JB1 **Reserved Reasons**

THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Gaffer **v J Sainsbury's**

Heard at: London Central **On**: 9, 10, 11 April 2017
12 April 2017 (In chambers)

Before: Employment Judge Pearl

Members: Mrs E Ali
Miss J Killick

Representation:
Claimant: Mr O Onibokun, Solicitor
Respondent: Ms J Danvers, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. All claims of disability discrimination fail and are dismissed.

REASONS

1. By ET1 received on 28 August 2026, the Claimant, who remains in the Respondent's employment as a Customer Service Assistant, claimed disability discrimination.

2. He set out a narrative in the ET1 and we will return to this in our conclusions. By the end of the case there was an amended and agreed list of issues, attached as Annex A, which sets out claims under Sections 15 and 20 of the Equality Act 2010. Reference is also made to Section 21. It is conceded that the Claimant is disabled as a result of having suffered from Polio as a child.

3. In resolving the various issues we heard from the Claimant; and from Mr Gunduz, Ms Burke and Mr Padden of the Respondent. We have studied a bundle that exceeds 300 pages and some additional documents were handed in during the hearing.

Facts

4. We observe at the outset that it is not our function to resolve each and every disputed issue of fact that can be detected in this claim. What follow are our relevant findings in relation to the issues. We also note that many of the basic facts are agreed.

5. The Claimant began his employment as a Customer Service Assistant at the Fenchurch Street store on 20 May 2014 and the store manager at that time was Mr Noor. The Claimant was working 39 hours over five days. In February 2015, he made a request, that was granted, to spread his 39 hours over four days, starting at 7am. The request was made on the basis of the Claimant's physical disability, although his email at page 60 sets out no details and also refers to his "inconvenience". In any event, it certainly appears to have been treated by the Respondent as a request for a reasonable adjustment and the endorsement on the email shows that it was made in that spirit.

6. The first matter complained of arose on 30 July 2015 and concerns a meeting the Claimant was asked to attend. This is one area of the case where there is a fairly stark difference of recollection and we have little doubt that the Claimant's account is less accurate than the Respondent's. Ms Burke is an experienced store manager and has worked for the Respondent for about 7 years. She is adamant, and we accept, that she was asked by Mr Noor, the Manager at Fenchurch Street, to meet with the Claimant to talk about his working arrangements at the store. She plainly knew about his disability which in all probability is why she attended with Ms Rafique, who is a National Great Place to Work Representative for the region and is disabled. Ms Burke states in terms that the purpose of the meeting was to discuss adjustments to his role. She knew about his difficulty in walking and standing for long periods of time and also knew that he used the chair lift in the store in order to move between the two floors.

7. She was concerned when she met the Claimant that he was sitting at a till on a chair that she thought might be too low. We accept that they discussed safety issues in general and that the discussion also included a possible transfer to another store. However, she testifies that the Claimant said that he preferred working at Fenchurch Street and said that he did not want to move. There are very brief notes of the meeting at page 64 that do not contradict Ms Burke's account.

8. The Claimant's case is that he had no notice of this meeting and that there was no reason why it should have been held with him. Our finding is that it was a meeting held to see whether or not there were any further steps that could be taken to assist him. The Claimant further states that Ms Rafique

told him at the meeting that he was not productive for the business, especially in this store. This would have been a highly offensive thing to have stated in these terms, but in evidence the Claimant substantially retreated from this allegation. He told us that she did not use the word productive. There is another feature of the exchanges in cross examination which we would note, because they have some bearing on other aspects of the Claimant's evidence. He told us that "after 3 years we have learned many things about how meetings are done" and "nothing was done after the meeting and I realised that the meeting was not a genuine meeting to help me." We note that there were numerous points in the Claimant's evidence in which we could detect judgments that he had made with the benefit of hindsight. He has been, in our view, greatly involved in the litigation process and these exchanges demonstrate that he has, after the event, come to construct a coherent picture in his own mind of disadvantage that he has suffered at the instigation of the employer. In relation to the meeting of 13 July 2015 it is clear to us that the principal allegation made against Ms Rafique cannot stand.

9. We would also note that Ms Rafique is herself disabled in a major way. Further, it is a notable feature of the chronology that nothing occurred after the meeting that gave the Claimant any cause for concern and, so far as the Respondent knew, matters were left there. We also note in passing that in the ET1 the Claimant stated that the store manager had arranged the meeting. He takes a contrary stance now, apparently based on what the manager has told him, but this is not easy to reconcile with the ET1; and, in any event, we find the Respondent's evidence on the point, as we have noted above, to be secure.

10. The store is on the ground floor but other facilities for staff are on the first floor. The stair lift is a Stannah and it has been there for approximately a dozen years or possibly a little longer. It is not in dispute that it was a fairly elderly piece of machinery. It appears that it broke down at some point in the autumn of 2015. The Claimant has now maintained that it was out of action for two months, although nearer the time (17 May 2016 at page 92) he appeared to be saying that it only took a month to repair. The Tribunal is unable to make a finding one way or the other. In any event, there were two days, 3 September and 3 November 2015, when the Claimant had a day's sickness. We are unsure that it can be said with any confidence that these days were occasioned by the stress or strain or additional pain involved in having to climb the stairs. That is the Claimant's case as asserted now in the witness statement. There is no reference whatsoever to the stairs or a stair lift in either or the two return to work forms and, again, at page 92 no such assertion was made. There are other indications in the papers that the Claimant's disability caused him to experience pain from time to time and we find ourselves in this incident also unable to make any positive finding as to the cause of the pain or discomfort that led the Claimant to take a day off work. We do not question the genuineness of his illness and we are certain that the Claimant would have gone to work had he been well enough to do so.

11. The Claimant was off work for 7 days in January 2016 and the reasons appear to be flu, back pain, chest pain, cough and headache. This is not attributed by him to the stair lift because it had been repaired by that point. What he says is that in late February or early March the stair lift broke down again. This was the reason why he wrote to the CEO, Mr Coupe, on 17 May at page 92. At this point he was alleging that it had been over two months since it broke down and there was still no repair. There was now an investigation and Mr Padden, Area Manager, looked into the matter. Putting together the evidence of Mr Gunduz the store Manager and the written evidence of the email of 26 May 2016 at page 104b, the following appears to be the case. The lift had broken down on 9 March 2016. A work order was logged on 11 April, spare parts were approved on 18 April but there were difficulties in obtaining them. The decision then appeared to be that it would have to be replaced rather than repaired and the costs of replacement went out to tender on 9 May. Although the details are immaterial, the Respondent was dealing with three outside agencies as far as we can tell. The first was the facilities management company. The second was ELA which had a contract for the maintenance of lifts and whose remit included the stair lift. The third was Stannah who put in a bid to replace the item.

12. In all of this toing and froing it is clear from the 26 May email that the Claimant had by that point been offered the opportunity to work at two nearby stores on a temporary basis. Those stores were on only one level and it is recorded by Mr Padden that the Claimant had declined the offer.

13. The Claimant was written to by a Group HR Director on 1 June, given a short account of what was being done and was told to liaise with Mr Gunduz about the installation of the new lift. As it happened, on 8 June, it was the Claimant who was able to update her because he knew that somebody had visited the store and he had been told that the replacement process may take 6-8 weeks. He also referred in this email to a meeting with Mr Padden that had taken place on 2 June a few days earlier.

14. At this meeting, they discussed a number of topics including whether the Claimant might wish to move to another store on a temporary basis. He again declined the offer. In relation to moving stores, we have received a certain amount of evidence and we are able to make the following findings. First, there is no basis to suspect that any move would have been other than temporary and there was no reason why anybody at Fenchurch Street wanted the Claimant not to return. Second, although the Claimant has referred to possible reasons for not wanting to move temporarily, we find on the evidence that the overwhelming reason was that he was very happy in the store at Fenchurch Street, well settled there and comfortable with not only the other employees and customers, but also the arrangements in the store. That was undoubtedly, we find, the principal reason why he did not want to move, even on a temporary basis, to a nearby store on one level.

15. The next relevant matter is that between 3 and 9 July the Claimant missed a number of days of work when he was ill and we refer to the return to work form at pages 109-110. It is right to note that in the box asking whether any

support was needed at that time it is written "stair lift support." It is not so clear that the stair lift is the cause of the illness which is described as back and shoulder pain. This is because the Claimant's comments read as follows: "this is natural pain due to physical disability and the body imbalance in day to day life but now I am fit to return to work."

16. At this point the attendance management form at page 112 is relevant. This records that there were four relevant dates for absence and we list them as follows, together with the fifth that we have referred to immediately above:-

    30 March 2015 – 31 March 2015 – cold/flu - no action taken – first absence
    3 September 2015 – back pain – no action taken – second absence
    3 November 2015 – muscular skeletal – no action
    8 January 2016 – 16 January 2016 – cold/flu – no action
    3 July – 9 July 2016 – back and shoulder pain

17. The form sets out in summary form the Respondent's rules about absence. After the first period of absence there is a return to work meeting. After the second period of absence in a 12 month period there is also such a meeting. After the third period of absence in the 12 month period there is a return to work meeting and there can be a possible verbal warning. If there is a fourth period of absence during the currency of a verbal warning it can be escalated to a possible written warning. We omit at this point the final written warning that can come after a fifth period of absence or potential dismissal during the sixth period of absence. These more stringent steps are not involved in this case.

18. What emerges from this chronology of absence is that there were two occasions when no action was taken under the policy. That policy that is to be found in the document C1 gives managers a discretion as to whether to hold a disciplinary hearing. That discretion was exercised in favour of the Claimant, i.e. not to hold any hearing, after the absence of 3 November 2015 and exactly the same happened after the absence of January 2016. It was only at the third time of asking, after the absence 3-9 July 2016, that discretion was exercised under the policy to hold a disciplinary meeting "to discuss your absences which could lead to your receiving a verbal warning for absence." At this point, in March 2015 absence was no longer relevant because it was outside the period of one year. There had therefore from 23 September 2015 been four absences, but it is important to note that the Respondent accepted, as it had to, that it was unable to apply the sanction that the policy lays down after a fourth period of absence within a 12 month period. The reason is that the sanctions are cumulative and even though there had been four absence periods during this year, they were bound to go no further than a potential verbal warning. Until such a verbal warning has been given (and it can be given after the third period of absence in the 12 month period) it is not possible to go to the next stage which would be a potential written warning, which would be a written warning after a fourth period of absence.

19. On 19 July 2016, the Claimant wrote the email to Mr Gunduz, at pages 119-120, which raised various requests and complaints. We will return to this below.

20. On 20 July the Deputy Manager wrote the letter inviting the Claimant to attend a disciplinary meeting to discuss the four periods of sickness absence in the rolling 12 month period. That meeting took place on 23 July.

21. On 21 July, i.e. between the date of the invitation and the meeting, the Claimant and Mr Gunduz met to discuss his email of 17 July. Brief notes were placed in the Claimant's personnel file which he later found: page 116. Mr Gunduz relies upon an expanded note that he compiled at pages 118-120. Despite some scepticism by the Claimant that this was a genuine document, having heard the evidence of Mr Gunduz, we are in no doubt that it was probably the next day, 22 July, that he wrote this expanded note. He also wanted to speak to others before he compiled the longer note. We found Mr Gunduz overall to be a very reliable and impressive witness whose testimony appeared to us to be accurate.

22. The first topic of discussion was the Claimant's request to return to what he called his contracted schedules which was his way of describing the 39 hours of work being spread over four days. This is a complicated part of the chronology and we will deal with shift patterns later on in these reasons. At this point it suffices to note that on 21 July there was some discussion of why the Claimant might have wanted to revert to four days, but the explanation he was given was that 10 hour shifts were not suitable for the store. This is a reference to the situation that Mr Gunduz found in the store when he began as manager in March 2016, which was just four months earlier. The employees were working disparate shifts and the hours that they worked varied from week to week. There are 44 such employees and only about 10 of them were working to their contractual hours. Mr Gunduz told us that it was difficult for him therefore to make operational plans and in particular to ensure that there was sufficient cover. He therefore invoked a process known at Sainsbury's as the Right People, Place and Time Process which is designed to provide for consultation over changes to working hours so as to ensure that colleagues' shifts are brought into line with the needs of the business. This was the background against which Mr Gunduz told him on 21 July that 10 hour shifts were unsuitable. In evidence Mr Gunduz told us that such shifts would make it very difficult for him to provide cover in the event of holidays and sickness. We accept all this evidence.

23. It is also worth noting that at this meeting he questioned the benefit of the Claimant working long ten hour shifts on four days if he found eight hour shifts sometimes to be difficult.

24. The next matter of discussion is that some of the Claimant's colleagues had made life difficult for him in the work place and he was specifically concerned that on 11 June Prem had asked him to clean a dozen or so baskets while he was serving customers at the till. The Claimant in his letter of 17 July said that he politely refused on the basis that he was unable to do so. It is clear

from the note at page 118 that Mr Gunduz took this seriously enough to review CCTV images. He considered that five baskets were involved but he notes diplomatically: "I have not fed this back to avoid any further distress."

25. The Claimant had also complained that on 17 July Zeb had asked him to face up some wines and he again had politely refused. The note of Mr Gunduz's investigation into this shows that Zeb told him that she had asked the Claimant to make a list of the gaps so that she could then get the stock for somebody else to fill up the shelves. She did ask him to tidy bottles during this process and Mr Gunduz says that "I coached Zeb regarding this and have told her to ask him if he could and not assume. She has completed her … equality diversity and inclusion course and did not realise that he would have taken offence had she tried to make him feel inclusive of the team by giving a task that would enable [him] to contribute towards the presentation and availability in-store."

26. The third matter of complaint in the 17 July letter is the stair lift and it was put in this way by the Claimant: "lastly, regarding the stair lift, it's now almost five months out of order and the end of the seventh week of eight weeks deadline given by the relevant department to arrange the complete replacement. We hope for the best, yet if it is not repaired within their time frame, I believe you would love to help me in this regard in every possible way to get further assistance."

27. This again is the subject of the near contemporaneous note that Mr Gunduz made and his first observation is that the problem with the stair lift had been ongoing since he joined the store in March. That he was frustrated would appear to be indicated by his reference to chasing up hundreds of phone calls and emails, although this may be something of an exaggeration. Mr Tinto, Head of Maintenance, had been involved and others had been notified on a weekly basis. He noted, perfectly fairly, that the Claimant told him that the Respondent had not made the necessary adjustments to accommodate his disability, believing that Sainsbury's was too focused on budgets. We know from other evidence that the Claimant was at this stage minded to consider making a Tribunal claim. Mr Gunduz explained to him at the meeting that he had previously offered him a temporary move to another store where he would not have to deal with stairs and this offer was made again. The Claimant is recorded as saying that he liked the environment of Fenchurch Street and would feel uncomfortable adjusting to a different store. Mr Gunduz offered to go that store and support him but the Claimant refused the suggestion. He was entitled to take that stance and, as we have indicated, we are confident that the reason was that he was comfortable in Fenchurch Street where he was familiar with everybody who came to the store or worked there and with the procedures.

28. We next come to the 23 July 2016 meeting which was a disciplinary for the purpose of dealing with the Claimant's absence under the policy we have referred to above. The notes show that he understood the effect of the policy and briefly explained it to the Deputy Manager. The Claimant gave an extensive account of the reasons for going off sick and attributed it to the

stair lift being out of order. There was a substantial discussion about shifts, which we deal with later on in these reasons. The outcome of the meeting was that the Deputy Manager gave the Claimant a verbal warning, as is possible under the policy, and told him that he could appeal.

29. Therefore, by this point, the stair lift had not been repaired or replaced; the Claimant had not been able to persuade Mr Gunduz to let him revert to 39 hours spread over four days; and he had now received a verbal warning. He therefore wrote to the CEO, which appears to be a procedure encouraged by Sainsbury's, and the email dated 25 July is at pages 128aaa-128bbb. It is a relatively lengthy setting out of his current grievance and it ends by saying that he had decided to come to an Employment Tribunal.

30. Mr Padden then became involved and investigated and set out a background note at pages 128aa-128bb approximately a week later. His first comment was that the disciplinary meeting notes, although detailed, included no decision making template and there were no clear reasons in the notes as to why the warning was issued. He also appears to be critical that ER Direct had not been informed that the Claimant had a disability and no call was made to them during the meeting adjournment. The Deputy Manager was asked by Mr Padden to give his reasoning for the decision and he stated that the Claimant had not clearly stipulated that the absence was related to the disability. Mr Padden quite fairly noted that the prudent course was to treat this part of the Claimant's letter to the CEO as grounds for appeal and he had already informed him that an appeal meeting would be arranged. The appeal was held relatively swiftly and resulted in the verbal warning being overturned.

31. Turning to the chair lift, Mr Padden noted from his investigations that there had since 9 March 2016 been eleven incidents logged through the facility management help desk and also "numerous emails and calls". The chair could not be adequately repaired because of its age and was in the process of being replaced. On 22 July he visited the store and tried again to chase matters. An engineer visited on 26 July and Mr Padden visited on the 27th and discovered the chair lift was now operational. He noted that the Claimant had been offered on more than one occasion the opportunity to work in the neighbouring store but that the offers had always been declined. We note, for the sake of brevity, that by the end of July the solution that the contractors or engineers had implemented was to repair the stair lift rather than replace it. The reasons are irrelevant to this decision but it has been possible to trace the evolution of this outcome through the various invoices and so forth.

32. Mr Padden then dealt with the question of shift patterns and he referred back to the meeting that he had had with the Claimant on 2 June. He noted that he had explained then that working for 10 hour shifts was not productive for any colleague; it was also not in itself a reasonable adjustment for the Claimant's disability. He notes that the Claimant at the time agreed with this and appeared to be more concerned about having 7am start times so that he would be able to drive to work and park while there were still spaces

available. As has transpired in evidence, although this may have been his aspiration, he did not at this time have a car. We omit the further detail that can be found on these pages. The action to be taken was, first, to invite the Claimant to an appeal against the verbal warning. Second, the chair lift situation was to be monitored so as to ensure no further breakdowns occurred if possible. Third, Mr Padden was to meet with Mr Gunduz when the latter returned from holiday in mid August and then he would meet with the Claimant and he would address the issue of shift patterns. It is worth our noting that this note made by Mr Padden is broadly sympathetic to the Claimant and very detailed.

33. Ms Burke undertook the appeal and the meeting was on 3 August. Ms Rafique was in attendance as note taker. At the conclusion of the meeting, Ms Burke overturned the disciplinary sanction and this was confirmed the same day in a letter. The note of the decision making at page 135 stated that the stair lift was being added to the reason for absence "due to being broken".

34. Mr Padden held his follow up meeting with the Claimant on 5 September 2016 which was a few days after the Claimant had (a) instituted his Tribunal claim and (b) written again to the CEO (page 140) to say that there was no progress in his case. We suspect this was a reference to the issue of shifts which was at this point the main outstanding item. At the beginning of the meeting, he confirmed that the chair lift was working and that the earlier disciplinary decision concerning the verbal warning had been overturned, although the Claimant maintained that he had not been treated fairly in the disciplinary and had been caused stress.

35. Mr Padden then immediately turned to the question of the contracted hours or shift hours generally. "You explained that you wanted to start your shifts at 7am to 5pm over four days a week. You didn't explain to me why you wanted to work for four days a week, could you explain?" The Claimant said that it was for his benefit and his disability and that working five days a week was too much for him. He cannot do anything else and he feels very tired. He confirmed that Mr Gunduz had told him that there were no long shifts available at weekends and also that he did not have the hours to offer the Claimant in accordance with his request. He was not needed for these times. The Claimant also accepted that he had been made an offer by Mr Gunduz that he could reduce his hours (and therefore go down to four days a week).

36. The Claimant stated that he had never had a fixed schedule in the past and that it was always changing. Mr Padden asked whether he thought it was right for colleagues to have a fixed schedule and the Claimant said that it was.

37. At this point we will very briefly summarise the historical situation concerning the Claimant's shifts. The evidence has been unusually intricate and unclear and there is no doubt that there had been many changes made in the past to his shift pattern. The initial pattern of five day working was changed in

February 2015, for reasons we have set out above, to four days with a 7am start on each day: see page 61.

38. In October a variation was made to five day working and this coincided with the Claimant taking driving lessons. Once he obtained his licence, he asked to revert to four days a week shortly before Mr Gunduz came to the store. There is some inconsistency between the precise hours and days set out by the Claimant in his witness statement and what Mr Gunduz states in his, but the long and short of it is that he was not permitted to revert to four days at 10 hours a day or thereabouts; and there were certain changes made to the days in the week upon which he worked for five days out of seven. The precise detail of these changes are not relevant. We have already recited that in July 2016, the Claimant pressed the issue and that there was a meeting on 20 July with Mr Gunduz. We have also set out the involvement of Mr Padden and the subsequent meeting at which he and the Claimant discussed the question of hours. It was in this meeting that the Claimant was saying that his request to revert to four days a week had been blocked. The Claimant was maintaining that the change to five days a week was only a temporary arrangement. Mr Padden's view was that it would be difficult to manage the business with a further change. He told the Claimant that the store was unable to accommodate the hours that he was requesting but a compromise was offered in what Mr Padden described as an attempt to support the Claimant. This was a 7am start on two days. The matter was left unresolved and the Claimant agreed that the Respondent could approach Occupational Health for advice, although this did not subsequently occur.

39. The 7am shift on Thursdays was offered by Mr Gunduz on 7 September but it appears that the Claimant did not accept this. The Claimant preferred to proceed with the Tribunal case, he said.

40. Unfortunately, the stair lift broke down again on 2 October; Mr Padden put arrangements in hand to have an engineer visit forthwith. It was repaired by 19 October.

Submissions

41. We are grateful to both parties for their detailed written submissions that were supplemented orally. Where relevant, we will refer to them below.

The Law

42. Section 15 provides that "(1) a person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

Section 20(3) of the Equality Act provides that 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, [there is imposed a duty] to take such steps as it is reasonable to have to take to avoid the disadvantage.

Para 20(1) of Schedule 8 provides that the employer is not subject to a duty to make reasonable adjustments if it "does not know, and could not reasonably be expected to know - … (b) that an interested disabled person … is likely to be placed at the disadvantage referred to …"

Section136(2) provides that: 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. It is then provided that this subsection does not apply if A shows that A did not contravene the provision.

As to burden of proof, the older law in Igen Ltd v Wong [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in Laing v Manchester City Council [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in Madarassy. In the event, this latter case has confirmed the Laing analysis. In particular, "'could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Conclusions

30 July 2015

43. We are not inclined to raise any jurisdictional objection against the Claimant on the basis that this is a claim which is up to year out of time. It seems to us that the Respondent has had no difficulties to in defending the claim. Moreover, if the Claimant on reviewing matters in 2016 only at that point considered that there was discrimination on 30 July 2015, it is understandable that he would wish to bring the claim forward. Overall, there is no injustice or inequity in allowing him to do so.

44. The fundamental problem with this claim is that there is no substance to the allegation. In our view, there is no other conclusion factually than that the store manager instigated the meeting and had every good reason to do so. This is why Ms Burke attended with Ms Rafique. The principal allegation, that they were seeking to remove the unproductive Claimant from the store, has fallen away in the light of the Claimant's evidence and we refer to our

factual findings above. On the contrary, Ms Burke was able to give the clearest evidence that this meeting was intended to support the Claimant and it was not unnatural nor unreasonable that the possibility of finding another work place for him that was more congenial would be aired. In the event, he expressed no interest in this and, in consequence, nothing at all was done after this meeting and there was no attempt to move him. As this was a supportive meeting, its instigation by the store manager could not amount to unfavourable treatment. It is of note that there is nothing else in the case to suggest that there were poor relations between the Claimant and Mr Noor.

45. As far as we can tell, the issue at 3(b)(i) refers to the mere mention during the meeting of the chair; and its configuration at the till being a potential health and safety hazard to other colleagues. Again, this matter was never taken forward and speaking about such matters could not be regarded in any realistic sense as being unfavourable treatment of the Claimant. The further point at sub-paragraph (ii) also fails as a claim because it is not made out in fact. The Claimant was not asked to consider transferring because of business and productivity reasons. There was a reference to transfer in the meeting but that was entirely because there was a possibility that the Claimant might regard such a transfer as being beneficial to him. He did not take that view and the matter was never raised again until the chair lift broke down.

Disciplinary proceedings

46. Sub-paragraph (c) is the instigation of disciplinary proceedings in July 2016. Here, it might appear on the face of matters that this was unfavourable treatment arising from the absences that, at least in part, appear to have been related to (and therefore arose from) the Claimant's disability. A reservation, however, arises from the authority of *Little v Richmond Pharmacology Limited [2014] ICR 85* which guides the Tribunal to look at the outcome in the process, overall. Here, the Respondent acted swiftly to make sure that the decision was put into appeal and that appeal had no difficulty in overturning the verbal warning. This all happened within a fortnight. We would agree with Ms Danvers that, taking a broad view of the incident, this was not unfavourable treatment. In the alternative, the instigation of disciplinary proceedings, even if it is to be regarded as unfavourable treatment and further within the meaning of the section arising from the consequences of disability, is in our view clearly a proportionate means of achieving a legitimate aim (securing satisfactory attendance.) At one point the Claimant advanced the case that he ought to have been subject to an investigation first, but this would surely have led to the same protest which was that any raising of the issue with him was disability discrimination. For these purposes, the disciplinary hearing was an investigation. What particularly makes the Respondent's actions proportionate is that they had twice consciously decided to take no action when they might have done so previously. On this occasion they sought to discuss the matter with the Claimant at a disciplinary hearing and there was no guarantee that he would receive any sanction. Given the terms of the attendance policy, it would be

irrational to hold other than that this was an entirely proportionate and reasonable means of proceeding.

47. Turning then to the verbal warning itself, this is first met by the objection that we have referred to above, namely that it was overturned fairly swiftly and therefore not unfavourable treatment. However, examining the matters on the alternative basis, we have come to the conclusion that this also was a proportionate means of achieving the legitimate aim. The legitimate aim was the Respondent seeking to ensure good attendance on the part of its employees in accordance with a policy that the Claimant accepts is not in itself discriminatory. Ms Burke clearly felt that the sanction of a verbal warning was inappropriate and overturned it, but it does not follow that it was therefore a disproportionate method of ensuring the legitimate attendance aim. In this context proportionality has to take into account (a) that this was the third point at which the Respondent might have acted and it was the first time it sought to do so; and (b) that the sanction involved was the lowest one and the only one permissible namely a verbal warning. Both of these factors together suggest that this was a proportionate way of seeking to achieve the legitimate aim, notwithstanding that a manager soon afterwards took a contrary view. We would note that if the matter had advanced further into the procedure and the Claimant was facing a dismissal decision at the last stage of the attendance procedure, entirely different considerations might apply. In such a theoretical scenario, the dismissal itself is such a drastic sanction that it might in all the circumstances be disproportionate to impose it. However, at this early point in the procedure, when the Respondent had deliberately stayed its hand on two previous occasions, we do not consider that such a conclusion is open to the Tribunal on these facts.

Grievance

48. Sub-paragraph (d) is failing to address, investigate or deal with the Claimant's grievance and complaints of 17 July 2016. Ms Danvers' points concerning this claim have considerable validity. The email of complaint was sent to Mr Gunduz's private email address. It was not in the form that, according to the annex to the procedures, should be used for formal grievances. Mr Gunduz met with the Claimant on 21 July. The initial allegation that the fuller notes might have been fabricated in some manner has fallen completely flat. Since the Claimant did not pursue the matter formally, it is difficult to say that the Respondent failed to address or investigate or deal with his complaints.

49. However, beyond this, if there was any unfavourable treatment, the Respondent is correct to say that it is not open to the Tribunal to hold that it was because of something arising from the Claimant's disability. This case has never been made out. In cross examination, the Claimant even advanced another reason for his criticism of the manager, which was that Mr Gunduz favoured other employees, namely Prem and Zeb. All of this takes the case some distance away from his disability. Of course, we recognise that there might have been circumstances in a different case where the failure to deal properly with a grievance could be because (for example) of

attitudinal problems on the part of the manager which arose directly from his reaction to a particular disability. It needs hardly to be said that this is not the case that has ever been advanced in this instance. Moreover, it has no reflection in the evidence. Therefore, on these alternative grounds this claim fails.

50. There is a further alternative relied upon by the Respondent which is that dealing with the grievance informally in this way was a proportionate means of achieving the legitimate aim set out in the procedures, and they specifically refer to an attempt to deal with matters informally, if possible. In the light of our findings and the above conclusions, it is unnecessary to descend to this alternative defence, but we see no reason why it should fail.

51. Therefore, for the reasons we have briefly set out above, all of the claims at paragraphs 3 – 6 inclusive of the agreed List of Issues, and which arise under section 15 of the Act, fail.

The Reasonable Adjustments Claims

52. We reject the Respondent's submission that there was no substantial disadvantage within the meaning of section 20, because he could have moved to another store from about early June 2016. The Fenchurch Street store being on two floors and the requirement to work there amounts to a PCP and it plainly put the Claimant at a substantial disadvantage. The Respondent is therefore obliged to take such steps as are reasonable to have to take to avoid that disadvantage. He was only employed in the store because there was a stair lift there and the duty was met from the outset of his employment. The problem has arisen because the stair lift broke down. In our view, his decision not to move to another store does not remove the duty to make the reasonable adjustment.

53. The real issue here is whether or not the employer took such steps as were reasonable to have to take to avoid the disadvantage in relation to the broken chair lift. It is in this context that offering to move stores was one of the adjustments reasonably made to avoid the disadvantage. The Claimant was entitled to refuse the offer but the Respondent is equally entitled to say that the offer was made in good faith in order to assist him and we consider this is what happened.

54. What has to be argued for the Claimant, in effect, is that once it broke down the Respondent was obliged to replace the chair lift instantly. Anything short of this would leave the chair lift in its defective state at the premises and the Claimant, while exercising his preference to stay there, could be said to be at a substantial disadvantage. We regard this as an artificial analysis. What the employer did here was to take steps to try to get the stair lift dealt with, either by way of a replacement or a repair. There were many interactions with the three entities that had to be contacted. First, was the facility management company. Second, was ELA who had responsibility for repairing such machinery. Third, and crucially, was Stannah stair lifts whose equipment it was and who, among other matters, would have to be involved in the

sourcing of spare parts. The Respondent was caught here between these various entities; and the additional difficulty was that different engineers appear at different points to have expressed different opinions about the viability of a repair. The Claimant himself referred at the time to visiting engineers and the chronology is summarised by Ms Danvers at paragraph 56 of her closing submission, to which we make brief reference. Initially the chair was to be replaced but it appeared after Stannah visited that it could be repaired. The invoice for £1,987 was paid and the work was completed towards the end of July 2016. Ms Danvers further submits, correctly in our view, that the Claimant in cross examination accepted that the Respondent had earlier made sincere efforts to get the machinery fixed. He compares the time it took with the time taken to repair a broken fridge or a till, but we regard the comparison as invalid. Given the efforts that were being made by the Respondent throughout the chronology, the absence of any evidence of obstructionism on the part of anybody in management, the further absence of any evidence of culpable delay and the offer to work elsewhere, it seems to this Tribunal that the Respondent did take reasonable steps to avoid the disadvantage. We would reject the claim under section 20 in relation to the stair lift.

55. This brings us to the complex question of the hours, which is complicated by the many changes that were made in the Claimant's shift pattern, not only as between four and five days, but in terms of changing hours and days. Ms Danvers takes a rather technical point that there is no PCP that required the Claimant to work specific hours five days a week. She is right that he and other employees could either be asked to, or choose to, work different hours. However, it does not follow that there was no provision, criterion or practice in play here and in our view there was such a PCP. This was that he should work his 39 hours over five days. Put another way, the PCP was that, other than exceptionally or as permitted by operational requirements, ten hour shifts were not permitted.

56. The real problem for the claim here arises in the next part of the analysis because the PCP must put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with those who are not disabled. His case is that a five day shift pattern causes him substantial comparative disadvantage because of the effect on his health and wellbeing. We consider that the evidence for this is remarkably slight. There is no helpful medical evidence in the two GP letters that we have seen. The second of these was prepared in March 2017 during the proceedings and, in effect, merely says that the GP supports the request. It cannot be assumed that somebody without a disability working five days a week would not also get tired, indeed there may be workers without any form of disability who would have many reasons for preferring a four day shift pattern.

57. Beyond this, the Claimant's case, that he is placed at the substantial comparative disadvantage by reason of the shift pattern of five days, is undermined by his own request to undertake that very pattern in October 2015. The request to revert to four days was not accompanied by any assertion that this was related to the disability. The predominant strand in

the Claimant's argument at the time was that he had the contractual right to work on a four day shift pattern and he wanted to hold the Respondent to the contract. This is also the way he framed the matter to Mr Coupe in July 2016.

58. The next point, which hardly assists the Claimant, is that throughout 2016 he was working overtime on the five day shift pattern. At page 174 there are twenty weeks set out and they run from approximately the beginning of December 2015 through to week four of period five in 2016. In sixteen of these twenty weeks, the Claimant was working overtime. Sometimes it was only an hour or two but on occasions he was working forty three, forty five, forty six and forty eight hours. It is difficult to reconcile this with his claim that the five day shift pattern placed him at a substantial comparative disadvantage.

59. Ms Danvers also draws attention to the facts that the Claimant only said the working pattern was harmful to his health after he had contacted ACAS in late July 2016; and that he refused the offer to do fewer hours on a four day pattern. We infer from the evidence that this would have been a thirty six hour week as opposed to thirty nine hours. In our view, taking matters overall, the Claimant has not established that the PCP put him at a substantial disadvantage as the statute requires.

60. When we turn to the issue of knowledge, there is nothing in the evidence to suggest that the initial request to return to the four day shift pattern was because the five day pattern put him at the substantial comparative disadvantage. We agree with Ms Danvers that the first point in time when some constructive knowledge might be imputed to the Respondent is 5 September 2016, after the claim was issued. This was in the meeting with Mr Padden and there was a clear indication that it was the travelling to work that was making the Claimant tired (see page 151). In putting together all of the evidence, including what the Claimant told us, it is difficult even at this stage to know how the tiredness relates to his disability. We are unsure whether the start time has anything to do with tiredness and we know that he has at various points suggested that a 7am start would make travel easier. We are unsure whether travelling to and from work on the fifth day is in itself a difficulty. The alternative could be that he needs more recovery time, but the uncertainty around the extra day off to recover is that in 2016 the shift pattern was changed so that he had a different day off to assist recovery. This was when the Claimant had a day swap so that he did not work five days in a row, but after one week he chose to go back to the existing shift pattern. Therefore, we are finding ourselves in considerable difficulty as to knowing whether the shift pattern (and the Respondent's operational requirement for five days) was causing any tiredness; and, if so, why that was different from the tiredness that any other person who was not disabled would experience given the same working pattern.

61. We have to go on and consider what the position would be if we were wrong in the above conclusions and that the duty to make reasonable adjustments arose; and that the Respondent had actual or constructive knowledge. The

Respondent's case is that it would not be reasonable for the employer to allow him to work the hours that had been agreed back in February 2015 when there was a widespread pattern of flexible working in the store which, on the evidence, caused considerable operational difficulties. It is pointed out that to achieve this, others would have to be requested or required to change their contractual hours. Alternatively, the Respondent would have to "over rota shifts", thereby employing staff who were not required. The next point is that it would be operationally difficult for the manager because absences would involve imposing ten hour shifts on people and that would be unreasonable. There may be ways around this but we accept that there have been a number of occasions where the Respondent has in good faith sought to meet the Claimant's requirements. There is a point beyond which operational practicalities impose such a restraint that the Respondent can reasonably refuse the request. We have come to the conclusion that this is one such point and that the refusal to accommodate 39 hours over four days was reasonable. It is important in the view of the Tribunal to bear in mind that the Respondent offered somewhat fewer hours (possibly three fewer hours) over four days and therefore was able to offer to the Claimant an almost equivalent accommodation. He has regarded this as unacceptable, but in weighing the reasonableness of the Respondent's reaction to his request, it is a fact that is in the employer's favour.

62. We know from the statutory code that we are entitled to take into account the practicability of the step contended for and also whether the step would be effective in preventing the substantial disadvantage. As to the practicability (and also the non-financial costs) we consider that there are real difficulties in requiring the Respondent to accede to the request to work a four day shift pattern. However, we are also concerned that the requested pattern would not necessarily be effective in preventing the substantial disadvantage.

63. In summary, for all these reasons we reject the various claims that have been asserted.

Employment Judge Pearl

24 May 2017

ANNEX A

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL CASE NO.207631/2016

BETWEEN

MR M GAFFER

Claimant

And

SAINSBURY'S SUPERMARKETS LTD

Respondent

AGREED LIST OF ISSUES

Disability (s.6 Equality Act 2010 ("EqA 2010")

1. The Respondent concedes that the Claimant is disabled within the meaning of the EqA 2010 as a result of having suffered from polio as a child.
2. The Respondent also concedes it had knowledge of that disability.

Discrimination arising from disability (s 15 EqA 2010)

3. Did the Respondent act or fail to act in the following ways:

    a. instigated a meeting on 30 July 2015 without reasonable and proper cause to consider adjustments to the Claimant's role;

    The Claimant alleges this treatment was because of his inability to stand for long periods at a stretch which arose in consequence of his disability.

    b. at the conclusion of the meeting on 30 July 2015 determined:

        i. that sitting at the operating check out till Number 6 (the Claimant alleges that this was the only till utilised by him for this task) constituted a health and safety hazard to his fellow colleagues;

        The Claimant alleges this treatment was because of his inability to stand for long periods at a stretch which arose in consequence of his disability.

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ii. that because it was considered that the Claimant was limited in tasks that needed completion, therefore for business and productivity reasons the Claimant should consider transferring from his current preferred store and place of work to another store

The Claimant alleges this treatment was because of his restricted mobility which arose in consequence of his disability.

c. Pursuant to the Respondent's Attendance Policy, instigated disciplinary proceedings and issued the Claimant with a verbal warning on 23 July 2016;

The Claimant alleges that this treatment was because of the inoperational stair-lift and his restricted mobility that caused him to fall sick and take time off and which arose in consequence of his disability.

d. failed to address, investigate and deal with the substance of the Claimant's grievance and complaints as set out in his email to his Store Manager dated 17 July 2016.

The Claimant has not identified what this treatment was "because of" which arose in consequence of his disability.

4. If so, did such acts or failures to act amount to unfavourable treatment?

5. If so, did the Respondent treat the Claimant in such a way because of the "something" that he relies on (as set out above) and did that "something" arise in consequence of his disability?

6. If so, can the Respondent show that the acts/failures to act were a proportionate means of achieving a legitimate aim?

Reasonable adjustments (s.20/21 EqA 2010)

Stairs

7. It is conceded by the Respondent that the Store at which the Claimant works is split over two levels.

8. Is the fact the store is split over two levels a physical feature that put the Claimant at a substantial disadvantage in relation to his employment as compared to those people who are not disabled?

The Claimant relies on the substantial disadvantage of a negative impact on the Claimant's health and wellbeing.

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