EMPLOYMENT TRIBUNALS

Claimant: Mr A Russell

Respondent: Royal Mail Group Ltd

HEARD AT: Manchester **ON:** 12 & 13 September 2017

In chambers: 9 October 2017

BEFORE: Employment Judge Porter
Mr G Skilling
Mr T A Henry

REPRESENTATION:

Claimant: Mr A Willock, lay representative

Respondent: Mr G Bailey-Gibbs, solicitor

RESERVED JUDGMENT

The claims of harassment and failure to make reasonable adjustments under the Equality Act 2010 are not well-founded and are hereby dismissed.

REASONS

Issues to be determined

1. At the outset it was noted that the parties had agreed a List of Issues, which:

   1.1 identified the claim as a claim of:

1.1.1 harassment within the meaning of s26 Equality Act 2010;

1.1.2 failure to make reasonable adjustments within the meaning of ss20 and 21 Equality Act 2010

1.2 noted that the claimant relied on the protected characteristic of disability and that the respondent conceded that the claimant "is a disabled person …in respect of anxiety and depression";

1.3 listed at paragraphs 1.1-1.7 as factual issues the 7 allegations of unwanted conduct relating to the claim of harassment;

1.4 failed to identify the provision criterion or practice ("PCP") relied upon in the claim of failure to make reasonable adjustments;

1.5 did not identify any preliminary and/or jurisdictional issues, did not list as a preliminary issue:

1.5.1 whether the claimant was at the relevant time a disabled person within the meaning of the Equality Act;

1.5.2 whether there was a continuing act of discrimination;

1.5.3 if not, whether part of the claim was presented out of time and, if so, whether it was just and equitable to extend time to bring any out of time claim within the jurisdiction of the tribunal.

2. Solicitor for the respondent indicated that his colleague had agreed the List of Issues with the claimant's lay representative, Mr Willock, but had failed to include the jurisdictional issue (raised in the Amended Response), namely the respondent's assertion that part of the claims, namely any allegation of harassment, other than that stated at paragraph 1.1 of the List of issues, was out of time. It was noted that this was a jurisdictional issue and would be considered by the tribunal after hearing all the evidence.

3. EJ Porter sought to clarify the claim of failure to make reasonable adjustments and asked Mr Willock to clarify:

3.1 what provision, criterion or practice (PCP) was applied by the respondent;

3.2 how that put the claimant at a substantial disadvantage in comparison with persons who are not disabled;

3.3 what steps the claimant says could have been taken to avoid or reduce that substantial disadvantage

4. Mr Willock asserted that:

4.1 the PCPs were:

4.1.1 the requirement to deliver the run within the stipulated time;

4.1.2 the requirement to complete the run using the HCT trolley

4.2 the claimant was disadvantaged because nobody knew how long the run would take and nobody had tested the run using that trolley;

5. EJ Porter was not clear how that fell within ss 20 and 21 Equality Act 2010 as, in such a claim, the tribunal would be required to determine:

5.1 whether the respondent had applied a provision, criterion or practice (PCP), which put the claimant at a substantial disadvantage in comparison with persons who are not disabled;

5.2 whether there were any reasonable steps which the respondent could have taken to avoid or reduce that substantial disadvantage.

6. The claimant's representative was given time to consider this, while the tribunal panel conducted its reading exercise.

7. The claimant's representative then identified the claim of failure to make reasonable adjustments as follows:

7.1 a PCP was applied, namely, the failure to follow the agreed rehabilitation plan in April 2016;

7.2 this put the claimant at a disadvantage as he was already labouring under the disability of stress and anxiety and this made him feel worse;

7.3 there was no other claim of failure to make reasonable adjustments, in particular there was no claim relating to the period of employment prior to the claimant's long term sickness absence.

8. The claim proceeded on the basis of that PCP as identified by Mr Willock.

9. EJ Porter also sought clarity of the claimant's Schedule of loss, in particular the claim for loss of earnings set out in the Schedule of Loss. It was not clear on what grounds that remedy was sought. The claimant's

representative confirmed that the claim of loss of earnings was not pursued.

Orders

10. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

11. During the cross-examination of the claimant solicitor for the respondent put to the claimant that he was not, at a certain period of time, a disabled person within the meaning of the Act. EJ Porter ordered that this was not an appropriate line of questioning as:

    11.1 the respondent had conceded that the claimant was a disabled person;

    11.2 any issue as to the time at which the claimant had become a disabled person had not been identified in the agreed list of issues;

    11.3 this issue had not been raised at the commencement of the hearing.

    In all the circumstances, the questions were not relevant to the issues to be determined by the tribunal

12. During the cross-examination of the respondent's witnesses the claimant's representative put questions relating to alleged race discrimination. EJ Porter ordered that this was not an appropriate line of questioning as:

    12.1 the protected characteristic relied upon by the claimant in the claim form and the agreed list of issues was disability;

    12.2 the claimant had not sought to amend the claim to include a claim of race discrimination;

    12.3 the questions were not relevant to the issues to be determined by the tribunal

Submissions

13. The representative for the claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

13.1 the tribunal is invited to accept the evidence of the claimant that the incidents described by him did happen and that the respondent's witnesses deny that the events happened simply because the claimant is unable to provide witnesses;

13.2 the respondent's witnesses do not remember the parts of the evidence that make Mr Masson look bad;

13.3 the tribunal is invited to reject Mr Masson's evidence that he was friendly to the claimant, that he was sympathetic towards him. This is simply not true;

13.4 The respondent deliberately changed the terms of the agreed phased return to work. Mr Richardson said that the claimant would work four hours indoor and one hour on delivery. Mr Masson said that he must do five hours delivery. The claimant was in a state of mental disarray because he was back at work with the same people who made life a misery for him;

13.5 The respondents acted on false allegations by the claimant's work colleagues that he was a bad driver. This is a classic case of victimisation. There had never been any complaints about the claimant's driving before, he had never been involved in any accident;

13.6 There was continuing bullying and harassment of the claimant. If there was any delay the tribunal should bear in mind that the claimant was ill for a long period of time. He was the only black employee in a workforce of 60. It was very difficult for the claimant to bring a complaint when he has had 19 years service with the respondent and wished to continue in that service

14. Solicitor for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here. He made a number of additional oral submissions which again the tribunal has considered with care but does not repeat here. In essence it was asserted that:

14.1 all of the claims of harassment, other than the allegation arising in April 2016, were out of time. The claimant was absent from the workplace for a period of 10 months prior to his return in April 2016. He had access to his trade union representative for advice to pursue a claim. He was aware of the right to claim and the three-month time limit. He asserts

that he had no faith in the trade union representative but he did have the opportunity to contact the Trade Union at a higher level. The claimant was aware of ACAS. The respondent should not be burdened with such historic complaints. It is not just and equitable to extend time;

14.2 the claim of failure to make reasonable adjustments is without merit. It is Mr Masson's evidence that the claimant agreed to the change to the phased return. That agreement was evidenced by the fact that the claimant turned up for work at 10 am on that day 18 April 2016. The complaints about the delivery do not relate to the claimant's disability. His complaints were not about his mental health condition but about the effect of the delivery and the use of the HCT trolley on the claimant's physical condition. In any event after 18 April 2016 the claimant was only required to do indoor work: all reasonable adjustments have been made;

14.3 there is no cogency in the complaints of harassment. The claimant makes simple assertions without any evidence to back up the assertions;

14.4 In relation to the allegation at paragraph 1.1 of the agreed list of issues this was not an unwanted conduct: the claimant agreed to the change to the phased return. The phased return as originally planned could not continue because the claimant had failed his driving assessment;

14.5 In relation to the allegation at paragraph 1.2 of the agreed list of issues, Mr Masson did not ignore the complaints, he simply knocked them back. There is no complaint that there was no satisfactory investigation of complaints;

14.6 In relation to the allegation at paragraph 1.3 of the agreed list of issues the claimant has failed to provide satisfactory evidence of when this alleged threat was made;

14.7 In relation to the allegation at paragraph 1.6 of the agreed list of issues, the complaint about the faeces on the claimant's windscreen was not ignored. The claimant now criticises Mr Masson for not doing more but that is not a complaint of harassment. Neither Mr Masson nor Mr Sagar had any knowledge of the “gollywog” incident. The claimant has failed to provide a date or approximate date of this incident. The tribunal is invited to reject the claimant's evidence on this complaint;

14.8 In relation to the allegation at paragraph 1.7 of the agreed list of issues the claimant has not called the trade union representative to give evidence, the way in which it was alleged that the claimant had been castigated by Gary Richardson was not put to Mr Richardson in cross-examination;

14.9 Mr Masson was cross-examined in relation to one allegation only - the accusation that he had called the claimant slow and lazy. The rest of the allegations were not put to Mr Masson;

14.10 it was not put to the respondent's witnesses in cross-examination that they had been lying on oath.

Evidence

15. The claimant gave evidence.

16. The respondent relied upon the evidence of:-

16.1 Mr Gary Richardson, delivery sector manager;

16.2 Mr Bill Masson, delivery office manager.

17. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

18. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

19. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

20. The claimant began working for the respondent in November 1998.

21. At the relevant time the claimant carried out the role of an Operational Post Grade (“OPG”) employee at the Accrington delivery office.

22. At the relevant time Mr Bill Masson was the Delivery office manager at the Accrington delivery office. He was the claimant's second line manager. Graham Sagar was the claimant's first line manager.

23. The primary role of an OPG employee is to deliver customers' mail to the appropriate addresses. This consists of two elements: preparing the mail for delivery in the delivery office and physically delivering the mail to customers' addresses. The delivery route which an employee is allocated to is referred to as a duty.

24. Since 2013 Royal mail has utilised a van share method to deliver mail. The van share method was implemented to replace the old method of single foot deliveries. The van share method comprises two employees sharing a Royal mail van to drive to a mutually convenient point near their delivery rounds. Both employees then deliver mail on foot to the delivery points allocated to their duty before meeting back at the van to return to the delivery office at the end of their shifts.

25. The claimant was absent from work with stress and depression from February 2013 to July 2013.

26. From around July 2013 the claimant and his van share partner, Stuart Walsh, were allocated to Duties 9 and 13. As Stuart Walsh did not work full-time hours it was the claimant's responsibility to prepare the mail for both duties before he then delivered the mail for Duty 9 and Stuart Walsh delivered the mail for Duty 13.

27. The respondent utilises computer software known as Pegasus to evaluate how long duties should take to deliver. A test is carried out on the duties from time to time to ensure that its time estimate is accurate.

28. There was a revision of certain duties in 2014 when the claimant's duty had been tested and it had been shown that it should take four hours and eight minutes to deliver. The respondent agreed with the trade union, CWU, that the average duty should take no longer than four hours and 15 minutes to deliver.

29. During this same revision the respondent decided to introduce what was referred to as "lapsing", whereby employees would be allotted additional work, in addition to the completion of their allocated duty, to ensure that everyone had sufficient workload during the quieter traffic periods.

30. From July 2013 onwards the claimant regularly complained to Mr Masson that he had to leave the office late as his duty was too large and the preparation element was taking too long. Mr Masson observed the claimant in his work and came to the genuine conclusion that the claimant

was taking too long to prepare the mail delivery because he was utilising an inefficient method. Mr Masson observed that the claimant would place all of the mail on his preparation frame at once, instead of placing it on the frame in batches, as was the more common practice, and this was slowing down the process. Mr Masson explained this to the claimant on numerous occasions and suggested that the claimant change his method of preparation. The claimant's CWU representative, Mr Richard Wright, supported Mr Masson's view. However, the claimant continued to use the inefficient method, continued to complain that the duty was too large, and repeatedly asked Mr Masson to test his duty. Mr Masson decided that it was not necessary to test the duty because it had been tested in 2014. Mr Masson had exempted the claimant and his partner from lapsing to ensure that the claimant was not placed under any additional pressure. Mr Masson noted that when the claimant's duty was covered by another colleague, that colleague was able to prepare the duties and deliver them within the time allotted without incurring any difficulties. On certain occasions when staff covered the claimant's duty they would be given lapsing to perform as well as completing the claimant's duty. Mr Masson was therefore convinced that it was the claimant's method of working that was causing the problem, not the size of the duty. No disciplinary action was taken against the claimant in relation to this matter.

[On this the tribunal accepts the evidence of Mr Masson. The claimant has not called his trade union representative to challenge the evidence of Mr Masson. The claimant has not challenged Mr Masson's evidence that other colleagues working his duty were able to complete the duty within the time allotted, has not challenged in cross-examination Mr Masson's evidence that he exempted the claimant from lapsing duties.]

31. Mr Masson did not threaten the claimant with the conduct charge of "wilful delay" when the claimant complained that his duty was too large to complete within the time allotted.

[On this the tribunal accepts the evidence of Mr Masson. The claimant has not provided any satisfactory evidence in support of his assertion.]

32. Mr Masson often had these conversations with the claimant about his working methods. The claimant would become upset by this, shouting "So you saying I'm lazy?" at the top of his voice. Mr Masson did not accuse the claimant of being slow and lazy in front of colleagues.

[On this the tribunal accepts the evidence of Mr Masson.]

33. On one occasion, in or around October 2014, the claimant showed Mr Masson a photograph on his mobile phone of a piece of faeces stuck to the outside of the back door of the claimant's Royal mail van. The faeces

was about the size of a 50p coin. The claimant was unable to tell Mr Masson when this had appeared on the van. Mr Masson conducted an informal investigation in the delivery office by speaking to all members of staff to see if anyone had witnessed anything to do with this. Nobody said that they had witnessed the faeces being placed on the claimant's van. The claimant took his vehicle home at night. Mr Masson decided that he could not take the matter any further as there was no evidence to suggest that the faeces had been placed on the claimant's van intentionally or maliciously by a member of Royal mail staff. Mr Masson did follow this up in a team briefing by reaffirming to the staff in the office the standards of behaviour that Royal Mail expected and the potential consequences if anyone were to commit such an act of misconduct. The claimant did not at this time raise a complaint, formally or informally, that the faeces had been placed on his van by a Royal mail employee and/or that Mr Masson had failed to carry out a reasonable investigation.

[On this the tribunal accepts the evidence of Mr Masson. The claimant has not challenged Mr Masson's evidence as to the circumstances in which this situation arose, does not assert that he gave Mr Masson any additional information to warrant a further investigation, does not assert that he complained at the time that Mr Masson had not done enough .]

34. The claimant did not report to Mr Masson or any other manager that he had found a golliwog doll on his windscreen.

[On this the tribunal accepts the evidence of Mr Masson. The claimant has not provided any satisfactory evidence in support of his assertion. This is an extremely serious matter. It is not credible that the claimant should raise this complaint with his managers and then fail to take any further action if his complaint was ignored. There is no satisfactory evidence that the claimant raised this matter with his trade union representative either at local or national level. The claimant was able to raise other complaints with Mr Masson on a regular basis.]

35. The claimant reported sick on 20 July 2015 with work-related stress.

36. The claimant was a member of the trade union and had access to union representation and legal advice through his Trade Union throughout the relevant period. He had some concerns about contacting the union representatives at a local level. He had lost faith in their ability to represent his views and act on his behalf. However, he was aware of the ability to contact the Union at a national level. In or around July 2015 he met the trade union representative Richard Wright, Area representative for the Communication Workers Union ("CWU") and was confident in Mr Wright's ability to assist him with any problems he had at work.

37. During the claimant's absence from work regular Occupational Health reports were obtained by the respondent. Mr Gary Richardson, Delivery Sector manager, met with the claimant and Richard Wright, the claimant's CWU representative, on a regular basis to discuss the Occupational Health advice received by the respondent, and the claimant's absence from work.

38. Mr Gary Richardson did not castigate the claimant for any comments the claimant had made to occupational health during any of the visits with them. Mr Gary Richardson did not suggest to the claimant that the claimant was jeopardising his job by making such comments to occupational health.

[On this the tribunal accepts the evidence of Mr Richardson. The claimant's assertion is unsupported by any satisfactory evidence. It is asserted that these comments were made during the course of meetings with Mr Richard Wright, who has not been called to give evidence.]

39. In August 2015 the claimant raised a bullying and harassment complaint on the basis that he believed that he was being treated differently. His complaints included that:

39.1 The delivery he was required to do was too long, he had complained about it regularly and his request that the delivery be tested had been refused;

39.2 Mr Masson called him lazy and slow;

39.3 In or around October 2014 the claimant had found faeces on his company van and had reported it to Mr Masson, who had not carried out any investigation of the complaint and/or informed him of the outcome;

39.4 In or around Summer 2014 the claimant had found a gollywog on his windscreen wipers on his company van and had reported it to Mr Masson who had not carried out any investigation of the complaint and/or informed him of the outcome;

39.5 the claimant had been told that drivers did not want to work with him because he was said to be a bad driver.

40. The claimant's bullying and harassment complaint was fully investigated and was concluded on 4 January 2016 (207). It made recommendations including that:

40.1 Mr Russell's actual walk and indoor workload be tested, to ensure that it was achievable within model week parameters;

40.2 Mr Russell was required to attend the RAC driver assessment training to determine his driving capability

41. Upon receiving the outcome of his grievance the claimant sought legal advice from a solicitor and from ACAS in relation to the pursuit of a claim arising from the outcome of the bullying and harassment complaint. The claimant was aware of the right to bring a claim to the tribunal, that there was a time limit for so doing.

42. The claimant appealed the outcome and following further investigation the bullying and harassment appeal investigation was concluded on 18 March 2016.

43. No complaint of discriminatory conduct is made before this tribunal in relation to the conduct of the investigation and/or outcome of the bullying and harassment complaint at either the initial or at the appeal stage..

44. During the investigation of the complaint and the appeal against the outcome an issue arose as to the claimant being accused of being a bad driver by some of his work colleagues. There is no satisfactory evidence before the tribunal that these were false allegations by the work colleagues.

45. The Appeal case report dated 18 March 2016 made a number of recommendations (242) including:

45.1 Anthony Russell's outdoor and indoor workload to be tested, to establish if it is achievable within the model week workload.

45.2 Anthony Russell, Bill Masson and Graham Sagar to attend a mediation meeting held by the DSM and Areas CWU rep in order to reinforce behavioural standards expected and agree how any future issues will be handled.

45.3 Anthony Russell to attend a driver assessment with the approved business supplier at the earliest available opportunity to determine his level of risk, stating: “A date must be arranged within five days of Anthony Russell resuming from sick leave. In light of the severity of the concerns expressed, Antony Russell is not to be permitted to drive until this has been completed.”

45.4 HR intervention to roll out the Dignity and Respect at work programme for all people working at Accrington DO including the management team.

46. By letter dated 24 March 2016 (doc 246) OH Assist confirmed that a consultation had taken place with the claimant on 24 March 2016 and a return to work plan was confirmed. The return to work plan indicated that the claimant would resume his duties on 13 April 2016, and reported that a full recovery from stress had been achieved. The return to work plan set out the type and number of hours of work for the first week, 13 – 16 April 2016. It also set out the following plan:

> Week 2 - 18/04/16 - normal duty start time. Regular indoor work on normal duty with delivery work of one hour, not necessarily on normal walk -- five hours per day.

47. The claimant returned to work on 13 April 2016. He worked in accordance with the return to work plan 13-15 April 2016. The claimant makes no compliant about that.

48. The claimant was required to participate in a driving assessment on Friday 15 April 2016, in accordance with the recommendations from the appeal outcome. The claimant failed that driving assessment, conducted by Pertemps, an outside agency. There is no satisfactory evidence that the reason for the failure related to the claimant's disability.

49. Before the driving assessment the claimant agreed with his line manager, Mr Sagar, that, for the following week, he would not start at his normal duty start time (7am) but that he would attend on Monday 18 April 2016 at 10 am to conduct delivery work for a period of five hours.

[On this the tribunal accepts the evidence of the respondent's witnesses. The tribunal has concerns that Mr Sagar has not been called to give evidence and that some of Mr Masson's evidence was not contained within his witness statement. However, on balance, we accept that the claimant did agree to this variation of the return to work plan because he did attend work at 10 am on Monday morning, not his normal start time, and on his own admission he did not raise any complaint when he was asked to do delivery work on duty 17 on Monday 18 April 2016.]

50. Mr Masson was not in attendance at work on 15 April 2016. When attending work on Monday 18 April 2016 he was advised that the claimant had failed his driving assessment. This necessitated a change in the duties for the claimant because he could no longer be the driver on any delivery round. The claimant indicated that he did want to do a walk, not indoor work. Mr Masson decided to give to the claimant duty 17, which was a walk near the office. It had been tested and risk assessed prior to this. It was scheduled to take 3.5 hours by a single employee working with a High Capacity Trolley (HCT). Mr Masson asked another employee to

prepare the delivery for the claimant in advance of the claimant starting work at 10am. Mr Masson arranged for the large parcels to be taken by another member of staff. The claimant received training in the use of the HCT Trolley, he was provided with the telephone numbers of Mr Masson and other workers in case he needed assistance at any time. The claimant raised no objection to this delivery, he did not say that the performance of this delivery would cause him any problems related to his disability. The claimant performed the delivery that day. He did not telephone Mr Masson or any other employee to say that the delivery was causing him problems, did not advise Mr Masson that he was unable to complete the delivery within the time allotted.

51. The claimant did not suffer stress and anxiety, mental anguish, at the time he performed his duties on 18 April 2016.

[The tribunal does not accept the claimant's evidence on this point. That is inconsistent with the claimant's complaint at the time. He made no such complaint on the day or on his return to work the next day.]

52. On Tuesday 19 April 2016 the claimant attended for work and reported to Mr Masson that he had been left in physical discomfort as a result of performing the HCT duty on duty 17 the day before. The claimant said that he was unable to perform any HCT duty on 19 April 2016. Mr Masson agreed that the claimant should not form any delivery work for a couple of days. The claimant was not requested to perform Duty 17 again. He was not required to use the HCT trolley again. The claimant did not assert at that time that the reason why he was unable to perform any HCT delivery, the reason why it had caused him pain and/or discomfort, related to his anxiety and depression, his disability.

53. The date of receipt by ACAS of the Early Conciliation notification was 10 May 2016. The date of issue by ACAS of the Early Conciliation Certificate was 24 June 2016.

54. The claim was presented on 1 July 2016

The Law

55. Section 123 Equality Act 2010 provides:

Time limits

(1) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) 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.

56. When determining whether a time limit has been complied with, the period beginning the day after the early conciliation request is received by ACAS up to and including the day when the early conciliation certificate is received or deemed to have been received by the prospective claimant is not counted. If a time limit is due to expire during the period beginning with the day ACAS receives the request and one month after the prospective claimant receives the certificate, the time limit expires instead at the end of that period.

57. In deciding whether an act is an act which extends over a period of time it is necessary to draw a distinction between a continuing act and an act which has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. In ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*** the Court of Appeal held that the concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". The focus should be on the substance of the allegations that the employer was responsible for an ongoing situation or continuing state of affairs in which employees were treated in a discriminatory manner. The question is whether there was an act extending over a period as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

58. This approach was approved by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548**. The tribunal should look at the substance of the complaints in question – as opposed to the existence of a policy or regime – and determine whether they can be said to be part of one continuing act by the employer.

59. The Tribunal may consider any complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so. The Tribunal has a wide discretion to do what it thinks is just and

equitable in the circumstances ***Hutchinson v Westward Television Ltd*** [1997] IRLR 69. The Tribunal should consider the prejudice which each party would suffer as a result of granting or refusing an extension and have regard to all the other circumstances of the case including in particular the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be effected by the delay, the extent to which the parties sued had cooperated with any request for information, the promptness with which the claimant acted once he or she knew of the facts given rise to the cause of action and the steps taken by the claimant to obtain appropriate professional advice once he or she knew the possibility of taking action; ***British Coal Corporation v Keeble*** [1997] IRLR 336.

60. Notwithstanding the breadth of the discretion there is no presumption that a Tribunal should exercise its discretion to extend time on the just and equitable ground unless it can justify failure to exercise the discretion; the onus is on the claimant to convince the Tribunal that it is just and equitable to extend time – the exercise of discretion is the exception rather than the rule. ***Robertson v Bexley Community Centre [2003] IRLR 434***.

61. The discretion to grant an extension of time under the just and equitable formula is as wide as that given to the civil courts by Section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing the extension and to have regard to all the other circumstances in particular:-

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

62. Section 20 Equality Act 2010 provides that the duty to make reasonable adjustments comprises of three requirements, set out in section 20(3), (4) and (5). Section 20(3) states:

> The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant

matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

63. The assessment of the alleged substantial disadvantage must be based on the facts pertaining to the claimant's actual disability. **Copal Castings Ltd v Hinton EAT 0903/04**

64. The Code of Practice on Employment 2011 sets out, at chapter 6, principles and application of the duty to make reasonable adjustments for disabled people in employment. It includes:

6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions (see also paragraph 4.5).

6.15 The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

6.16 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, place at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all circumstances of the case, in order to make adjustments. The act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

65. Paragraph 20(1) of Schedule 8 of the Equality Act provides that a person is not subject to the duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employers PCP, the physical features of the workplace, or a failure to provide an auxiliary aid. Thus, the employer must

have knowledge of both the disability and the disadvantage in order for the adjustment duty to be triggered.

66. Section 26 Equality Act 2010 provides:-

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating these dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

67. The EHRC Code of Practice on Employment 2011 provides:

7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word “unwanted” means essentially the same as “unwelcome” or “uninvited”. “Unwanted” does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

7.16 ….. if the purpose of subjecting the worker to the conduct is to create any of the circumstances defined in paragraph 7.6, this will be sufficient to establish unlawful harassment. It will not be necessary to enquire into the effect of that conduct on the worker.

7.17 Regardless of the intended purpose, unwanted conduct will also amount to harassment, if it has the effect of creating any of the circumstances defined in paragraph 7.6.

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

(a) the perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment;

(b) the other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which to conduct takes place.

(c) whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

68. Harassment. There are three essential elements of harassment claim under section 26(1):

a. Unwanted conduct

b. That has the proscribed purpose or effect, and

c. Which relates to a relevant protected characteristic

69. The cases relating to harassment claims under the legislation prior to the Equality Act are of some assistance. The tribunal notes **Richmond Pharmacology v Dhaliwal 2009 ICR 724** in which the EAT noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions the tribunal should then consider whether it was reasonable for him or her to do so. In deciding whether the claimant did experience these feelings or perceptions the tribunal must apply a subjective test.

70. In deciding whether it was reasonable for conduct to have that effect an objective test is applied. Whether it was reasonable for a claimant to have felt his/her dignity to have been violated is a matter for the factual assessment of the Tribunal taking into account all the relevant circumstances including the context of the conduct in question. The Tribunal must consider whether it was reasonable for the conduct to have that effect on that particular claimant.

71. Section 136 Equality Act 2010 provides:

Burden of Proof

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

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

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

72. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

Harassment

73. In relation the claim of harassment, the first issue is whether the tribunal has jurisdiction to hear the complaints, whether they are, in part, presented out of time.

74. It is agreed that the complaint at paragraph 1.1 of the List of Issues, the actions of Mr Masson in April 2016, was presented in time.

75. Each of the remaining acts of alleged harassment arose before the claimant went on long term sickness absence in July 2015.

76. The tribunal has considered whether each of the complaints relates to a separate and distinct act, or whether each of the alleged acts of discrimination forms part of a continuing course of conduct, conduct extending over a period. The tribunal has considered the substance of the complaints in question – as opposed to the existence of a policy or regime – to determine whether they can be said to be part of one continuing act by the employer.

77. The tribunal has considered the alleged unwanted conduct as set out at paragraphs 1.1 -- 1.7 of the agreed list of issues.

78. The tribunal finds that:

76.1 (Paragraph 1.1). Mr Masson did fail to implement the rehabilitation plan as recommended by Occupational Health for the claimant following a period of absence in April 2016;

76.2 (Paragraph 1.2). The claimant did repeatedly complain that his duty was too long. Mr Masson did not repeatedly ignore the

claimant's complaints regarding his duty. Mr Masson addressed the complaints. Mr Masson disagreed with the claimant's complaint that his duty took too long, that the claimant was unable to complete the duty within the time allocated. There was a difference of opinion between Mr Masson and the claimant as to the reason it was taking the claimant too long to complete his duty. Mr Masson and the claimant discussed this on a regular basis. Mr Masson informed the claimant of his view that the reason for the duty taking so long was the way in which the claimant was preparing for the duty. The claimant raises no complaints before this tribunal that the manner in which Mr Masson repeatedly addressed his complaints amounted to unwanted conduct, harassment within the meaning of section 26. The claimant did not assert at the time, or before this tribunal, that he prepared for the duty in that way for a reason relating to or arising from his disability. The claimant did not assert at the time, or before this tribunal, that the reason he struggled to complete the duty on time was because of or related to his disability. The claimant did not, at the time, or before this tribunal, assert that the completion of his duty in the time allowed put him at a substantial disadvantage for a reason related to his disability, made no request for a reasonable adjustment;

76.3 (Paragraph 1.3). Mr Masson did not threaten the claimant with the conduct charge of wilful delay;

76.4 (Paragraph 1.4). Mr Masson did fail to grant the claimant's repeated requests for his duty to be tested;

76.5 (Paragraph 1.5). Mr Masson did not accuse the claimant of being slow and lazy in front of colleagues;

76.6 (Paragraph 1.6.) Mr Masson did not ignore complaints from the claimant that he had found faeces on his van and a golliwog on the windscreen. Mr Masson did carry out an investigation of the complaint about the faeces on the claimant’s van. There is no complaint before this tribunal that the manner in which that investigation was carried out was unwanted conduct. The claimant did not make any complaint to Mr Masson about the golliwog.

76.7 (Paragraph 1.7). Mr Gary Richardson did not castigate the claimant in front of a trade union representative in October/November 2015.

77 The claimant's repeated complaints about the length of his duty, his repeated requests for his duty to be tested, the investigation of the faeces, took place

in the period before the claimant went on long-term sickness absence in July 2015. There was no unwanted conduct during the claimant's absence from work between July 2015 and April 2016. The next allegation of unwanted conduct arose in April 2016, following the claimant's return to work, when Mr Masson failed to implement the rehabilitation plan as set out by Occupational Health.

78 There is no satisfactory evidence to support an assertion that the actions of Mr Masson were part of a continuing act of discrimination relating to the claimant's disability. The claimant has failed to establish how any unwanted conduct in relation to the repeated complaints about the length of his duty, his repeated requests for his duty to be tested, the investigation of the faeces, related to his disability. It is not the claimant's case that he was unable to perform the duty because of, or for a reason related to or arising from, the claimant's disability. He wanted the duty to be tested because, in essence, his assertion was that nobody could do that duty in the allotted time. It is not the claimant's case that a non-disabled work colleague who had requested such a test, or who had found faeces on his van would have been treated differently. He has not argued that point before this tribunal, has not put that assertion to Mr Masson.

79 In all the circumstances the tribunal has considered the substance of the complaints in question and decided that the actions/omissions of the respondent before the claimant's long term sickness absence and the acts/omissions of the respondent in April 2016 were not part of a continuing act by the employer. They were each separate and distinct acts.

80 In reaching this decision the tribunal notes that the complaint relating to the actions of Mr Masson in April 2016 is a separate and distinct complaint from the earlier complaints. The last time that the claimant complained about his length of duty, the last time the claimant requested a test, the last time Mr Masson refused a test, was before the start of the long term sickness absence in July 2015.

81 Time to present a claim in relation to acts arising before the claimant went on long term sickness absence ran from, at the latest, the start of that sickness absence.

82 The complaints set out in paragraphs 1.2 – 1.7 of the List of issues were therefore presented out of time.

83 The tribunal has considered all the circumstances to decide whether it is just and equitable to extend time. The tribunal notes in particular that:

83.1 the claimant had the benefit of trade union representation throughout;

83.2 the claimant had trust in one trade union representative, Richard Wright, whom the claimant consulted from July 2015 onwards;

83.3 the claimant sought legal advice in January 2016 relating to the outcome of his grievance relating to the matters now before this tribunal;

83.4 the claimant, at the same time, sought advice from ACAS about a potential claim;

83.5 the claimant was aware of the right to claim and the existence of a time limit;

83.6 the claimant has failed to provide a satisfactory explanation as to why he chose to delay presenting a claim, after receiving legal advice. There is no satisfactory evidence to support the assertion that the claimant's medical condition and/or disability prevented him from presenting a claim at that time. In any event, the claimant was sufficiently recovered from his illness to return to work in April 2016. There is no satisfactory explanation as to why the claimant did not present his claim at that time.

83.7 In all the circumstances it is not just and equitable to extend time to allow these claims to proceed.

84 Further, and in any event, if we are wrong on that, if there is a continuing act, we have considered each allegation of unwanted conduct.

Allegation at paragraph 1.2 of the List of Issues.

85 Mr Masson did not repeatedly ignore the claimant's complaints regarding his duty. The claimant did repeatedly complain that his duty was too long. Mr Masson addressed the complaints. The complaint is not well-founded. There was no such unwanted conduct.

86 Further and in any event, we have considered Mr Masson's reaction to the claimant's complaints. Mr Masson disagreed with the claimant's complaint that his duty took too long, that the claimant was unable to complete the duty within the time allocated. There was a difference of opinion between Mr Masson and the claimant as to the reason it was taking the claimant too long to complete his duty. Mr Masson and the claimant discussed this on a regular basis. Mr Masson informed the claimant of his view that the reason for the duty taking so long was the way in which the claimant was preparing for the duty. There is no satisfactory evidence before this tribunal that the

manner in which Mr Masson repeatedly addressed his complaints amounted to unwanted conduct, harassment within the meaning of section 26. The claimant did not assert at the time, or before this tribunal, that he prepared for the duty in that way for a reason relating to or arising from his disability. The claimant did not assert at the time, or before this tribunal, that the reason he struggled to complete the duty on time was because of, or for a reason related to, his disability. The claimant did not, at the time, assert that the completion of his duty put him at a substantial disadvantage for a reason related to his disability, made no request for a reasonable adjustment. It is clear that Mr Masson's response to the claimant's complaints was unwanted conduct. However, such conduct did not relate to the claimant's disability.

87 The complaint is not well-founded.

Allegation at paragraph 1.3 of the List of Issues.

88 Mr Masson did not threaten the claimant with a conduct charge of wilful delay. There was no such unwanted conduct.

89 The complaint is not well-founded.

Allegation at paragraph 1.4 of the List of Issues.

90 Mr Masson did fail to grant the claimant's frequent requests for his duty to be tested. The requests related to the difference of opinion between the claimant and Mr Masson as to the length of time it took to complete the duty, as considered at paragraph 88 above. Mr Masson informed the claimant that a test was not necessary because the reason for the duty taking so long was the way in which the claimant was preparing for the duty. There is no satisfactory evidence before this tribunal that the manner in which Mr Masson repeatedly refused the requests for a test amounted to unwanted conduct, harassment within the meaning of section 26. The claimant did not assert at the time, or before this tribunal, that the reason for his requests for a test related to his disability. The claimant did not assert at the time, or before this tribunal, that the reason he struggled to complete the duty on time, the reason he needed the test, was because of, or for a reason related to, his disability. The claimant did not, at the time, assert that the completion of his duty put him at a substantial disadvantage for a reason related to his disability, made no request for a reasonable adjustment. It is clear that Mr Masson's refusal of the claimant's requests for a test was unwanted conduct. However, such conduct did not relate to the claimant's disability.

91 The complaint is not well-founded.

Allegation at paragraph 1.5 of the List of Issues.

92 Mr Masson did not accuse the claimant of being slow and lazy. There was no such unwanted conduct.

93 The complaint is not well-founded.

Allegation at paragraph 1.6 of the List of Issues.

94 Mr Masson did not ignore a complaint from the claimant that he had found faeces on his van. There was no such unwanted conduct.

95 The complaint is not well-founded.

96 Further, and in any event, Mr Masson did conduct an investigation of the complaint. The claimant did not at the time, or before the tribunal, state that the attachment of faeces to his van was because of, or arose for a reason relating to, his disability. There was no satisfactory evidence before Mr Masson or the tribunal that the attachment of the faeces was a deliberate act by one of the claimant's work colleagues. There is no satisfactory evidence that the conduct of Mr Masson in relation to this complaint related in any way to the claimant's disability.

97 The complaint is not well-founded.

98 Mr Masson did not ignore a complaint from the claimant that he had found a golliwog on his van. The claimant made no such complaint. There was no such unwanted conduct.

99 The complaint is not well-founded.

Allegation at paragraph 1.7 of the List of Issues.

100 Mr Gary Richardson did not castigate the claimant in front of a trade union representative in October/November 2015. There was no such unwanted conduct.

101 The complaint is not well-founded

Allegation at paragraph 1.1 of the List of Issues.

102 This complaint was presented in time.

103 Mr Masson did fail to implement the rehabilitation plan as recommended by Occupational Health following a period of absence in April 2016. OH Assist put forward the plan for the claimant's return to work by its letter dated 24 March 2016 (see paragraph 46 above). The plan was followed for the first week.

104 The plan was then changed with the agreement of the claimant. He agreed to attend work at 10am on Monday 18 April 2016 to perform 5 hours delivery work. It is not clear what delivery the claimant and respondent were anticipating he would complete. However, it is clear that the failure by the claimant of the driving assessment on Friday 15 April 2016 meant that the claimant could not drive, and therefore could not work on a van share duty as a driver. The claimant indicated that he did want to do a walk, a duty, not indoor work. Mr Masson decided to give to the claimant duty 17, which was a walk near the office. It had been tested and risk assessed prior to this. It was scheduled to take 3.5 hours by a single employee working with a High Capacity Trolley (HCT). Mr Masson asked another employee to prepare the delivery for the claimant in advance of the claimant starting work at 10am. Mr Masson arranged for the large parcels to be taken by another member of staff. The claimant received training in the use of the HCT Trolley, he was provided with the telephone numbers of Mr Masson and other workers in case he needed assistance at any time. The claimant raised no objection to this delivery at the time, he did not say that the performance of this delivery would cause him any problems related to his disability. The claimant performed the delivery that day. He did not telephone Mr Masson or any other employee to say that the delivery was causing him problems, or that he was unable to complete the delivery within the time allotted. The change to the rehabilitation plan, the failure to implement the rehabilitation plan as recommended by Occupational Health, was not unwanted conduct. The claimant agreed to it.

105 The complaint is not well-founded.

106 Further, and in any event, the change to the rehabilitation plan, the failure to implement the rehabilitation plan as recommended by Occupational Health, was caused by the claimant's failure to pass the driving assessment. The failure to pass the driving assessment was the reason for the change to the rehabilitation plan, the reason for Mr Masson's decision to allocate duty 17 to the claimant. The failure to pass the driving assessment was not related to the claimant's disability. There is no satisfactory evidence that the claimant failed the driving assessment for a reason related to his disability. The claimant was not required to do the driving assessment because of, or for a reason related to, the claimant's disability. He was required to do that because complaints had been made about his driving, these had been considered as part of the grievance procedure, and a business decision was made that the claimant should be required to undertake a driving assessment on his return to work. The claimant was well aware of that, as it formed part of the recommendations from the grievance process. The claimant was clearly unhappy with both the allegations that he was a bad driver and the requirement for him to pass an assessment. However, he failed that assessment by a third party. There is no satisfactory evidence to

support any assertion that complaints from work colleagues were false, or that the driving assessment was false, unfair or in any way discriminatory. The conduct of Mr Masson, allocating duty 17 to the claimant arose because of the claimant's failure to pass the driving assessment. It did not relate to the claimant's disability. The complaint is not well-founded.

107 Further, and in any event, the tribunal has considered all the surrounding circumstances to determine the purpose of Mr Masson's conduct. There are no facts from which we might draw any appropriate adverse inference in deciding whether the unwanted conduct did have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

108 In any event, the tribunal has considered all the surrounding evidence and accepts Mr Masson's evidence and finds that Mr Masson's change to the rehabilitation plan, his failure to implement the rehabilitation plan as recommended by Occupational Health, was not done for the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Mr Masson changed the rehabilitation plan because the claimant had agreed to do delivery work and had failed the driving assessment. Mr Masson did not order the driving assessment. It was conducted following the recommendation of the appeal panel in the grievance process, which clearly stated that the claimant was unable to drive until he had completed that assessment. Mr Masson did not deliberately choose the particular duty, duty 17, for the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. He clearly took steps to ensure that the claimant would be able to complete the duty. He arranged for larger parcels to be transported by someone else, he ensured that the claimant received training in the use of the HCT trolley, he gave the claimant telephone numbers so that the claimant could telephone someone in the event of any difficulty. The claimant did not, when allocated that duty, make any complaint about it, did not assert that he would be unable to complete the duty, and/or would be put at a substantial disadvantage for a reason related to his disability.

109 The tribunal does not accept the claimant's evidence that he felt, or perceived, his dignity to have been violated or an adverse environment to have been created by the change of the rehabilitation plan, and/or the failure to implement the rehabilitation plan as recommended by Occupational Health. The claimant made no complaint at the time. He completed the duty without complaint, without making contact on any of the telephone numbers given to him. When he did make a complaint the following day it was about the effect on him physically of carrying out that duty. In all the circumstances, having applied a subjective test, the tribunal finds that the claimant did not feel, or perceive, his dignity to have been violated or an adverse

environment to have been created by the conduct of Mr Masson in this regard.

110 Further, and in any event, if the claimant did experience those feelings or perceptions then the tribunal has considered whether it was reasonable for him to do so. Having considered all the circumstances the tribunal notes in particular that:

110.1 The claimant was aware that the Appeal outcome of the grievance procedure had recommended that he undertake a driving assessment before being allowed to drive;

110.2 The claimant had agreed a variation to the rehabilitation plan, had agreed to do delivery work on 18 April 2016;

110.3 The claimant failed the driving assessment. The claimant was aware that he could not conduct any duty which required driving;

110.4 Although the claimant would have preferred to do a different duty he did not complain when he was allocated duty 17. He did not raise any objection to the allocation of duty 17 to him at the time.

110.5 The duty allocated, duty 17, was not known to be a difficult walk/duty. The claimant has not asserted that, for example, the allocation of duty 17 was known to be, or regarded as, a "punishment" by managers against employees ;

110.6 Duty 17 had been tested and was timed as taking 3.5 hours by a single employee working with a High Capacity Trolley (HCT).That was well within the 5 hours delivery work to which the claimant had agreed.

In all the circumstances the tribunal finds that it was not reasonable for the claimant to hold any such feeling or perception.

111 The complaint is not well-founded.

Failure to make reasonable adjustments

112 There was some confusion, at the outset of the hearing, as to the identification of the PCP alleged to have been applied by the respondent.

113 The tribunal has considered all three PCPs as identified at paragraphs 4 and 7 above.

114 The respondent did, on 18 April 2016, fail to follow the rehabilitation plan recommended by OH Assist in March 2016. Therefore, a PCP was applied as asserted at paragraph 7 above.

115 The respondent did, on 18 April 2016, require the claimant to complete run 17 in the time allocated to that run, he was required to use a HCT trolley for that purpose. Therefore, the two PCPs were applied as asserted at paragraph 4 above.

116 The tribunal has considered whether the claimant was placed at a substantial disadvantage by the application of those PCPs. The tribunal notes that "substantial" means more than minor or trivial, and that the assessment of the alleged substantial disadvantage must be based on the facts pertaining to the claimant's actual disability.

117 There is no satisfactory evidence to support the assertion that the claimant was disadvantaged by the application of any of the PCPs for any reason relating to his disability of anxiety and depression. The tribunal does not accept the claimant's evidence that he suffered stress and anxiety, mental anguish, at the time he performed his duties on 18 April 2016. That is inconsistent with the claimant's complaint at the time. He made no complaint on the day. The following day he explained that the disadvantage to him was the physical reaction to the performing of the role: a muscular – skeletal problem which had no link to his actual disability. The claimant has adduced no medical evidence to support the assertion that the application of the PCPs put him at a substantial disadvantage for a reason relating to his disability.

118 The complaint is not well-founded.

119 Further, and in any event, if the tribunal is wrong on that, it finds that the respondent, on 18 April 2016, did not know, and could not reasonably be expected to know, that the claimant was likely to be placed at a disadvantage by the application of the PCPs. The OH report did not say that the claimant was incapable of performing any deliveries. The claimant agreed to do a 5 hour delivery. He made no complaint when he was allocated duty 17. He made no complaint whilst performing the duty. He did not use the telephone contact numbers to say that he was struggling to perform the duty, that it was taking him too long, that he needed assistance. The duty to make reasonable adjustments did not arise on 18 April 2016.

120 Once the claimant alerted the respondent to the problems he had had in performing duty 17, the respondent took the reasonable step to avoid any disadvantage by informing the claimant that he was not required to do that,

or any other delivery, for a few days. The respondent complied with its duty to make reasonable adjustments as soon as it was aware of the problem.

121 The claimant makes no complaint before this tribunal in relation to the subsequent events in April 2016.

122 The complaint is not well-founded.

Employment Judge Porter
Dated: 30 October 2017

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

03 November 2017

FOR THE TRIBUNAL OFFICE