# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Mele

**Respondent:** B & M Retail Limited

**Heard at:** Liverpool **On:** 2-5 January 2024

**Before:** Employment Judge Aspinall
Mrs L Heath
Mrs J Stewart

**Representation**
Claimant: In person
Respondent: Mr Lewinski, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of failure to reasonably adjust fails for the reasons set out below.

2. The claimant's contractual job title and position is that she is employed as a Distribution Centre Warehouse Operative.

# REASONS

**Background**

1. By a Claim Form dated 28 March 2023 the claimant brought a complaint for disability discrimination. She has DVT in her arm. She was employed in a warehouse operative role and she says that her contract was changed to an office based contract and that the respondent failed to reasonably adjust for her in that it compelled her to continue performing warehouse operative duties.

2. The claimant went off sick on 2 July 2022 for work related stress reasons and has not returned to work. The respondent defended the complaint by its response form and by the time of this hearing had conceded that the claimant had been disabled and it had known that she was disabled throughout her employment.

It said that the complaints about failures to adjust were brought out of time.

3. There was a case management hearing before Employment Judge Benson on 26 June 2023. Orders were made to prepare the case for final hearing. The claimant pleaded one PCP, the requirement to perform warehouse duties.

4. The Tribunal file shows that the claimant regularly sent correspondences and documents for the final hearing bundle to the Tribunal. There were disputes in correspondence about the relevance of documents to be included in the bundle (the claimant wanted to include advice from her union and discussions with ACAS) and about the relevant respondent witnesses for the final hearing. The claimant was challenging which witnesses the respondent planned to call. Employment Judge Buzzard wrote to the parties giving guidance as to how to resolve those matters to prepare for final hearing.

5. The matter came to final hearing in person at Liverpool with an interpreter present.

**Discussion about adjustments**

6. The claimant has DVT and told the Tribunal she has been diagnosed with Post Traumatic Stress Disorder relating to events at work. She did not need any adjustments to be able to participate fully in the hearing. She asked if her daughter might accompany her. Arrangement was made so that the claimant did not start giving evidence until day two when her daughter could be with her.

7. Ms Ludewig was the Tribunal's interpreter and is to be commended for the support she provided to the Tribunal. She did not wish to take the rest breaks offered each hour but preferred to stay with the flow of the evidence. The Tribunal is grateful to her for her expertise and commitment this week.

**Discussion about documents and witnesses**

8. Following discussion and explanation about legal privilege (documents that remain private to the claimant, or to the claimant and respondent, unless it is agreed they are no longer private) the claimant agreed to withdraw her application to include documents relevant to settlement discussions through ACAS.

9. The Tribunal considered whether its knowledge of the existence of such documents and indeed an allusion to the amount of an offer made in the claimant's witness statement (£ 1000) meant that it ought to consider its own recusal. Neither party wished the Tribunal to recuse itself. The Tribunal considered that an objective informed observer of proceedings would know that a Tribunal accepts that in most cases there will have been attempts to settle and that knowledge of that background does not, of itself, mean that the Tribunal cannot go on to deal impartially with the case. The informed observer would know that the low amount of the figure quoted (in the context of the claimant's Schedule of Loss claiming £166 000) meant that this was not an offer which was indicative of the respondent's acceptance of any wrongdoing.

10. The Tribunal allowed the claimant to add 5 pages of email communications

and an application pack for union support of 32 pages which she said were relevant to the time issue and why she had not been able to bring her claim sooner. Assistance was given to the claimant to have the documents copied and added to the bundles.

11. The respondent produced a chronology of events. The claimant produced her own chronology of events and cast list so that the Tribunal had two versions of those documents; they were not agreed and were a tool to assist the Tribunal.

12. During the claimant's evidence she came back to the point about her ACAS documents and wanting to include them. She wished to make an application to add further documents, relevant to the out of time point and her reliance on ACAS guidance, to the bundle. It was agreed that the application would be heard after her evidence and after that of Ms Pearson who had been scheduled for personal commitment reasons and did not have evidence to give on any ACAS or time related matters.

13. After the evidence of the first respondent witness Ms Pearson the claimant's request that she be allowed to add ACAS emails was addressed. Clear direction was given that the claimant must not tell the Tribunal the content of any of those documents but that the Tribunal would hear from each side as to why they thought the documents were relevant or not. The respondent had seen the documents, at the direction of the Tribunal, just an hour or so before the application. The respondent was clear that overall the documents were the claimant putting her case to ACAS but that the documents also contained without prejudice information on settlement discussions. The claimant agreed that was their content. She wanted to rely on them to explain the delay in bringing her complaint. The Judge asked *If the Tribunal accepts that your case on the time point is as follows:*

> *That you relied on Union advice that you had to exhaust internal processes (grievance etc) before you could bring a tribunal claim and that ran until 23 December 2022 and that*
>
> *After that in January 2023 you contacted ACAS and were trying to settle your case until 22 March 2023 when you got your ACAS certificate and then you brought your complaint on 28 March 2023*

would you still need the Tribunal to see the content of the documents? The claimant's answer was no, if the Tribunal accepted that to be the position she would not need it to see the documents. The claimant withdrew her application to have the documents included. She was content that her point was as set out above. The reason she had not brought the claim sooner was because she exhausted internal processes and was then in settlement discussions.

14. There was discussion about the respondent's witnesses. It was explained to the claimant that both the identity of witnesses to be called and the order of their being called was a matter for the respondent. There were no adjustment related reasons why the claimant might need to have witnesses in a particular order nor any adjustments to cross-examination. It was agreed that Ms Pearson could be called first for the respondent to accommodate her commitments this week.

15. There was discussion about the list of issues. Over an hour was taken in discussion to seek clarity from the claimant as to who she said had required her to undertake warehouse duties, when this had been required of her and how this had been communicated to her. The claimant was evasive and continued to focus on the issue of what she alleged was her change in contract so that she had become an office worker. The attempt to seek further specificity for the list was abandoned and it was agreed there would need to be findings of fact on those points.

**The list of issues**

16. The issues for the Tribunal to determine were as follows:

1. **Time limits**

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 18 October 2022 may not have been brought in time.

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

1.2.1 What was the date when the respondent failed to act on its alleged duty to make an adjustment?

A failure to do something is to be treated as occurring when the person in question decided on it — S.123(3)(b) Equality Act 2010. In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it — S.123(4).

1.2.2 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.3 If not, was there conduct extending over a period?

1.2.4 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.5 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.5.1 Why were the complaints not made to the Tribunal in time?

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

*Paragraph 2 on disability was removed, disabled status having been conceded from 28 February 2021.*

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

3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

3.2.1 Requiring an employee to undertake warehouse operative duties.

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that her health and safety was put at risk when performing those duties?

3.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

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

3.5.1 To allow her to continue in an administrative role.

3.6 By what date should the respondent reasonably have taken this step?

4. **Declaration of the Terms of Employment (section 11 Employment Rights Act 1996)**

4.1 What is the claimant's contractual job title and position? If it changed during her employment when did any change take place?

5. **Remedy for discrimination or victimisation**

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

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

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

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

*Paragraphs relating to ACAS uplift were deleted it having been agreed that the List of Issues did not include a complaint about the handling of the grievance.*

## The Hearing

*Documents*

17. The parties had prepared a bundle of 454 pages to which were added the 5 pages of Union emails for the claimant and the 32 page claimant's union support application pack.

*Oral evidence*

18. The Tribunal heard oral evidence from the claimant. It was her evidence that she had been told she had to do warehouse duties but refused to follow those instructions. She could not say who had told her to perform warehouse duties at any date after February 2021. She accepted in cross-examination and in response to a question from the Tribunal after the implication of the answer was made clear to her, that she had not done any warehouse duties at all after February 2021.

19. For the claimant the issues of her contract and a reasonable adjustment to her duties became conflated. She insisted that the adjustment made by manager AJ in February 2021 and recorded on a Change of Duties Request form on 4 September 2021, amounted to a new contract. The Tribunal explained to the claimant through the interpreter and with direction that the interpreter retain use of the same words consistently throughout the hearing, the difference between a "new contract" "novo contrato" and an adjustment to duties on the same contract "modificaco".

20. The claimant was not credible in her position that she believed herself to have a new contract from either February or September 2021 because (i) she had signed a contract on appointment in June 2020 and knew what a contract looked like as opposed to a Request for a Change of Details form and (ii) the Handbook that she referred to in support of her argument that a Change of Details form can amount to a new contract plainly does not say that and plainly refers to changes of details such as address and (iii) after the date on which she says she had a new contract as an administrator she complained about not having enough work to do, asked if she could do the job of employee Mr M and asked for a transfer to the Vault in adjusted duty roles and (iv) on the occasions in her generic assertion that she was told to perform warehouse duties by unspecified persons she did not raise

a formal complaint about what she arguably would have perceived to have been a breach of her contract.

21. The Tribunal heard evidence from Ms Pearson of HR. She gave her evidence in a straightforward and helpful way. She explained to the Tribunal the process for dealing with an OH report; that it would be received, sent to the manager and employee, that there should be a meeting and discussion about its content, agreement reached on adjustments, the agreement recorded in writing and sent to HR on a Welfare Meeting report document. She accepted that the meeting had not happened in the claimant's case and that there had been no Welfare Meeting report document produced.

22. The Tribunal heard from Mr Brooks, team manager. He was a nervous witness but was consistent and credible in saying that he had not required the claimant to perform warehouse duties. Mr Massey was the team manager, above the claimant but below AJ he gave evidence that he had been told by AJ that the claimant was to do office duties and had immediately protested that there was not enough work to warrant office based duties for two long weekend shifts. Mr Hodgson was the general manager at The Vault and was clear and consistent in his evidence that the claimant had not been required to perform warehouse duties.

**The Facts**

23. The claimant began working as an agency worker warehouse operative at the respondent's Qube site in December 2019. The respondent had an adjacent warehouse, the Vault, which handled more volume than the Qube. The Vault is the biggest fast moving consumer goods distribution centre in the north of England, it occupies a site of over 600,000 square feet and has as many as 1250 employees on site at any time. Both the Vault and the Qube had office accommodation where office staff such as HR, payroll and senior management worked. Senior managers used a computer system called Vitesse.

24. On 31 December 2019 the claimant suffered an incident which led to diagnosis of DVT in her right arm.

25. She was again invited to be an agency worker warehouse operative at the Qube in January 2020. The claimant informed her shift manager Mr S about her DVT and was told that she had agreed to do a warehouse operative job and that is what she would have to do. The claimant performed warehouse operative duties as an agency worker from January 2020.

26. On 14 June 2020 she became a directly employed permanent employee. The claimant signed a contract describing her role as "DC warehouse operative". She continued to perform the following warehouse operative tasks:

- Picking, which meant getting items of stock from warehouse shelving to a delivery point. It included moving boxes manually onto a pallet, moving big boxes including up to 70kg with machinery and manually.

- Ferrying, which meant driving a truck taking boxes from their warehouse location to a different location for delivery loading.

- Intake unloading, which meant unlocking containers with a big, heavy key, unloading container content onto pallets, identifying items that had arrived and correctly labelling them.

27. She worked a 37 hour week over 5 days. The work was difficult for her as she got pain in her arm when working but she persevered as she had to work. The claimant had a further DVT incident during 2020 following which, with consent she reduced her hours to 25 hours per week over two long weekend shifts. The volume of work at the weekend was considerably less than during the week with fewer containers arriving, though the weekend warehouse shifts were seen as catch up shifts needing picking and ferrying to address any backlog in getting stock out to stores.

28. Sometimes stores ordered items and the order could not be fulfilled, either at all or in part. When that happened a cancellations list was produced and a warehouse operative would perform the administrative task of cancelling undelivered items from the store order paperwork. This was known as “deleting shorts”.

29. Warehouse operatives also picked up administrative tasks and were required to work flexibly. There were no designated solely administrative roles for warehouse operatives. All warehouse operatives were expected to do warehouse tasks and some administration as needed. There was little need for administration.

30. Where there was a need to reasonably adjust duties for example for pregnant workers to avoid heavy lifting or for disability the respondent had a list of adjusted duties that managers can offer to staff. It comprised:

- Cleaning
- Ferrying (truck driving)
- 100% checks; checking the containers coming in have the correct content
- Office based ad hoc administrative duties.

31. If a member of staff can’t do a mixture of those tasks then they can be assigned administrative duties only by way of reasonable adjustment. The process would be to obtain an OH report, consider the recommendations with the member of staff, get agreement on the amended duties, record that agreement in a welfare discussion document that the manager would send to HR and agree a review date. This is not a change of contract in that the person remains a warehouse operative but with an agreed adjustment for the period of the review.

32. In Spring 2021 the claimant told her manager AJ that driving the truck was painful for her because of her arm. He agreed an adjustment to her duties so that from February 2021 she was not driving at all. She was continuing to do picking and intake unloading and this became problematic. There was further discussion with AJ about what the claimant could do, she said she could not do cleaning as

this, too, would be too much pressure for her arm. AJ spoke to a colleague Ms Sophie Bell in HR and it was his understanding that she advised adjusting the claimant to office based duties in view of her health. In March 2021 AJ adjusted the claimant's duties to solely office based duties. She remained working in the office. Her main tasks were computer and paperwork tasks around logging the incoming containers. The problem was that there was reduced demand for this at the weekend because of the fewer containers coming in at weekends. There were usually long gaps on the 12 hour shift when the claimant had little or no work to do.

33. In May 2021 AJ advised his colleague, subordinate team manager Dave Brooks that he had moved the claimant from warehouse duties to office based duties for medical reasons. Dave Brooks knew that there was no need for an administrator for 25 hours at the weekend. The maximum requirement for any weekend administration tasks was one and a half to two hours per shift. During the week the requirement was higher and shared between designated administrators who were also required to work flexibly and regularly did 2 – 3 hours per shift on operational tasks in the warehouse. Dave Brooks was concerned that the claimant was under employed but his manager AJ had agreed the claimant could work solely on office based duties.

34. On 4 September 2021 AJ met with the claimant and conducted a Welfare Meeting. She reported her ongoing health problems including liver and kidney issues and the ongoing DVT risk which meant she must avoid lifting or too much use of her arm. He recorded on the Welfare Meeting report form that went to HR:

> *We have already gave Silmara another role and this is office based so with further notice this is what role she will be doing, nothing else is needed to be changed as she is office staff.*

35. He also filled out a form Change of Details, the claimant signed it. It was a request form that had to be authorised by a senior manager and he put on the desk in payroll.

36. The Employee Handbook provided:

> *If you change any of your details eg your name, address or contact telephone number you must ensure that you inform your manager……complete a Colleague Change of Details Form …..*

37. The request for a change of details to a permanent office based role was subsequently refused but AJ did not communicate this to the claimant and did not require the claimant to resume warehouse operational duties.

38. For one year from approximately February 2021 to February 2022 the claimant performed office based duties from the Qube. There was not enough work for her to do.

39. On 14 January 2022 Mr Hodgson met with AJ to discuss potentially preferential treatment that had been given to the claimant in allowing her to be office based when there was little or no need for an office based administrator for

25 hours at the weekends. AJ explained he had had advice from HR and that the claimant had been put on office based duties for health reasons.

40. On 28 January 2022 AJ was transferred to Bedford. A new shift manager came to manage the claimant. The new manager Joe Gregory talked to Dave Brooks the team manager and reviewed the claimant's role and it was immediately apparent to him that (i) there had been no formal approval for the claimant's change in duties and (ii) no occupational health referral in accordance with the respondent's policy and (iii) that there was no need for a 25 hour per week administrator performing office based duties at the weekend and (iv) it appeared that AJ had been delegating part of his role, working on Vitesses, to the claimant without approval so as to give her tasks to perform. This had meant that she was seeing confidential material that ought not to have been seen by a warehouse operative.

41. In early March 2022 Mr Brooks and Mr Thomas, a Qube shift manager, spoke to the claimant about the problem of there not being enough need for office based duties at the weekend. They raised the possibility of the claimant assisting a colleague called Mario who was a warehouse operative with adjusted duties for health reasons so that he performed the following non physical desk based tasks from a desk within the warehouse:

> *Checking dispatch, opening and closing jobs on the computer, fixing problems with loads, planning schedules for loading, planning the list for picking, releasing the picking lists to colleagues and other administrative tasks relevant to the warehouse.*

42. The claimant said she would not do a role supporting Mario as she had a permanent office based contract given to her by AJ.

43. Mr Brooks and Mr Thomas explained that she did not have a permanent office based contract but adjusted duties and that they needed to talk about what she could do as there weren't enough office based duties for the weekend. They asked about the prospect of her going back into the warehouse to resume duties as a picker, driving a truck rather than heavy lifting. The claimant said that she could not do driving because of her DVT. They explained that she did not have enough to fill her day and there would have to be a plan going forward.

44. In early March 2022, after the conversation with Mr Brooks and Mr Thomas, the claimant asked Melanie Pearson in HR for a copy of her contract and her Change of Details form. Melanie Pearson sent the claimant her contract and the only Change of Details form on file which related to a change of address. The claimant protested. On 13 March 2022 she said that she wanted to see her contract regarding her "new office position". No such contract existed so Melanie Pearson contacted the claimant's team manager Dave Brooks to find out if there had been a new contract or COD form relating to duties. Dave Brooks replied to say there was no new contract or COD but he was aware that AJ had asked for a COD for the claimant and it had been refused. Melanie Pearson was not surprised there was no COD form on file as requests that are rejected are shredded in confidential waste. It is only changes that are actioned that stay on file. Also Ms Pearson would not expect a change of contract from warehouse operative to

warehouse administrator to be achieved on a COD form. Ms Pearson informed the claimant that she was a warehouse operative but could remain on adjusted administrative duties whilst an OH referral took place.

45. Ms Pearson from HR advised the shift manager to sit down with the claimant and tell her this was the case. That meeting took place on 2 April 2022. Joe Gregory sent an email to HR that same day outlining the content of the meeting. The claimant had been told:

(i) her contract had not changed from warehouse operative to warehouse administrator;

(ii) there are no office admin contracts only available;

(iii) she had had an adjustment to office based duties by AJ and that would continue, she could stay in her current role, whilst an OH referral took place;

(iv) once the OH report was available they would sit down again with her to discuss welfare and where best they can support her and the capabilities she can do from a productive standpoint.

46. The claimant went off sick.

47. The claimant then approached management about wanting Mario's role. The claimant was told this would not be possible.

48. With advice from Melanie Pearson's predecessor Sophie Bell from HR, Joe Gregory agreed a temporary adjustment for the claimant to office based administrative duties at a nearby alternate location, The Vault until he had sight of the OH report. The claimant, who had not done anything other than office based administrative duties since February 2021, agreed to the move to the Vault. It happened in early April 2022.

49. The first duties she was assigned in the Vault, for the first two weekends of April, were filing duties. The personnel files were heavy and after two weeks the claimant said that it was painful for her.

50. On 10 April 2022 the claimant wrote to Ms Pearson. She said:

> *You have said…. I have been put into a less demanding role to assist me while you wait for occupational health to assess me…..if this is the case how come I have been asked to do different tasks ? I have been asked to ferry? to do 100% checks etc … if feels like the company doesn't take my health seriously and ignores advice given to them to keep me in a less demanding role.*

51. The claimant was then, for the third and fourth weekends of April, moved to duties supporting Koralis who did computer based work deleting shorts. It required working across two monitors and using the mouse to click on the list of shortfalls and click on the part of the order that needed deleting as it had not been fulfilled.

After two twelve hour shifts of this task which the claimant found to be repetitive "clicking" and which was painful for her, she reported that she had had a DVT incident with pain in her arm.

52. On 23 April 2022 there was a welfare discussion with Mr Gregory. The claimant had failed to attend an occupational health meeting and needed to rebook. She told Mr Gregory she could not do manual handling due to pain caused by her veins. She could not do picking due to pain brought on by continuous standing. She is on blood thinners and so must avoid the risk of being cut. This meant she could not do cleaning, picking, 100% checking or ferrying. She said she needed office based work Saturdays and Sundays. The Welfare Discussion form recorded the ongoing agreement to support her with office based duties and filing across both sites whilst awaiting the OH report. Mr Gregory recommended a transfer to the Vault as it was a bigger warehouse with more need for weekend administration than the Qube. The claimant signed that form. The claimant had not told Mr Gregory she could not do filing nor that she could not do the work with Karolis due to repetitive clicking.

53. On 8 May 2022 the claimant applied for a permanent transfer to a role at The Vault. Mr Massey met with her and told her that there was no ongoing need for a weekend administrator, she would transfer as a warehouse operative, but that she would continue her office based duties until the outcome of the OH report. Mr Massey recorded the informal discussion at the time. His note said:

> *We would be happy to accommodate the transfer request. That this would be in a warehouse ops role as currently there is no admin positions available. That it would remain as a supporting role agreed in recent welfare discussion with ongoing review.*

54. On 10 May 2022 the claimant saw OH. The referral had recited:

> *Warehouse operative…cannot carry out duties due to health conditions, offered ferrying on LLOP but cannot drive MHE due to medication and health issue driving all day and lifting heavy boxes…offered 100% checks walking around and checking stock tick box exercise cannot complete due to health condition as too much work with arm can cause blood clots...if required to lift boxes occasionally.*

55. The report dated 11 May 2022 said:

> *Continue her amended duties, working in the office in her current role, if this can be feasibly accommodated, alternating her tasks frequently, wherever possible to avoid any repetitive movements of her right arm…further medical evidence may be required in order to assess her medical suitability to resume her substantive post.*

56. Ordinarily HR receive the OH report and forward it to the shift manager for the manager to have a discussion with the employee. Ms Pearson sent the report to Mr Hodgson.

57. When the claimant saw the report she lodged a grievance, dated 11 May

2022. She said she had an office adminstrator's contract from 2021 and yet was being asked to go back into the warehouse. She said she was enjoying her role at the Vault, (she did not say that the filing or supporting Karolis duties were not suitable for her) and was being treated with respect there but at the Qube had been bullied. She said that she would have been able to do the loading administrative (Mario) role that she had initially refused but that it was no longer available. She said she had been working in the office for one year with an office administrator's contract and is now being told to go back to the warehouse.

58. There was then a grievance hearing scheduled for 17 May 2022. The claimant was absent from work for 15 May to 21 May so the hearing was rearranged to 25 May 2022. The claimant was accompanied by her union representative Colin Jones at that meeting. On 25 May 2022 as part of the grievance discussion the claimant complained that there had not been enough work for her to do at the Qube office. She said at that meeting *I stayed more than one year with no work, only help from AJ with Vitesse and more systems*. *Very difficult to stay 12 hours, I cry in the bathroom.*

59. This was the claimant accepting that there was no need for an office based administrator at the Qube at weekends. The claimant said she did not want to go back to the warehouse. She protested that she should not have had to be referred to OH but should have been provided with work in an office based administration role. At the grievance meeting the claimant denied having had a relationship with AJ which she subsequently admitted. For the first time she complained about a colleague touching the arms and upper body of another and she reported manager colleagues for coming in at 6.15 when they should have been in at 6am.

60. Notes were provided of the grievance meeting and the claimant and amended them.

61. The claimant lodged a second grievance on 16 June 2022 relating to alleged discrimination against her by the office supervisor Dom who she felt had not supported her to learn how to do office tasks. The grievance also related to the audit administrator. The claimant said that the audit lady had made fun of her by asking her to delete over 4000 emails, which the claimant had started doing one at a time. The claimant was later shown by Dom that they could be deleted in batches and not one by one and so felt the audit lady had made fun of her.

62. The first grievance outcome letter was sent by Mr Hodgson to the claimant on 27 June 2022. It was three pages long and dealt in detail with the issues the claimant had raised. It concluded:

> *We will continue to support you in an administrative role as an amendment to your duties and you are welcome to apply for any roles that are advertised……..for the duration of you performing an administrative function you were paid for it……..there is no longer any scope for this function due to workload and intake no longer being done on weekend days.*
>
> *You were transferred to the Vault because as a business we could no longer support your amended duty requirement within an administrative function at the Qube…..this was never a transfer into a contractual administrative*

> *position……there are no administrative contracts available……..you are providing support in this function as a warehouse operative to meet the needs of your amended duties……. I have confirmation from HR that you have received a copy of the report and the role you are now in meets the recommendations contained within it. This does not take away from the length of time you have waited to discuss the report with management and this has been actioned to be done when you next attend site.*

63. Mr Hodgson said that he would not be dealing with the second grievance as it was largely repetitive of issues he had addressed with her verbally.

64. On 30 June the claimant replied in some detail to Ms Bell by way of an appeal against the grievance outcome. She persisted in saying that she had the same contract as the office staff. She said for the first time that the working with Karolis deleting shorts was not possible for her as 12 hours of clicking the mouse was not good for her arm. The claimant said she was not willing to discuss her OH report with anyone.

65. On 2 July 2022 the claimant went off sick.

66. On 1 December 2022 the grievance appeal was heard in the claimant's absence. On 23 December 2022 the grievance appeal outcome was sent to the claimant. On 18 January 2023 the claimant provided the requisite information to ACAS to begin early conciliation. Efforts were made by the parties through conciliation to seek to resolve the dispute. On 1 March 2023, conciliation having been unsuccessful, a Certificate was issued. On 28 March 2023 the claimant commenced Employment Tribunal proceedings by submitting her ET1. On 2 June 2023 the respondent invited the claimant to a welfare meeting.

67. On 6 July 2023 the respondent indicated that if the claimant could not participate in welfare meetings and not return to work then it will move to an incapability dismissal process.

**Relevant Law**

<u>Burden of Proof</u>

68. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

> "(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."

69. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

70. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

71. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

72. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three 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 …**
>
> **(2) …**
>
> **(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".**

73. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "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." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "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."

Early Conciliation Provisions

74. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

75. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

Duty to make Reasonable Adjustments

76. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

> "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."

77. The words "provision criterion or practice are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

78. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632.

79. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EAT 2018 Mrs Justice Simler considered the comparison exercise. At paragraph 48:

> "*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question…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 circumstances."*
>
> *"The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and measured by*

*comparison with what the position would be if the disabled person in question did not have a disability."*

80. The Code provides that a PCP is a PCP that is applied by or on behalf of the respondent.

81. In Ishola v Transport for London [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

*"The words "provision, criterion or practice" are not terms of art, but are ordinary English words…they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application."*

82. And at paragraph 37:

*"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

83. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

84. The test of reasonableness of an adjustment is an objective one. There is no obligation on an employer to create a post which is not otherwise necessary within the respondent organisation specifically for a disabled person Tarbuck v Sainsbury's [2006] IRLR 664 though this may sometimes be appropriate. It will depend on the circumstances of the case as to what is reasonable. It is not a question of accommodating an employee's preference. The Tribunal may take into account the circumstances including the operational objectives of the employer. Lincolnshire Police V Weaver EAT 0622/07

85. Section 11 Employment Rights Act 1996 provides that reference may be made to an employment tribunal (where an employer does not give a worker a statement as required by section 1 Employment Rights Act 1996 either because there is no statement or it does not comply with what is required to be given) for the tribunal to determine what particulars ought to have been included or referred to so as to comply with section 1. The requirement for a statement to be given to include job title is at Section 1(3)(f).

86. Under Section 12, on determining such a reference the Tribunal may confirm, amend or substitute particulars given as the tribunal deems appropriate.

## Submissions

87. The claimant submitted that her contract was changed by AJ in February 2021 so that from that date she had a new contract as an office administrator. In her written closing submission she sought to argue that she had also been discriminated against because of PTSD. It was understood and explained in the hearing that this was a remedy point, rather than a disability relied on in the failure to reasonably adjust complaint.

88. The respondent submitted that the claimant's complaint for failure to reasonably adjust fails on the facts as the respondent did not fail to adjust but in the alternative, was out of time. It says, the claimant having failed to identify a date at which she says adjustment ought to have been made and was not, that her complaint is about the information communicated to her in February 2022 when AJ left when Mr Brooks and or Mr Gregory explained that there was no need for office based administrator at weekends and that there would need to be a discussion about her role going forward, subject to OH advice. It says that her primary limitation date would have been by 26 May 2022 and adding on her time with ACAS she ought to have brought her claim by 6 July 2023. The claimant brought proceedings on 28 March 2023 so the respondent says the complaint is 8 months and 3 weeks out of time. It says the claimant has failed to advance a request for an extention of time and not provided any evidence in support of that position. It says the tribunal does not have jurisdiction to hear that complaint.

89. The respondent says that at all times the claimant was employed on the terms of the written contract she signed on 14 June 2020 describing her job role as DC warehouse operative. It says that her argument that AJ gave her a new contract must fail as (i) it is not credible on the facts and (ii) he had no authority to have done so. The respondent says the claimant was provided with a reasonable adjustment to her duties from February 2021 by AJ, and continuously thereafter as attested to by its witnesses and has never been required to perform warehouse duties. It submits that as the claimant accepted the truth of that position in oral evidence her claim for failure to reasonably adjust must fail.

## Applying the Law to the Facts

## Time limits

<u>LOI 1.2 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010?</u>

90. The Tribunal finds as a fact that there was no requirement imposed on the claimant to perform warehouse duties after February 2021. However, for the purposes of the time issue it takes the claimant's contention that the position changed for her in February 2022 when AJ left as the relevant date from which she says (though she was not this clear about her own case) both that she had a contract entitling her to work in the office and that the respondent failed to reasonably adjust. A failure to do something is to be treated as occurring when the person in question decided on it — S.123(3)(b) Equality Act 2010. In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something,

or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it — S.123(4).

91. The Tribunal rejects the respondent's submission that time runs from February 2022 and that the claim was brought out of time. The Tribunal had regard to Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, and finds that the complaint of failure to reasonably adjust, to require the claimant to do warehouse operative duties, is a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'… A one-off act with continuing consequences is not the same as an act extending over a period: Sougrin v Haringey Health Authority [1992] IRLR 416, [1992] ICR 650, CA. The Tribunal finds that there was no one off act with continuing consequences or ongoing impact in this case. There is not a one off decision to send the claimant to do warehouse duties. What happens is a conversation is opened about the need to discuss the claimant's duties and reasonable adjustments subject to OH advice. That creates a state of uncertainty for the claimant that is ongoing. The course of conduct began in February 2022 when the claimant's certainty about doing office only duties was removed by Mr Gregory and Mr Brooks wishing to discuss appropriate duties for the claimant and identifying that there was no need for a permanent office administrator at weekends. The course of conduct continues to the present day as the claimant remains off sick and the conversation about return to work, and to which duties she may return following the OH report, has not yet been had.

92. The Tribunal finds that the discrimination complaint is brought in time. If the Tribunal is wrong about that so that time ran, as submitted by the respondent and the claim is over 8 months out of time then the Tribunal would find that it would not have been just and equitable to extend time. An extension would be the exception not the rule. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: Robertson v. Bexley Community Centre [2003] EWCA Civ 576. The discretion to extend time is "broad and unfettered": Abertawe Bro Morgannwg University v. Morgan [2018] EWCA Civ 640. The Tribunal may take into account all the circumstances of the case. The claimant was a well informed litigant who had the support of her union until determination of her grievance. The claimant argued that she relied on union advice that she had to exhaust all internal processes before going to ACAS. This would not have been a good reason for extending time. She cannot rely on her own ignorance of the legal position on time limits or on bad advice she was given, if indeed she was wrongly advised. The claimant was a smart phone user, had access to internet, was well informed about her rights having raised allegations of discrimination and bullying in her correspondences with the respondent prior to her grievance outcome and was capable of writing detailed letters setting out her position to her employer's HR department.

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

LOI 3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

3.2.1 Requiring an employee employed as warehouse operative to undertake warehouse operative duties.

93. The Tribunal finds that the PCP existed for warehouse operatives. They were required to carry out:

- Picking, which meant getting items of stock from warehouse shelving to a delivery point. It included moving boxes manually onto a pallet, moving big boxes including up to 70kg with machinery and manually.

- Ferrying, which meant driving a truck taking boxes from their warehouse location to a different location for delivery loading.

- Intake unloading, which meant unlocking containers with a big, heavy key, unloading container content onto pallets, identifying items that had arrived and correctly labelling them.

94. Warehouse operatives also picked up administrative tasks and were required to work flexibly. There were no designated solely administrative roles for warehouse operatives. All warehouse operatives were expected to do warehouse tasks and some administration as needed. There was little need for administration. This PCP was applied to everyone and only applied to the claimant until 28 February 2021.

LOI 3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that her health and safety was put at risk when performing those duties?

95. Yes, the claimant had DVT and the duties that involved her using her arm to lift, or using it repetitively or frequently or exposing herself to a risk of a cut, would have put her at a substantial disadvantage.

LOI 3.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

96. The respondent knew from the claimant telling AJ in February 2021 that she was at a substantial disadvantage. AJ made an adjustment to her duties and that time and by September 2021 the respondent had acknowledged that substantial disadvantage and documented an agreement that had been in place since February 2021 to allocate the claimant adminstrative duties only. The PCP was not applied to the claimant after it February 2021 when it became aware that she had a disability.

LOI 3.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

3.5.1 To allow her to continue in an administrative role.

97. The respondent did not fail to reasonably adjust. It has not required her to perform warehouse operative duties since February 2021. The claimant accepted

in oral evidence under cross-examination that she had never after February 2021 been required to carry out warehouse operative tasks but had at all times been provided with alternate administrative duties. The claimant repeated this position when the question was put to her again by the Tribunal, checking her understanding through the interpreter, that the implication of this admission, would be that the thing she complained about in her complaint, the List of Issues para 3.2.1, had never happened. The claimant accepted that she had never been required to do the duties. The Tribunal took her to the allegation in her Extended Grounds of Complaint document at page 45 and 46 by her shift leaders, either do warehouse duties or go home. The claimant said she had refused to do those duties and so been given alternate administrative tasks. The Tribunal rejects her evidence that she was told to do warehouse duties or go home. The claimant accepted that she had not been sent home but had gone home sick on one occasion in around February 2022. The Tribunal finds:

- The claimant accepted she did not do warehouse operative tasks after February 2021.
- She accepted that there were conversations about her role and the lack of sufficient administrative tasks at the Qube,
- She has not been able to point to an occasion, by date and name of person, when she was told to do warehouse duties or go home.
- She complained in her grievance about not having enough office based duties to do.
- She did not say in her grievance the name of the person or occasion on which she had been required to do warehouse duties.
- She accepted that she agreed to request a transfer to the Vault in the expectation of their being a higher needed for office based duties at the Vault.

98. The Tribunal accepts the evidence of Mr Brooks and Mr Massey that the claimant was underemployed in office based duties at the Qube, (corroborated by the claimant herself in the notes of the grievance meeting where she talked about crying in the toilet and having nothing to do) that she was supported to transfer to the Vault and did so, that she was given office based tasks at the Vault in April 2022 and performed them without complaint until after her grievance outcome when on 30 June 2022 she first said the filing and working with Karolis were not reasonable adjustments for her. She did not tell occupational health at the meeting on 10 May 2022 that the filing and working with Karolis were not good adjustments for her.

99. The Tribunal finds that the claimant has conflated the issue of whether or not she had a permanent office administrator's contract, and the respondent's agreements and reasonable adjustments for her. She has sought to say that the respondent's attempts to discuss her being underemployed, there having been no OH referral and the need for referral and further discussion about allocation of duties meant that they were not honouring her contract (which she said was for

permanent office duties). At all times the documentation from HR direct to the claimant, from Mr Hodgson to the claimant in the grievance outcome and before that from Mr Massey and Mr Hodgson in the welfare meetings all reiterated that she did not have an office administrator's contract and that pending the OH outcome the respondent would continue to support her with office based duties.

100. What the claimant seemed and seems to this day to want is a permanent office administrator's contract, akin to those held by members of HR, payroll and finance. She has not said that failing to give her that is a failure to reasonably adjust. The Tribunal finds that there has been no failure to reasonably adjust and that the reasonable step as drafted by the claimant to *allow her to continue in an administrative role* has happened in the sense that she has not been required to do warehouse operative tasks. However, in the sense that the claimant sees it, that she has not been given a *permanent office administration contract,* or allowed to continue in the office administrator contract that she would have the Tribunal believe that she had, then she is correct that has not happened. The List of Issues did not require the Tribunal determine whether or not a failure to provide a new permanent office administrator weekend contract was a failure to reasonably adjust. If the Tribunal had been asked to determine that point then it would have found against the claimant because it would accept the submission of the respondent relying on Tarbuck v Sainsbury's [2006] IRLR 664 that the respondent was not obliged to create a post, which is not otherwise necessary, specifically for a disabled person. The Tribunal would accept the evidence of the respondent witnesses, corroborated by the claimant, that there was no need for a full time administrator at weekends. In those circumstances, and the circumstances of the respondent having looked at alternatives such as cleaning, picking, driving, filing, deleting shorts, the Mario role, the Karolis role and the claimant having refused to perform each of them the Tribunal would not have found it reasonable for the respondent to have to create a permanent weekend only office administrator post for the claimant. Adjusting from warehouse operative contract to office based administrator contract (held by those in HR, payroll and senior management) is in effect a request for a promotion and, had the Tribunal been required to determine that point, would not have been a reasonable adjustment for the claimant.

LOI 4.1 What is the claimant's contractual job title and position? If it changed during her employment when did any change take place?

101. The claimant is a "distribution centre warehouse operative". She entered a contract to that effect on 14 June 2020 which subsists. The duties she is required to perform under that contract were adjusted in February 2021 and this was documented in a welfare meeting on 4 September 2021 by AJ. That reasonable adjustment, in AJ's words on the Welfare Report form of 4 September 2021 *we have already gave Silmara another role and this is office based* was to not require her to perform warehouse operative tasks. The request was poorly worded as it focused on the office location and not the tasks and the Tribunal acknowledges that AJ may have allowed the claimant, whilst he was her manager and in a relationship with her, to base herself in the office at weekends, underemployed and carrying out some of the tasks that were assigned to him as senior manager on Vitesse. He did that without authority to do so. The Tribunal interprets the words on the Welfare Report document to record the agreed adjustments which were that

the claimant would not be required to carry out anything other than administrative tasks. It does not mean that this was a new contract.

102. The Tribunal rejects the claimant's submission that she had an office administrator contract because:

- She did not sign a new contract with the respondent. She had signed a contract in June 2020 and knew what that looked like. The Tribunal finds that the claimant could not reasonably have believed that AJ allowing her to base herself in the office and help him meant that she had a new contract as an office worker akin to the contracts of the HR, payroll and management staff. It was disingenuous of her to insist that she had an office contract.

- She was told in February 2022 that there wasn't enough administrative work at the Qube and she agreed to move to administrative duties as a warehouse operative in the Vault. She discussed Mario's role, did filing work, did some work with Karolis and the Tribunal finds she would not have done any of those things if she had genuinely believed that she had an office contract.

- Mr Massey spelled out to her in their meeting on 8 May 2022 that she was a warehouse operative on adjusted duties and the difference between that and an office administrator contract, the specialist HR and payroll roles.

103. Nothing that was agreed by way of reasonable adjustment by AJ amounts to a variation of the claimant's job title or substantive post. AJ's request, the Change of Details form which the Tribunal did not see because it had been shredded when it was rejected, would not have amounted to a change in her contract as it was, at its highest, a *request* for a change. A contract cannot be unilaterally varied. A contract cannot be varied other than by those people who have authority to vary it. The Tribunal accepts the respondent's submissions that AJ had not agreed the change to a substantive post of warehouse administrator. He only made a request. He did not agree it and could not agree it as he did not have authority to do so. If he had, he would not have needed to make a request for a change. The request needed to be authorised by a senior manager, in conjunction with HR. He knew this and that is why he made it. The Tribunal did not hear evidence from AJ but accepts the evidence of Mr Massey that he had heard that AJ had placed the request on an office administrator's desk and that it had been rejected by a senior manager. He may have been acting for her because of their relationship or as he would any member of disabled staff. What matters is that what he did, did not amount to a variation of her job description or job title nor did it amount to the creation for the claimant of a new office adminstrator's contract.

104. Accordingly, the Tribunal determines that the term of the claimant's contract, required to be provided by Section 1 Employment Rights Act 1996 was provided to her in her contract dated 14 June 2020. She was and is employed as a DC warehouse operative.

105. The claimant's complaints having failed, no remedy issue arises.

106. The claimant remains an employee. She has been absent on long term sickness since 2 July 2022 because of mental health issues which she says have been diagnosed as post traumatic stress disorder because of events at work. The respondent indicated its intention to begin capability processes in July 2023.

107. If the claimant has not already returned to work by the date of this judgment then it is hoped that the parties will agree the terms of a return to work, and the date for a return to work, as a warehouse operative on reasonably adjusted duties, as soon as possible.

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Employment Judge Aspinall

Date: 27 March 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 4 April 2024

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FOR EMPLOYMENT TRIBUNALS

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