by Mr Abbott, Ms Lamb and

Mr Richardson (an impression that went unchallenged in cross-examination).

135. Although not as physically demanding as the role of warehouse operative, we are satisfied that the gatehouse duties were nonetheless physically demanding. Going out of the warehouse 40 or 50 times over an eight hour period and then walking around the HGVs to inspect them is physically arduous and something which, in our judgment, the Claimant could not reasonably have done given the medical evidence presented by the Claimant, the Respondent's occupational health report and what the Claimant himself was telling the Respondent's witnesses. Symptoms of sweating, screaming and fever are extreme indeed and incompatible with work at night in the gatehouse dealing with HGVs. In our judgment, therefore, on balance we do not objectively consider it a reasonable step (by reason solely of the Claimant's health) for the Respondent to have assigned him to the gatehouse.

136. Even without the physical aspects of the gatehouse role, in our judgment, it would not be reasonable for the Respondent to have taken the view that it was a reasonable adjustment to assign him to that task. In our judgment the Respondent had reasonably held concerns about the Claimant's ability to concentrate on his work or whatever task was assigned to him given his evident preoccupation in trying simply to find a comfortable position in which to sit. It would not in our judgment be reasonable for the Respondent to have concluded that it could have faith in the Claimant to provide a reliable service in circumstances where he was informing the Respondent of extreme symptoms rendering him bedridden once or twice a month and it could be reasonably apprehended that he would have difficulty concentrating on his tasks.

137. We now turn to the issue of the systems clerk. In our judgment, the issue of Din Liu is something of a red herring. We accept that the Respondent, acting within its managerial prerogative, had decided to restructure and not replace her. However, objectively it would not be reasonable for the Respondent to simply take the view that the Claimant ought to be dismissed by reason of that decision. Had the Claimant been fit for a systems clerk role then it would have been incumbent upon the Respondent to select from within the pool of systems clerks one person for redundancy. The Respondent could not simply select the Claimant for dismissal by reason of the Respondent's need for fewer systems clerks. Such would have been to act outside the range of reasonable responses of the reasonable employer in the circumstances and plainly would therefore be objectively unreasonable.

138. Such however is an academic consideration in light of our determination that the Claimant was simply not fit to undertake the systems clerk role. We agree with the Claimant that the Respondent has overemphasised the element of heavy lifting involved in this role. It is our judgment that, as a reasonable adjustment, the heavier tasks could have been assigned to others. We have taken account of the practicability of hiving off tasks alluded to by Mr Richardson. That has not precluded the Respondent from creating specialised system clerks roles and therefore in our judgment had the Claimant been fit for the role it would have been possible to adjust his duties and those of others in order to accommodate him.

139. The difficulty for the Claimant is simply that there are restrictions upon his walking, lifting and sitting. All three are indispensible to the systems clerk role. As Mr Richardson said, the systems clerk role may entail the clerk going on to the workhouse floor for several hours at a time. The Claimant's symptoms were simply incompatible with that demand. Sitting for long periods was beyond the Claimant's capabilities. It is the case that the Respondent, as a reasonable adjustment, could have accommodated the Claimant standing from time to time to stretch. However, there is a limit in our judgment as to how far the systems clerk roles could have been divided and inevitably any such role would involve both prolonged sitting and walking (even if the lifting element of the role could be removed and assigned to others). The Claimant presented to the Respondent and the Respondent's occupational health provider as having difficulty walking other than slowly and in pain. It would not be reasonable, in our judgment, for the Respondent to have set the Claimant on as a systems clerk.

140. While it may have been practicable with adjustments to have carved out aspects of that role with the Claimant could do, the restrictions upon sitting and walking were such that it would emasculate the role to such a degree as to not serve the Respondent's business. The demands of the role were such that it would not be effective ameliorating the significant disadvantage caused to the Claimant by his substantive role. The extreme picture that presented to the Respondent and the objectively reasonably held concerns over the Claimant's ability to focus on the job rather than making himself comfortable reasonably and objectively preclude any finding that it would have been a reasonable adjustment to have set him on as a systems clerk.

141. There was no suggestion that the Claimant had the necessary qualifications to undertake any of the six office roles that which we heard in finance and HR. We heard nothing to the effect that the Claimant was suitably qualified to undertake them. Plainly in those circumstances it would not be a reasonable adjustment to assign him to them (leaving aside the issue of whether there were any suitable alternative vacancies).

142. The plain fact of the matter is that there were simply no suitable alternative roles to which the Claimant could be assigned at Redhouse. He was not fit for the role in Sherburn in Elmet and not suitably qualified for the available technician role in Doncaster. For domestic reasons he was unable to contemplate moving sadly geographical areas served by Redhouse. It was therefore reasonable for the Respondent not to consider looking any further afield.

143. We now turn to the complaint of discrimination for something arising in consequence of disability. As recorded by Employment Judge Jones, it was accepted by the Respondent that the Claimant was dismissed and that that amount to unfavourable treatment. The reason for the dismissal related to his disability. It follows therefore that the Claimant was unfavourably treated for something arising in consequence of it. It was also accepted by the Claimant that it was a legitimate aim of the Respondent to run its business effectively and efficiently.

144. The issue therefore is whether the dismissal of the Claimant was a proportionate means of achieving that aim. We dealt with the reasonable adjustments issue first because if there were any available reasonable adjustment open to the Respondent it would be difficult if not impossible to

justify disability related discrimination given that there were available steps to ameliorate the disadvantaged caused by the disability. We have determined that there were no reasonable adjustments that the Respondent could have taken.

145. Proportionality entails a balancing of the respective hardship to the Claimant caused by his dismissal on the one hand as against the business needs of the Respondent on the other. We have determined that there were no alternatives realistically open to the Respondent. There is no obligation upon the Respondent to create a post for the Claimant by way of reasonable adjustment. Such a step would not be compatible with the effective and efficient economic running of the Respondent's business.

146. In our judgment, the Respondent really had no alternative but to dismiss the Claimant. The retention of the Claimant would in reality have been a burden upon the Respondent given the probability of the Claimant's lack of productivity. In these circumstances, the balance favours the Respondent and we hold therefore that the dismissal of the Claimant (being the unfavourable treatment complained of) was justified.

147. We now turn to the complaint of unfair dismissal. The Claimant accepted that the reason for the dismissal was because of his incapability to perform work of the kind which he was employed by the employer to do. We hold that the Respondent had reasonable grounds to believe that to be the case.

148. The Respondent did not obtain an update of the occupational health report of 21 December 2015. We have little doubt that some employers would have done so. However, acting within the range of reasonable responses, we consider it to be permissible for the Respondent not to have commissioned an update. This was because of what the Claimant was telling them, quite honestly and frankly, about the restrictions upon his abilities.

149. The Respondent has therefore established a statutory permitted reason for the dismissal of the Claimant within section 98 of the Employment Rights Act 1996. We have also determined that the Respondent entertained a reasonable belief in that statutory permitted reason (on account of the Claimant's incapability for his substantive role).

150. The question that arises therefore is whether the dismissal for that reason was reasonable in all the circumstances of the case having regard to the size and administrative resources, equity and the substantial merits of the case. In cases where an employee is dismissed on grounds of ill health, the basic question that has to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer and if so how much longer? Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, the need of the employer to have done the work which the employee was engaged to do and the circumstances of the case. An employer, acting reasonably, will discuss the position with the employee so that the situation can be weighed up.

151. In this case, the Claimant had been continually absent from work from 20 April 2015. Before that, he had had periods of absence with back problems and had made a flexible working request (as was his entitlement) to reduce his hours to cope better with his back condition.

152. On any view, the Respondent reasonably reached the conclusion that the Claimant was unable to return to his substantive role. The Claimant at no stage sought to suggest otherwise. Again, therefore, the issue really comes down to the question of alternative work.

153. There is no rule of law that an employer is obliged to create a special job for an employee whom it is proposing to dismiss upon the grounds of incapacity. There is also no rule of law which obliges the employer in an ill health case to find other work for the employee. Whether, before dismissing on grounds of incapacity, an employer should offer the employee alternative work depends upon the circumstances of the case. Employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the Tribunal.

154. The range of reasonable responses test applies to these considerations upon the Claimant's unfair dismissal complaint. This affords a wider margin of appreciation for the employer than does the objective test that we have described in connection with the discrimination complaints. It was reasonable for the Respondent to conclude that there were no suitable alternative vacancies that it could give to the Claimant or offer to the Claimant. In our judgment, the Respondent acted within the range of reasonable responses in taking the view that it did given how the Claimant presented himself to the Respondent's witnesses at the material time and the significant restriction upon available vacancies within the Respondent's operation at that time.

155. It is unfortunate that Ms Lamb did not retain her list and to which she refers in paragraph 18 of her witness statement. As we have said, Ms Lamb's evidence is inconsistent with that of Mr Richardson and Mr Abbott to the effect that there were no vacancies at the time. The issue for us is the reasonableness of the dismissing officer and the appeals officer. In our judgment, they could each reasonably have concluded that the Claimant was simply unfit for any of the roles carried out at Redhouse (regardless of whether there were any vacancies or not).

156. We therefore conclude that the Respondent acted within the range of reasonable responses when deciding that the Claimant should be dismissed from his role as a warehouse operative and that there were no reasonable and suitable vacancies to offer to him.

157. We conclude therefore that all of the Claimant's claims stand dismissed. The Tribunal found this to be a very sad case. No one had a bad word to say about the Claimant. He appears to have been well regarded by all. The Respondent dealt with the Claimant sympathetically. It tolerated a significant period of absence. It is unfortunate that through no fault of his own the Claimant found himself losing a position to which he was eminently suited. It is to be hoped that the Claimant's prospects improve in the fullness of time.

Employment Judge Brain

Date: 16 March 2017

Sent on 16 March 2017