



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr PG Sadler

**Respondent:** Wilko Retail Limited

**HEARD AT:** BURY ST EDMUNDS **ON:** 24<sup>th</sup>, 25<sup>th</sup> & 26<sup>th</sup> April 2017.  
24th May 2017 Discussion day

**BEFORE:** Employment Judge Warren

**MEMBERS:** Ms S Stones  
Ms B Shelley

## REPRESENTATION

**For the Claimant:** In person

**For the Respondent:** Mr D Massarella (Counsel)

## JUDGMENT

The Claimant's claim that he was discriminated against by reason of disability fails and is dismissed.

## REASONS

### Background

1. Mr Sadler brings a claim that he was discriminated against by reason of his disability in the form of a back condition, in the circumstances surrounding his dismissal from the Respondent's employment after 16 years service, on 17 November 2015.

### Issues

2. The issues were agreed by the parties' legal representatives prior to a Preliminary Hearing before Employment Judge Laidler on 16 December

2016. She set them out, in the form as agreed by the representatives, in her hearing summary of that date. For our purposes, we need to expand on that list of issues by including in summary form, the allegations. This is because unhelpfully, the list of issues merely referred to the allegations by cross referencing to Claimant's pleaded case.

3. A further complication is that in his witness statement at paragraphs 23 to 29, Mr Sadler made allegations of disability related discrimination that were not referred to or cross referenced in the agreed list of issues. Mr Massarella objected that Mr Salder ought not be allowed to rely on these allegations as part of his case.
4. A list of issues is a useful case management tool, but it does not define the claimant's case in substitution for his pleaded case, see Millin v Capsticks & Others UKEAT/0093/14/RN and Chandhok v Tirkey UKEAT/0190/14/KN.
5. In respect of the allegations in the witness statement to which the Respondent objected, we found that on close analysis, the allegations did appear in the Claimants Second Amended ET1 at paragraphs 28 to 39 and 43. We therefore allowed him to rely on them as part of his case.
6. I set out below the issues as agreed by the parties, as appears on EJ Laidler's Preliminary Hearing summary. I have added in italics a summary of the allegations lifted from the cross referred pleading paragraphs and paragraphs 23 to 29 of Mr Salder's witness statement. The numbering is as in the Preliminary Hearing.

The Claimant has withdrawn his claim of unfair dismissal.

#### Claimant's Disability

The Respondent accepts that the Claimant's spinal injury constitutes a disability for the purposes of the Equality Act 2010.

Accordingly, the issues to be determined by the Employment Tribunal are as follows:

#### The Claims

1. Did the Respondent discriminate against the Claimant contrary to section 15 of the Equality Act 2010 by dismissing him for capability reasons on 17 November 2015? In particular:

1.1.1 Was the Claimant victim of unfavourable treatment arising in consequence of his disability?

1.1.2 What was this unfavourable treatment? The Claimant pleads at paragraph 62 that it was his dismissal and the process undertaken by the Respondent, as set out in greater detail at paragraph 62 of the ET1 rider, as

amended. *Paragraph 62 does not set out greater detail, but merely refers to the entire dismissal process.*

*In his witness statement, under a heading, "Unfavourable Treatment Arising", Mr Sadler makes the following additional allegations:*

*(a) The Respondent refused to consider his medical evidence and comments and became fixated on its own Occupational Health, (OH) report.*

*(b) He offered to get his consultant to verify his advice in writing and the Respondent ignored this.*

*(c) The Respondent relied on an OH report that was too old.*

*(d) The Respondent ignored its own OH report in dismissing the Claimant, in particular the report recommended a phased return to work and did not stipulate that had to be to a different role.*

*(e) The Respondent created a wholly unsuitable adjustment, requiring the Claimant to return to work as a cashier.*

*(f) The Respondent failed to follow its own process in not offering the Claimant 3 alternative suitable positions.*

*(g) Mr Bates tried to goad the Claimant into resigning.*

1.1.3 If the Claimant was treated unfavourably as described above, can the Respondent's actions be objectively justified as a proportionate means of achieving a legitimate aim?

1.1.4 Did the Respondent discriminate against the Claimant by failing to comply with its duty pursuant to section 20 of the Equality Act 2010? In particular:

1.1.5 Did the Respondent maintain PCPs as referred to at paragraph 69 of the Claimant's ET1 as amended? *Those are (a) that the Claimant should be able to lift weights in excess of 15kg and (b) should be able to lift objects from the floor.*

1.1.6 If so, does one or more of these PCPs put the Claimant at a substantial disadvantage in comparison to his other work colleagues who were not disabled?

1.1.7 If so, what is that substantial disadvantage? The Claimant pleads that, he was unable to perform the PCPs at paragraph 69 of his ET1, as amended.

1.1.8 Who should the Claimant's comparator be? The Claimant considers that this should be a hypothetical comparator who is employed to undertake the same work as the Claimant, but who does not have the Claimant's disability.

1.1.9 What are the reasonable steps that the Respondent should have taken to avoid the disadvantage from the PCPs, if any? The Claimant says that the Respondent should have taken the steps set out at paragraph 72. *These are set out as follows:*

- (a) *Placing the Claimant on lighter duties so as to restrict his lifting to 15kg or less*
- (b) *Offering the Claimant a Jack Trolley so that he could raise items to be shelved to a suitable level*
- (c) *To team the Claimant with a buddy to assist him with the tasks he found difficult*
- (d) *To offer the Claimant training to ensure all lifting is done by bending the knees rather than the back*
- (e) *To offer the Claimant physiotherapy or other suitable treatment.*

1.1.10 Were steps taken and were these reasonable, or should further or alternative steps be taken?

1.1.11 Should the Respondent have provided one or more auxiliary aid by way of reasonable adjustment, as pleaded at paragraph 73-74 of the Claimant's claim? *The Claimant says the Respondent should have provided him with a Jack Trolley.*

## Jurisdiction

2. It being acknowledged that at least one aspect of the Claimant's Claim for discrimination is in time, namely the part of the claim relating to the appeal (see paragraph 10 of Judge Hutchinson's record of preliminary hearing). The issues relating to jurisdiction are now as follows:

2.1.1 Whether the discrimination complained of prior to 23.2.16 was conduct extending over a period ending on 23.2.16, pursuant to s.123(3) (a) as pleaded in the Claimant's amended ET1.

2.1.2 If not, whether it is just and equitable for the conduct that might otherwise have been out of time, to be brought, as pleaded in the Claimant's amended ET1.

### **The Evidence**

7. This case was heard over 3 days on 24 to 26 April 2017 on the issue of liability only. We concluded hearing the evidence and submissions at lunchtime on day 3 and elected to give a Reserved Judgment. It was necessary for us to reconvene in chambers, which we did on 24 May 2017.
8. We had before us witness statements for the Claimant, from Mr Sadler only. For the Respondent, we had witness statements from Ms Julie Hill, (a Retail Manager who provided support to the dismissing officer) Mr Ian Bates, (Regional Manager who heard Mr Sadler's first appeal) and Ms Julie Taylor, (Contact Centre Manager who heard Mr Sadler's second appeal). We did not have any evidence before us from the dismissing officer, Mr Jason Bates.
9. We had before us a bundle of documents, properly paginated and indexed, running to page number 230. During the course of the hearing, we added to the bundle, by agreement, the Respondent's Attendance Policy and a copy of an occupational health referral, pages 231 to 238.
10. We had written closing submissions from Mr Massarella for the Respondent. Mr Salder also produced some written submissions prepared by his solicitor at the closing submissions stage of the hearing; these related to whether the allegations in Mr Sadler's witness statement referred to above should be considered as allegations of disability related discrimination. We had already decided in Mr Sadler's favour in that regard, at the outset of the hearing.

### **Law**

11. Disability is a protected characteristic pursuant to Section 4 of the Equality Act 2010.
12. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.
13. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

### **Reasonable Adjustments**

14. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first and third of which might apply in this case, set out at subsections (3) and (5) as follows:-

*“(3) 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...”*

*(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.”*

15. Section 21 provides that a failure to comply with those requirements is a failure to make a reasonable adjustment, which amounts to discrimination.

16. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

16.1 The relevant provision criterion or practice applied by or on behalf of the employer;

16.2 The identity of non-disabled comparators, (where appropriate);

16.3 The nature and extent of the substantial disadvantage suffered by the disabled employee;

16.4 The steps the employer is said to have failed to take, and

16.5 Whether it was reasonable to take that step.

17. The obligation to make reasonable adjustments is on the employer. That means that it must consider for itself what adjustments can be made, thus for example in Cosgrove v Caesar and Howie [2001] IRLR 653 the duty was not discharged simply because the Claimant and her GP had not come up with what adjustments could be made. An employer that does not make enquiries as to what might be done to ameliorate the disabled persons disadvantage, runs the risk that it fails to make a reasonable adjustment.

18. The duty is to make “reasonable” adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective, (Smith v Churchill Stairlifts plc [2006] ICR 524). Our focus should be not on the process followed by the employer to reach its decision but on whether there is an adjustment that should be considered reasonable.

### ***Disability Related Discrimination***

19. Disability Related discrimination is defined at section 15 as follows:

*“(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.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”*

20. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.
21. There are 2 separate causative steps: firstly, the disability has consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).
22. In considering a claim under Section 15, we should identify the, “something arising in consequence of the disability”, the unfavourable treatment and whether the, unfavourable treatment was because of the, “thing arising” in the mind of the person responsible for the unfavourable treatment.
23. If there has been such treatment, we should then go on to ask, as set out at Section 15(2), whether the unfavourable treatment can be justified. This requires us to determine:
- 23.1 Whether there was a legitimate aim, unrelated to discrimination;
- 23.2 Whether the treatment was capable of achieving that aim, and

- 23.3 Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.
24. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.
25. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.
26. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.
27. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.
28. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.
29. The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).
30. The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrington & Rosedale College [2001] ICR 189).
31. In respect of the burden of proof, Section 136 reads as follows:
- "(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.”*

32. The Court of Appeal gave guidance on how to apply the shifting burden of proof under the previous discrimination legislation in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps which we have carefully observed in this case, on the basis that those steps assist equally well under the Equality Act 2010.
33. Section 123 of the Equality Act requires that claims of discrimination must normally be made within 3 months of the act complained of, or such further period as the Tribunal considers just and equitable. Where an act continues over a period of time, time runs from the end of that period, from the last act.
34. A failure to make a reasonable adjustment is not an act, or a continuing act, but a failure to act, an omission. In the case of Kingston Upon Hull City Council v Matuszowicz [2009] ICR 1170 it was explained that in the context of reasonable adjustments, time runs from either when the omission was decided upon, or if there is no evidence of a deliberate decision, when the decision to make the adjustment might reasonably have been expected to have been made. This can lead to a situation where time expires long before a Claimant may have realised, in which case a Tribunal is likely to be willing to find that it is just and equitable to extend time.

## **Facts**

35. The Respondent operates a chain of DIY, Home & Garden Stores nationwide with approximately 20,000 employees. Surprisingly, the Respondent appears not to have in place a system to ensure that staff at any level have equality and diversity training. Certainly, the evidence of the Regional Manager Mr Ian Bates, (who heard the first appeal) and of Ms Julie Taylor, the Contact Manager who heard the second appeal, was that neither of them had any such training and were not aware of such training being provided to employees of the Respondent. In a different case, this might have had significant adverse consequences for the Respondent.
36. The Respondent has an Attendance Policy, (page 231). This aims to encourage employees to maximise their attendance and sets out the impact absence can have not only on the Respondent's business, but on the workload of colleagues.
37. Mr Sadler had been employed by the Respondent at its Ipswich store for 16 years at the time of his dismissal. His role had been what is known as a Merchandiser. This role involved his taking delivered stock from the

warehouse to the store and placing it on the shelves in the store. Occasionally, his role involved assisting in unloading lorries.

38. The products would be conveyed from the warehouse to the shop floor by two alternative means. The first is that they would be contained within cardboard boxes, referred to as totes. These totes would be stacked on top of each other, up to eight at a time. Such a stack would stand at about 1.5 metres in height, sitting on a wheeled trolley.
39. The other means of conveying the stock from the warehouse to the shop floor, for larger products such as bags of pet food or bags of compost, would be in wheeled cages, referred to as uni-cages. These cages would be approximately 1 metre wide and 2 metres high.
40. On 27<sup>th</sup> March 2013, Mr Sadler was subjected to formal action with regards to his attendance, having had 4 periods of absence in the previous 12 months, (see page 130). One of these periods of absence had been for back pain. During the disciplinary hearing at which a warning was administered, Mr Sadler commented that he was experiencing ongoing back problems and that he was taking painkillers.
41. The Manager of the Ipswich Store at the relevant time was a Mr Jason Bates. He is no longer in the Respondent's employment and he was not called to give evidence.
42. From January 2014, because of the back pain that he was experiencing, arrangements were made to give Mr Sadler lighter duties. At paragraph 5 of his witness statement, the only information he gives is that he was given lighter loads to stack. Asked to explain this further in questions from the Tribunal, he said that he was just given lighter loads and that anything heavy was given to a colleague. He was allocated work in sections where the loads were lighter such as stationery, rather than pets, (where the loads were heavier). There was also an arrangement in place whereby if he found himself with a heavy load to lift, he could call upon a work colleague to assist him or to do the lifting for him.
43. On the 18<sup>th</sup> March 2014, Mr Sadler began a period of absence due to back pain and never again returned to work. He was dismissed almost 2 years later.
44. On the 17<sup>th</sup> September 2014, the Respondent obtained an Occupational Health Report, given Mr Sadler's continuing absence. The Occupational Health Physician, (Dr Tayseer Mustafa) referred to Mr Sadler having developed back pain which had been on and off for 2 years or so and had become severe in March 2014. He said that he had difficulty walking and standing for long periods of time and also difficulty with floor level activities, including bending and lifting. Dr Mustafa's opinion was that Mr Sadler was not fit to return to work and that consideration should be given to re-deploying him to work which was more sedentary. No action appears

to have been taken regarding this recommendation and no complaint is made about that.

45. In November 2014, Mr Sadler was diagnosed with slipped vertebrae and he was placed on a waiting list for an operation. He was to remain off work during the intervening period.
46. However, on the 2<sup>nd</sup> June 2015, Mr Sadler was seen by his consultant orthopaedic surgeon, Mr Bhagat. He was told by Mr Bhagat that he no longer needed an operation. This was confirmed in a letter of the 2<sup>nd</sup> June 2015, which is at page 148 and is very short. It simply states that no operative intervention is required and that he has been discharged from Mr Bhagat's care.
47. On the reverse of Mr Sadler's original of this letter are hand written notes. Mr Sadler produced these notes to the Respondents and relies upon them in this case. He asserts that these are hand written notes made by him at the time of his consultation with Mr Bhagat on the 2<sup>nd</sup> June 2015. Unfortunately, we cannot accept these notes as reliable evidence of what may or may not have been said by Mr Bhagat to Mr Sadler during that consultation, for the following reasons.

47.1 In the first place, Mr Sadler admitted in cross examination that actually, most of the hand writing is his wife's, not his.

47.2 In the note, about one third of the way down, it states that Mr Bhagat is a specialist which is "higher" than Occupational Health. That makes no sense whatsoever in the context of the meeting on the 2<sup>nd</sup> June 2015. The note only makes sense in the context that there is later, a dispute between the Respondent and Mr Sadler, with Mr Sadler asserting that Mr Bhagat is senior to the Respondent's Occupational Health Advisors. That dispute was in November 2015.

47.3 Further, a little lower down on page 208, the note makes reference to Mr Bhagat having said that Mr Sadler has been fit to return to work as at the end of August. That cannot be a note of what Mr Bhagat said on the 2<sup>nd</sup> June 2015.

47.4 In the opening lines of the note, it states that Dr Bhagat "*discharged me from his clinic June*". It is not a natural remark to record in a meeting which takes place in June. Alongside that note there is inserted an asterisk, "*he said bending would not make any worse*". That remark is clearly something which has been added as an afterthought. It is not something one can imagine Mr Bhagat would have been likely to have said and the most likely explanation is that in November, whether or not Mr Sadler could bend (as in picking things up from floor level) became an issue in the context of his wanting to return to his old role as a Merchandiser.

48. The Respondent obtained a further Occupational Health report. The referral was made on the 18<sup>th</sup> August 2015. This document was added to the bundle when we asked to see it. It is surprising that the document was not included in the first place.
49. In the referral, the Respondent describes Mr Sadler's role as a, "*CSA Merchandiser nights/mornings merchandising stock from totes and cages onto the shelves*". In a section on the form which calls for an indication of any other possible positions, the Respondent had written, "*we will try to fit Paul in where possible as long as he understands what would be involved. E.g. tills he could stand rather than sitting.*".
50. On a section of the form that asks whether the employee had been seen since absence commenced, the answer was, "*Yes on about 4–6 occasions we started off with some sort of possible return e.g. operation pain management, which now seems to have gone*".
51. In October 2015, the Respondent carried out a risk assessment for, "Delivery Acceptance" which incorporated Mr Sadler's role as a merchandiser. A copy of this Risk Assessment is in the bundle at pages 86-88. There are a number of hazards identified in this risk assessment which are relevant to Mr Sadler, with control measures referred to. For example at item 4 on page 86, for the hazards involved in moving or transporting heavy items, the control measure is that team members were to assess a load before moving it or attempting to move a load outside the individuals personal capability. Similar control measures are identified in relation to hazards such as twisting and turning whilst manoeuvring wheel based stock, moving heavy or awkward palletised stock and handling heavy stock such as compost, paint, bulk pet foods. Of particular note at page 88 items 8 and 9, in relation to filling and storing stock and splitting/sorting stock from deliveries, control measures included, "*the weight of tote boxes is limited to 15kg at Service Centre*". As we understand it, the Service Centre is where the tote boxes are filled before despatch to the stores. The control measures in this section of the risk assessment include a reference to something called Warehouse On Wheels (WOD) trolleys to be used as part of the warehouse racking system, enabling team members to take stock direct to the sales floor thereby reducing the amount of manual handling.
52. The Occupational Health report was produced on the 6<sup>th</sup> October 2015 and a copy appears in the bundle at pages 149 and 150. In terms of background information, Doctor Mustafa explained that Mr Sadler had been awaiting an operation on his back and after a long period of absence since March 2014, the operation had been cancelled. Curiously, this referred to his legs having been pain free and that he had been told by his specialist that because his condition had improved, he would not benefit from the surgery. However, Mr Sadler was said to remain suffering from chronic lower back pain and he says;

*“he is currently able to walk steadily unaided and also able to do gardening which sometimes can be challenging but as long as he is careful with how he bends or sits on floor level activities or sit at floor level he would normally be able to manage things.*

*Unfortunately he has also developed a frozen shoulder which started 8 months ago is being treated with injections and physiotherapy.*

*Currently he has a good degree of movement in the right shoulder but has restrictions of movement above shoulder level.”*

53. It is necessary for us to quote extensively from Doctor Mustafa’s conclusions and recommendations as follows:-

*“... it is my opinion that he would likely be fit to start the phased return to work within the coming 6 weeks.*

*I anticipate that within the 6 weeks his frozen shoulder would hopefully improve with further physiotherapy and therefore he would be able to engage with more physically demanding tasks.*

*However, I would recommend restricting him from lifting objects of more than 15kgs and also from tasks that need repetitive bending and lifting objects from floor level to prevent aggravation of his back condition.*

*I do recommend that he starts with doing half a day every other day and then increase his hours gradually aiming for contractual hours within four weeks. I anticipate the restrictions to be reviewed in 3 months time as hopefully he would be able to engage with more tasks. However there is a possibility that he might not be able to return to his full duties including heavy lifting and repetitive floor level activities but this would need to be assessed after he has been three months in the job.*

*I would also recommend that he is given tasks where he would be able to mobilise easily and he should not be sticking in one position for prolonged periods of time. He needs to keep his back moving. ...*

*All recommendations contained in this report are recommendations only and it is the responsibility and decision of the employer to decide what is and is not a reasonable adjustment.”*

54. Mr Sadler had of course had a series of GP fit notes throughout his period of absence, the last was issued to him on 22<sup>nd</sup> October 2015, copied at page 124 of the bundle. This refers to his unfitness for work due to, *“back pain shoulder pain – under physio”*, but also because of, *“stress related illness”*. That stress was caused, says Mr Sadler, by his being told that it was likely that he would be asked to work on the tills on his return to work, at least initially. Mr Sadler could not recall when he was giving evidence, when exactly it was that he was told that. He recalled that it was in a meeting with Mr Jason Bates. We surmise that meeting was probably on

Tuesday 14<sup>th</sup> October, because in a letter of the 28<sup>th</sup> October 2015 at page 151, Mr Jason Bates refers to their having had a discussion on the 14<sup>th</sup> October. That would then fit in chronologically with Mr Sadler's GP referring to stress on the fit note of 22<sup>nd</sup> October.

55. Subsequently, in the letter of the 28<sup>th</sup> October 2015 that we have just referred to, Mr Sadler was invited to attend a meeting at which a decision would have to be made as to whether to terminate his contract of employment on the grounds of his incapability. That meeting was rescheduled for the 6<sup>th</sup> November. In this meeting, Mr Sadler presented Mr Jason Bates with a handwritten letter, a copy of which is at page 155/156. In this letter, he said that he had been looking forward to going back to work as a Merchandiser with reasonable adjustments in place and complains that the only job that he was to be considered for was working on the tills, which he said had caused him considerable stress and had made him ill. He complained that he could not believe that working on the tills was the only task open to him, that it was going to be hard coming back to work after 19 months off and all the harder coming back to a job which he had not done before, which involved sitting down.
56. In the meeting, Mr Bates referred to the Occupational Health Report and the proposed restrictions on the tasks to be assigned to Mr Sadler, specifically not lifting more than 15kgs, avoiding repetitive bending, avoiding lifting from floor level and the suggestion of an assessment after 3 months. Mr Bates said that he needed to make adjustments to Mr Sadler's role that would not put him at risk and in his view, the cashier position was the only one suitable that did not pose such a risk. He explained that Mr Sadler would be given full training and support, he would make sure that he did not have to sit down all the time and that there would be a further report after 12 weeks (page 162). Mr Sadler protested that this was making him stressed and that he was frightened. Mr Bates sought to reassure him that it would be a phased return to work and that he would make sure that he was allocated to work on quiet days and on quiet tills (page 163). Mr Sadler indicated that he was not going to take the job, he did not regard it as reasonable. Mr Bates asked if he was to take it that Mr Sadler was resigning to which Mr Bates responded that he was being forced to resign, he had taken legal advice and he made reference to constructive dismissal. Mr Bates encouraged Mr Sadler to go away for the weekend and think about it, (6<sup>th</sup> November 2015 was a Friday) and Mr Sadler responded that he could tell him there and then that the answer was no and that he would be seeking legal advice, as he regarded this as atrocious, (page 164). He went on to refer to ACAS, Citizen's Advice, Industrial Tribunals and dragging the Respondent through the mud.
57. Following this meeting, Mr Jason Bates wrote to Mr Sadler on 12<sup>th</sup> November, (page 157). He made reference to Mr Sadler having indicated, notwithstanding their discussions about possible adjustments, Mr Sadler had said that he would not be able to return to work in his current role or in any another suitable role. The letter makes the point that by this time,

Mr Sadler had been absent from work for 92 weeks. He was therefore invited to a further meeting on the 17<sup>th</sup> November 2015, at which his future employment was to be considered. He was warned that the decision to terminate his employment on the grounds of his incapability due to ill health would be taken.

58. The proposed meeting on the 17<sup>th</sup> November 2015 took place. On this occasion, Ms Hill attended. There is a dispute on the evidence at this point. Ms Hill says that it had been reported to her by two people in the canteen at some point before the 17<sup>th</sup> November, that Mr Sadler had told colleagues that he would not accept the role of working on the till because it was, "women's work". She further says that before the meeting on the 17<sup>th</sup> November began, Mr Sadler made that same remark to Mr Bates; she described it as a flippant remark followed by a laugh. This is hotly contested by Mr Sadler. We accept the evidence of Ms Hill for the following reasons:

58.1 Ms Hill was a compelling witness, Mr Sadler was not. For example his assertion that the note of his meeting with Dr Bhagat on 2<sup>nd</sup> June 2015 was a contemporaneous document was not credible. He denied that it was explained to him that the work on the tills would include the opportunity to have breaks by working on the shop floor, when taken to the notes of the appeal hearing on 18 December which record exactly that, he said he had forgotten about that. There were passages in his witness statement he must have known were untrue, such as his statement that his back pain started in 2014.

58.2 He was unable to give a rational explanation as to why he found the role so objectionable. He said in evidence at one point that he did not take it because he did not like the job, he confirmed he would not take the job even if it were offered today, he said that, "*it wasn't me*". The most likely explanation, it seems to us, is that he saw the role as demeaning, as, "women's work".

59. We note at page 167, that Ms Hill's attendance was purportedly on the basis of her being an independent witness. We know from her witness statement at paragraphs 31 and 32 and from her oral evidence, that she actively participated in the decision making, discussing with Mr Bates his decision to dismiss, his reasons for that decision and that she indicated her agreement with it.

60. During the meeting, Mr Sadler referred to his letter from his Consultant Orthopaedic Surgeon. Mr Bates observed that the letter said that he did not need an operation. Mr Sadler said that he was begging him to come back to work. Mr Bates explained that all the jobs that they had available involved lifting and bending and that the cashier role was the most appropriate. He said that the Respondent would support Mr Sadler with training and do anything to make the job easier for him and review the situation after 12 weeks.

61. Mr Sadler was vexed by Mr Bates' reference to there being 3 posts, of which only one was suitable, that of the cashier. Mr Sadler complains now that this had given him false hope at the time. Minutes of the meeting show that Mr Bates explained that he had brought up the 3 roles because he had been told by somebody in HR to do so and to explain why those other than that of cashier were not suitable, because they entailed lifting.
62. Mr Sadler protested that he wanted to go back to his original job with adjustments in place. He said that he could do it without placing anybody at risk and he asked Mr Bates to read the notes on the back of letter from the Surgeon, (page 172). Mr Bates made the observation that this was not information from the medical team. Mr Sadler offered to obtain a written report from him if required. Mr Sadler confirmed that he was still in need of painkiller injections and that he was at the time going through physiotherapy. Mr Sadler also said that his doctor was willing to sign him back to work, (page 174). Mr Bates stressed that he too wanted Mr Sadler back to work, but he had to follow the advice of the Occupational Health Expert. Mr Sadler suggested that report was out of date, being 7 weeks old and Mr Bates responded that it was valid for 12 months.
63. There followed an adjournment during which Mr Bates took advice from Human Resources. Subsequently, Mr Sadler protested that Occupational Health had advised that he should keep his back mobile. He said that his understanding of the cashier role was that he could stand and sit, but it would not enable him to keep mobile, (page 177).
64. Mr Bates explained that Mr Sadler had been absent from work for more than 90 weeks, which was 4 times the usual period of absence permitted. He re-assured Mr Sadler that his Merchandising role would be there and kept open for him, but for the phased return to work, his view was that working on the tills was his best option. Mr Sadler did not agree. Mr Bates concluded by saying that his decision in the circumstances was that Mr Sadler's employment should be terminated.
65. Mr Bates decision was confirmed by a letter dated 23<sup>rd</sup> November 2015, a copy of which appears at page 184. In this letter, Mr Bates referred to the Respondent's duty of care from a health and safety perspective and stated with that in mind, the Respondent had to have regard to the Occupational Health recommendations by looking for suitable work to provide him with within the store, work that avoided repetitive lifting and lifting from the floor. He referred to the letter from the Consultant Orthopaedic Surgeon of 2<sup>nd</sup> June and the notes on the reverse thereof. He explained that this did not give the Respondent sufficient information on how they could support his return to work. In effect, he indicated that the Respondent must rely on the advice from its Occupational Health Advisor.
66. On the same day, 23<sup>rd</sup> November 2015, Mr Sadler appealed against his dismissal using a prescribed form, a copy of which appears at page 186.



He set out in a handwritten document attached, his grounds of appeal, which were:

- 66.1 That he had been dismissed whilst he was covered by a valid GPs fit note;
  - 66.2 He should have received, (in effect) earlier warnings;
  - 66.3 That during his period of absence, it had been down to him to initiate contact with the Respondent and not vice versa, and
  - 66.4 Lastly, that he had never been told the night shift, (on which he had worked) had finished.
67. The Appeal was considered by a Regional Manager, Mr Ian Bates. The Appeal Hearing took place on 18<sup>th</sup> December 2015. The Minutes of this Meeting start at page 191. Mr Sadler complained that the Occupational Health Advisor had not taken into account that he was better, that he did not need surgery. Mr Ian Bates explained that the Respondent had to follow the Occupational Health advice and they were offering alternative roles for a short period of time with a view to reviewing it in 3 months. At page 193, Mr Sadler said that he did not like sitting on tills, that he needed to keep moving and, *"I wouldn't want to do that job. I wanted to come back in my current job."* Later on at page 195 he said, *"You're offering me a role which is not something I want to do."* When asked about this in cross examination, Mr Sadler agreed that he had made that remark and also confirmed that he had said with regard to the job on the tills, *"it wasn't difficult"*.
68. Mr Bates provided an outcome to the appeal in a letter dated 8<sup>th</sup> January 2016, a copy of which appears at page 209. His conclusion was that the decision to dismiss should be upheld. He said on the medical evidence:
- "We have taken advice from our Medigold Occupational Health Report, who are aware of our job roles. We are prepared to support you from a duty of care by moving you to lighter duties as a cashier and would re-address this after three months by referring you again to Medigold following a phased return."*
69. What is clear, is that the option of working on the Respondent's tills remained open to Mr Sadler during the appeal process and he remained unwilling to accept that role. Other grounds of appeal dealt with in the appeal outcome letter, are not relevant to this case.
70. On the same day as the appeal outcome, Mr Sadler took advantage of a further stage of appeal allowed within the Respondent's processes and submitted his further appeal. He indicated that his grounds of appeal would be that the Respondent had not followed its procedures, that he was presenting new information and that he considered the decision too harsh.

71. Attached to the notification of appeal at page 211, was a handwritten document starting at page 212, purportedly providing new information. Amongst the information provided which is relevant to this case, is that at his point 3 on page 213; Mr Sadler said that he felt that because he had been away for so long, more should have been done for him i.e. that more roles should have been offered to him. He complained that the role he was offered was the complete reverse of what he was used to do.
72. The second appeal was heard by Contact Centre Manager, Ms Julie Taylor. The hearing took place on 2<sup>nd</sup> February 2016 and the Minutes of that Hearing start at page 216. During this meeting, Ms Taylor explained that the till role would not just be about sitting at a till, but that it would also involve doing work on the shop floor so as to keep Mr Sadler mobile. She explained that this was just a short term position, so that they could review his fitness in light of the Occupational Health report. Mr Sadler said that he was not convinced that there would be mobility on the till work. Ms Taylor responded that there would be self management of his condition to allow variety within his return to work, which would then give him a better idea of his mobility. The Respondent's concern was to get him back to work in this type of role before considering Merchandising. Once back at work, they could review the situation. Mr Sadler said that he was stressed about the idea of working on the tills, suggesting a handyman role or working in the warehouse. Ms Taylor asked what it was about working on the tills that he did not like, to which he is recorded as responding, *"doesn't really know, idea just feel that it would frighten the life out of him"*.
73. It is clear that even at this stage, the job of working on the till was still open to Mr Sadler. Ms Taylor explained that to him and that accommodation would be made for his concerns.
74. Ms Taylor provided an outcome to this second appeal in a letter dated 23<sup>rd</sup> February 2016, a copy of which is at page 224. In her letter, Ms Taylor recites that Mr Sadler had not been able to explain why he regarded the cashier role as unsuitable and why it was causing him stress. Whilst she dealt with the other grounds of complaint in her letter, they are not relevant to this case. The outcome was that the original decision to dismiss was upheld.
75. Before we conclude our finding of fact, we ought to note that in his oral evidence, Mr Sadler confirmed the following about his back condition since dismissal and presently;
  - 75.1 He still has chronic back pain, in the medical sense, in other words it is ongoing and long term.
  - 75.2 He is still on high levels of pain killers.

- 75.3 He agreed with what was in his amended claim at paragraphs 57 and 59, that he would not be able to function without pain killers, that he would otherwise be in too much pain and that the condition has not resolved and would be life long.
- 75.4 He said that he is very vulnerable to further problems with his back and he has to be very careful.
- 75.5 He agreed that he could do further damage to his back if he was not careful.
- 75.6 He was walking more steadily at the time of the Occupational Health Report than he is now.
- 75.7 He gardens sitting down and cannot weed standing up.

## **Conclusions**

### ***Unfavourable Treatment Arising from Disability***

#### *Ignoring Claimant's medical evidence*

76. Mr Sadler says that the Respondent fixated on its own medical evidence and ignored his medical evidence and comments. This is not correct, Mr Sadler's medical evidence consisted of no more than a letter from Dr Bhagat stating that he no longer needed an operation and a series of GP Fit Notes certifying him as unfit for work. These documents gave no further information, they made no reference to adjustments. Mr Sadler was unable to say what the evidence was that the Respondent ignored and responded in cross examination that he had never said that the Respondent ignored the letter from Dr Bhagat.
77. If Mr Sadler means by this that the Respondent ignored what he had written on the back of the letter from Dr Bhagat, that is factually incorrect in that it is evident Mr Jason Bates took a copy of it and made reference to it during the meeting and in the dismissal letter. It is not unfavourable treatment to attribute little weight to such a document given its obviously doubtful provenance.
78. Mr Sadler has suggested that because on his last GP fit Note dated 15 October 2015, the Doctors had indicated that she would not need to see him again, this meant that she was certifying him as fit to return to work at the end of the certified period, (i.e. to 22 November 2015). That is unsustainable. The Doctor certified him as not fit to work as at 15 October, she was not certifying him as fit, which would require a specific statement to that effect.

*Claimant offered to get own consultant to verify advice.*

79. The Respondent had medical evidence from its occupational health advisors, upon which it was entitled to rely. There is no evidence before us, (other than the discredited hand note of Mr Sadler) that suggests that Mr Bhagat would have recommended anything different or given any information that would have led the Respondent to take a different course of action. It is highly improbable, based on the information we have, that Mr Bhagat would have advised that it would be fine for Mr Sadler to continue lifting and bending on a daily, routine basis. No amount of adjustment would have altered that such actions were an integral part the job. This is particularly so, given Mr Sadler's evidence about the ongoing symptoms he was experiencing at the time. See our findings of fact at paragraph 75.

*The Occupational Health Report was too old.*

80. There is no evidence that there were any significant changes in Mr Sadler's medical condition in the 7 weeks between the publication of the report and the meetings in November 2015. Neither Mr Sadler nor Mr Jason Bates are right in what they said to each other at the time. It is not right to say that the report is valid for 12 months, nor is it right to say that that 7 weeks is too old. Whether a report is out of date and a new report needed, depends on whether the medical condition of the individual concerned had changed. There was no evidence that Mr Sadler's condition had changed.
81. This allegation is not made out because there was no unfavourable treatment, (it is not unfavourable not to seek further evidence when none is necessary). Further, the reason no such further evidence was sought was because none was needed, the Respondent felt it had all the evidence it needed, it was not because of something arising in consequence of Mr Sadler's disability.

*The Respondent did not follow its own Occupational Health Advice:*

82. This assertion is simply incorrect. In cross examination Mr Sadler said that the Respondent did not ignore its OH advice, his complaint was that it did not do what he wanted it to do. It is right to say that Dr Mustafa did not recommend that Mr Sadler return to a different role; he left the decision on what adjustments should be made to the Respondent. His advice was that Mr Sadler should not lift over 15kg or lift from floor. The Respondent followed that advice by coming up with a proposal for an adjustment that avoided those actions, namely assigning him to work on the tills as a cashier.

*The role of cashier was a wholly unsuitable*

83. Mr Sadler acknowledged in cross examination that he could see the logic of Mr Bates suggesting this role as a means to getting someone back to

work on light duties. Contrary to Mr Sadler's assertion, the role was suitable. Mr Sadler is not a technophobe; in answer to questions from the Tribunal, he confirmed that he is comfortable using a modern mobile phone and an iPad. He is a confident person; from his demeanour in tribunal we do not imagine for one minute that he is a person who would have difficulty in dealing with members of the public. His terms and conditions were to remain unaltered. He could not explain why he was frightened. It was made clear to him that he could stand and sit as he chose, he could move around, he would be able to do things on the shop floor from time to time. It was also made clear to him that the situation would be reviewed after 3 months. It seems to us that the role was suitable and we simply do not understand his refusal to take it. The only credible explanation we can see, and we so find, is that he truly did, (unreasonably) regard it as demeaning and as, "women's work".

*The Respondent failed to follow its own process*

84. Mr Sadler argues that the Respondent treated him unfavourably by failing to follow its own process, in not offering him 3 suitable alternative positions. There was no such process. It appears that someone in Human Resources suggested to Mr Bates that he try to offer Mr Sadler 3 alternative positions, but that was not pursuant to any process. As it turned out, there was the one suitable alternative position that could be offered, that of working on the tills as a cashier.

*Goaded to resign*

85. Mr Sadler complains that the Respondent tried to goad him into resigning during the meeting on the 6<sup>th</sup> November 2015. It is clear from all the evidence that we have heard and from the minutes of meetings that we have read, that the reverse is the case. The Respondent through Mr Jason Bates, Mr Ian Bates and Ms Taylor were all trying to persuade him to go back to work. The one piece of evidence that might be said to support Mr Sadler's contention is in the minutes of the meeting on 6<sup>th</sup> November at page 163 where Mr Bates is recorded as saying, "So do I take it from that your resigning". The context was Mr Sadler making it clear that he would not come back and work on the tills. However, in evidence Mr Sadler accepted that Mr Jason Bates wanted him back at work and did not want him to make a snap decision. He accepted that as the minutes show, he was given the weekend to think about it. Mr Bates was not goading him.
86. We find therefore, that none of the above allegations of unfavourable treatment have been made out.

*Dismissal*

87. The final allegation of unfavourable treatment relied upon is the act of dismissal. Mr Sadler was dismissed. That is unfavourable treatment. The Respondent accepts that arises because of his disability.
88. Can the decision to be dismiss be objectively justified?
89. The following aims relied upon by the Respondent are all, in our view, legitimate aims:
- 89.1 Complying with its health and safety obligations and its duty of care to Mr Sadler;
  - 89.2 Ensuring adequate staffing levels;
  - 89.3 Maintaining attendance levels;
  - 89.4 Implementing a nationwide attendance management procedure;
  - 89.5 Freeing up positions for permanent recruitment;
  - 89.6 Saving management time, and
  - 89.7 Dealing with absence from work and staffing in a cost-efficient manner.
90. We agree with Mr Massarella's submission that health and safety and the Respondent's duty of care to Mr Sadler was at the heart of its approach throughout. The Respondent's attendance policy does provide for dismissal in instances of long term absence and Mr Sadler agreed that the Respondent took absence levels seriously. Management time was being taken up dealing with Mr Sadler's absence, which after 20 months, could not be allowed to go on indefinitely. These were the genuine concerns, aims, of the Respondent and they are legitimate.
91. The evidence, (of Ms Hill) was that in fact, the Respondent was short of staff. There was insufficient evidence to conclude that freeing up positions for recruitment was an aim being pursued by the Respondent.
92. Was the means of pursuing these legitimate aims proportionate? The following factors are relevant:
- 92.1 Mr Sadler had been absent for 20 months.
  - 92.2 No pressure had been applied to Mr Sadler to return to work.
  - 92.3 The Respondent had contemplated an alternative to dismissal namely, placing him in a suitable role that did not pose a health and safety risk and was not a threat to Mr Sadler's physical health.

92.4 Mr Sadler was assured the situation would be reviewed after 3 months and that his role as a Merchandiser would still be open to him to return to.

92.5 Mr Sadler was offered training and support in the new role.

92.6 Mr Sadler was assured that the role offered would not entail just sitting down, but the opportunity to stand and to move around. It appeared to be an eminently sensible role to offer a person with a back condition such as that which Mr Sadler had.

92.7 Mr Sadler was unable to offer an explanation as to why he would not take the role.

93. Considerable latitude had already been given to Mr Sadler, an impasse had been reached, the Respondent had tried to avoid dismissal, the point had in our judgment been reached where it was proportionate to make the decision to dismiss. The decision was objectively justified.

### ***Failure to Make Reasonable Adjustments***

#### *The Provision, Criterion or Practice, (PCP)*

94. The PCPs relied upon are that the Claimant should be able to lift weights in excess of 15kg and that he should be able to lift objects from the floor.

95. We do not accept the Respondent's argument that it did not require Mr Sadler to do these things and there were therefore no such PCPs. The Respondent argues that in fact, it required him *not* to do these things, by seeking to place him to work on the tills. In our view, these PCPs were requirements of Mr Sadler's role as a Merchandiser; it was because he could not safely perform his role by fulfilling these two PCP's, (thereby placing him at a disadvantage) that the Respondent sought to make a reasonable adjustment by allocating him to work on the tills.

96. Clearly those PCPs placed Mr Sadler at a disadvantage, compared to someone doing the same role as a Merchandiser who did not have a back injury; he could not do his job without risk of further injury unless some adjustment was made.

#### *The reasonable adjustments contended for*

97. The first is that it is suggested the Respondent should have placed Mr Sadler on lighter duties so as to restrict his lifting to 15kg or less. We note that the Respondent's own risk assessment stipulated that totes should not weigh over 15kg and make the obvious observation that the Respondent ought to follow the advice of its own risk assessments. However, in practice, totes often did weigh more than 15kg. This is not an adjustment that would have enabled Mr Sadler to do his job: he told us he cannot weed the garden standing up, (he has to do it sitting down) and

that he could not at the time, lift anything above shoulder height because of his shoulder issue. So even if it were possible to make sure that all the totes that he was given weighed less than 15kg and that he was never given the uni-cages containing the heavier goods to move, Mr Sadler would still not have been able to perform his role.

98. The second suggested adjustment is the provision of a jack trolley. Mr Sadler provided no evidence of what this was or what it would do. In cross examination, he contradicted himself, saying on the one hand it would lift the totes about one foot off the ground, and on the other hand, he said it would lift the totes to the level of the shelves. He would still have to bend, to the lower shelves and/or to the height of just a foot off the ground. He would still have to lift goods above shoulder height. Therefore, this was not an adjustment that would have enabled him to do his job. He acknowledged as such in cross examination.
99. The third suggested adjustment was to team Mr Sadler up with a buddy to assist him with the tasks he found difficult. Mr Sadler agreed that it would not be practicable to have someone shadow him. His suggestion was that someone should be nearby that he could call on to assist. Actually, if one were to exclude the bending, the lifting above the shoulder, the restriction in weight, the fact that he acknowledged he would have difficulty moving the uni-cages about, one wonders what of the job would be left? Very little. It is not an adjustment that would have enabled Mr Sadler to safely do his job.
100. The fourth suggested adjustment was to offer Mr Sadler training to ensure that all lifting was done by bending the knees and not the back. Mr Sadler acknowledged in cross examination that he knew this anyway and there was no point in any such training.
101. The final suggestion was that the Respondent should have offered Mr Sadler physiotherapy or other suitable treatment. Mr Sadler agreed in evidence that the Respondent could not have done that and in any event, he was to have physiotherapy provided through his own medical advisors. There was no evidence before us as to how such physiotherapy would have assisted Mr Sadler in performing his Merchandising role at that time and remove the disadvantage.
102. Mr Sadler's pleaded case is that the Respondent should have taken one or more of these steps. We therefore reflected on whether one could say that a combination of one or more of the above would together amount to a reasonable adjustment. What if for example, the Respondent were to have combined giving Mr Sadler lighter things to move, given him a jack trolley and allocating him a buddy to call on for help? If the Respondent were to have done all of that, one again finds oneself wondering, what would there have been left there for him to do, if he cannot lift anything over 15kg, cannot move the uni-cages, does not bend and does not lift above his shoulder? Once again, the answer is, very little. It would not be a practical set of arrangements. Furthermore, there is the question of the



Respondent's duty of care to its employees, to provide a safe system of work. Self-evidently, giving Mr Sadler physical work to do, bending and lifting, would carry with it a risk of further injury. His condition had previously become worse at a time when he had been allocated, "light duties". It is not reasonable to expect the Respondent to take that risk.

- 103. A separate reasonable adjustment contended for as an auxiliary aid, is the Jack Trolley, we have dealt with that above.
- 104. The adjustment the Respondent proposed was, in our view, a reasonable adjustment:
  - 104.1 Mr Sadler would be able to stand and sit;
  - 104.2 He would be able to move around;
  - 104.3 He would be able to perform tasks on the shop floor to enable mobility;
  - 104.4 There was nothing about the job that made it impractical for him to do it, other than his own prejudice;
  - 104.5 His terms and conditions were to remain the same;
  - 104.6 It was to be temporary, with a review after 3 months, and
  - 104.7 He would be able to go back to merchandising, if his health sufficiently improved
- 105. In summary, the adjustments Mr Sadler contends for were not reasonable and in any event, the Respondent had complied with its obligation to make reasonable adjustments, because the adjustment it proposed was reasonable. It does not become unreasonable, just because Mr Sadler did not like the role he was offered.

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Employment Judge Warren, Bury St Edmunds.  
Date: 26 May 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS