



EMPLOYMENT TRIBUNALS

Claimant: Mr G Chance

Respondent: Booker Limited

HEARD AT: WATFORD **ON:** 3rd, 4th, 5th & 6th July 2017
(Hearing) 10 July 2017 (Chambers)

BEFORE: Employment Judge Smail

MEMBERS: Mrs S Goldthorpe and Ms S Hamill

REPRESENTATION

For the Claimant: In person

For the Respondent: Mr L Ashwood, Solicitor.

JUDGMENT

1. The Claimant was at all material times a disabled person under the Equality Act 2010.
2. The Respondent dismissed the Claimant arising from his disability and is liable to the Claimant under section 15 of the Equality Act 2010.
3. The Respondent failed to make the reasonable adjustments of placing the Claimant on amended lighter duties and is liable to the Claimant under sections 20 and 21 of the Equality Act 2010.
4. The Respondent indirectly discriminated against the Claimant by applying the 85% picking rate to him without allowing him to perform amended lighter duties, and is liable to the Claimant under section 19 of the Equality Act 2010.
5. The Respondent unfairly dismissed the Claimant.

6. The Claimant's compensation both for unfair dismissal and disability discrimination will be reduced by 50% because of his unco-operative and sometimes rude behaviour whilst still employed which contributed 50% to his dismissal.
7. There will be a remedy hearing with a time estimate of 1 day on 16 November 2017 at the Watford Employment Tribunal.
8. The Claimant will serve upon the Respondent (not the Tribunal) by 4pm on 20 October 2017 a revised schedule of loss together with any documents in support.
9. The Respondent will serve, if so advised, a counter-schedule of loss with any documents in support on the Claimant (not the Tribunal) by 4pm on 3 November 2017.
10. The Respondent will prepare a Remedy Hearing bundle and serve a copy of the same on the claimant by 10 November 2017. It will bring 5 copies of it to the Tribunal for use by the Tribunal on the morning of 16 November 2017.

REASONS

1. By a claim form presented on the 27th September 2016 the Claimant claims unfair dismissal and disability discrimination. The Claimant was employed by the Respondent as a Warehouse Operative between the 1st March 2001 and 6th May 2016. He was dismissed for misconduct in wilfully failing to meet a picking rate in the alternative for capability in not being able to comply with a picking rate.
2. The Claimant has claimed that he was a disabled person within the meaning of the Equality Act 2010 in that he had a susceptibility to inflammation and pain in the groin and hip and this restricted his ability to pick. The Respondent has put disability in issue. It had denied knowledge of the factors that might constitute a disability but at this hearing it has been conceded that if the Claimant was a disabled person, they had knowledge of it.

The Issues

3. These were defined at a Preliminary Hearing before Employment Judge Southam on the 16th December 2016. Whether the principal reason for dismissal was the fact that the Claimant had raised a matter of Health and Safety was one of those issues. That issue has not been pursued by the Claimant before us; he accepts that the reason he was dismissed

was connected with a failure to achieve picking rates not the automatically unfair one of having raised a matter of Health and Safety.

4. The matters we have to determine then are as follows:-

(1) Disability discrimination – Reasonable Adjustments

- (a) Was the Claimant a disabled person?
- (b) Reasonable adjustments – it is not in dispute that the Respondent applied to its pickers in the ambient section as a provision, criterion or practice (PCP) the requirement to pick at least 85% of a target of 210 cases per hour. Did that requirement place the Claimant at a substantial disadvantage compared with non-disabled pickers? The disadvantage the Claimant alleges is that his condition prevented him from meeting the requirement.
- (c) Did the Respondent know or could they have reasonably have been expected to know that he was put to that disadvantage?
- (d) Did the Respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage?

(2) Indirect discrimination

Did the Respondent apply a provision, criterion or practice which is discriminatory in relation to the Claimant's disability, i.e:-

- (a) Did it or would it apply it to persons with whom the Claimant does not share the characteristic?
- (b) It put or would put persons with whom the Claimant shares a characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it?
- (c) It puts or would put the Claimant at that disadvantage and the Respondent cannot show it to be a proportionate means of achieving a legitimate aim.

(3) Discrimination arising from disability

- (a) Was the Claimant treated unfavourably because of something arising in consequence of his disability?
- (b) Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

(4) Unfair dismissal

Was the reason, or if more than one, the principal reason for the dismissal the potentially fair one of misconduct or capability? If so did the Respondent act reasonably or unreasonably in the circumstances including the size and administrative resources in treating it as a sufficient reason for dismissing the employee?

The Law

5. The definition of disability is dealt with below. The duty to make reasonable adjustments for a disabled person is dealt with under Section 20 of the Equality Act 2010. By Section 1 sub-section 3 the first requirement is a requirement where a provision, criterion or practice of the Respondent puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. By Section 21 subsection 1 the failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments.
6. Knowledge of disability and its impact is provided for as follows under paragraph 20 of Schedule 8 to the 2010 Act. Sub-paragraph 1 provides that a Respondent is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the requirements of Section 20.
7. Indirect discrimination is dealt with under Section 19 of the Equality Act 2010. By subsection 2, a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of the employee, which includes the disability, if:-
 - (a) The Respondent applies or would apply it to persons with whom the employee does not share the characteristic;
 - (b) It puts or would put persons with whom the employee shares a characteristic at a particular disadvantage when compared with persons whom the employee does not share it;
 - (c) It puts or would put the employee at that disadvantage; and
 - (d) The Respondent cannot show it to be a proportionate means of achieving a legitimate aim.
8. Discrimination arising from disability is covered by Section 15 of the Equality Act 2010. By subsection 1 an employer discriminates against a disabled employee if:-

- (a) The employer treats the employee unfavourably because of something arising in consequence of the employees disability; and
 - (b) The Respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. By subsection 2, subsection 1 does not apply if the employer shows that the employer did not know and could not reasonably have been expected to know that the employee had the disability.
9. Unfair dismissal is covered by Section 98 of the Employment Rights Act 1996. By subsections 1 and 2 it is for the employer to show that there is a potentially fair reason for dismissal, in this case conduct or capability are relied upon. By subsection 4 where the employer has fulfilled the requirements of subsection 1, the determination of the question whether the dismissal is fair or unfair having regards to the reason shown by the employer:-
- (a) depends on whether in the circumstances including the size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.

Burden of Proof

10. Burden of proof is important in discrimination cases by Section 136 subsection 2, if there are facts from which the court could decide in the absence of any other explanation that the Respondent contravened the provision concerned, the Tribunal must hold that the contravention occurred; but by subsection 3, subsection 2 does not apply if the employer shows that the employer did not contravene the provision. What this means is if there is a prima facie case that there was discrimination, the Respondent must show that its decision-making was not tarnished by discrimination in any way whatsoever.

Concessions made by the Respondent

- 11. The first concession is that if the Claimant was disabled then the Respondent accepts it knew he was disabled by virtue of 'an issue', as they put it, with his left hip/groin.
- 12. The second concession is in terms of indirect discrimination: that the Respondent accepts that the PCP of requiring 85% compliance with target resulted in the disadvantage of dismissal.

13. The third concession, in respect of Section 15 discrimination arising from disability, is that the dismissal was unfavourable treatment done because of something arising as a consequence of the Claimant's disability.

Disability Ruling

14. As a preliminary matter we decided with the parties consent to determine whether or not the Claimant was a disabled person at all relevant times for the purposes of this case. The relevant period is mid 2015 to the 6th May 2016. The Respondent has conceded that if he was, then they had knowledge of it all relevant times. Section 6, subsection 1 of the Equality Act 2010 defines disability for the purposes of the Act as:-

“A person has a disability for the purposes of the Act if he has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on his ability to carry out normal day to day activities.”

15. The Respondent concedes that the Claimant did have a physical impairment which they record as ‘an issue on the left side of his groin and in the region of his left hip’. The Respondent also concedes the long-term nature of the impairment.
16. The issue for us is whether the impairment had a substantial adverse effect on his ability to carry out normal day to day activities. We can perhaps do better than describing the impairment as ‘an issue’ on the left side of his groin. The Claimant, we accept, went to see Mr Matthew Mojsak a registered Osteopath initially in July 2015, and again after dismissal in October 2016. Mr Mojsak described the impairment as ‘a groin injury which is a strain to the abductor and iliopsoas muscles’. According to Mr Mojsak, the strain was most likely caused by repetitive movement. Osteopathic treatment was recommended in the form of hands on manipulation of the joints and muscles, postural exercises, advice regarding working posture, stretches and strengthening exercises. In a letter dated the 17th November 2016 Mr Mojsak went on to describe the impairment as tendonitis involving the abductor and iliopsoas muscles.
17. We have also seen a letter from Mr Paul Thawley dated the 10th January 2017, again obtained after dismissal and addressed to the Claimant's GP. Mr Thawley is a sports physiotherapist and a clinical teaching fellow at University College London. He writes, and we quote:-

“I have had a long discussion with Gabriel about his history. He is somewhat upset that he is not working and his level of activity is greatly reduced with a young family, and he is currently unemployed. He has an unremarkable past medical history and takes Ibuprofen and Paracetamol for the pain. Looking at him he is

standing with his left hip shifted to the right slightly, and slightly rotated. I screened lumbar spine which is extremely stiff when he flexes forward and extends. He also describes some night time pain and stiffness with his lower back however a slump test straight leg raise and all other special tests including quadrant for the lumbar spine do not reproduce his groin pain, and I cannot identify any radicular referral into the left groin from the lumbar spine or SIJ joint. Looking at his hip he has a painful straight leg raise, he is tender over his left groin and he has a mildly positive FADIR test and he certainly gives all the symptoms of having femoroacetabular impingement of this hip. He has had x-rays which are clear but often in FAI you do not have a positive x-ray and it is often MRI arthrogram which gives you the most information. If he does not have this, in my professional opinion he may well have a deep lying hernia which has been undiagnosed, but either way there seems to be some groin pathology. Resisted tests are weak in abduction and functionally he is de-conditioned due to the pain in his groin and being unable to work out with exercise to strengthen himself. He is also having difficulty with his family in carrying his young children due to the pain he is in."

18. So there is a variety there of sources of medical opinion expanding on the concession that there was an issue in the groin area. It is fair to say that much of the source information about the impairment comes from the Claimant himself, accordingly much may turn on whether the Claimant's evidence or Claimant's account is accepted as being genuine.
19. The Claimant has told us that the repetitive picking causes inflammation to the groin area and sensations of sharp electrical pain flowing through the groin area down his left leg. He has been referred by the Respondent to Occupational Health once in April 2015 and on another occasion in November 2015. The latter was not a successful meeting because it seems the Claimant distrusted the request to sign a consent form. Be that as it may, we do have a record albeit an incomplete record, of the first meeting the Claimant had with Dr Thornley who is an Occupational Health Specialist. His letter is incomplete because there was space for a recommendation only part of which is present on the letter that we have, and it seems no one at the Respondent followed it up to obtain a completed version.
20. Dr Thornley tells us that he saw the Claimant on the 13th April 2015. The Claimant is a Warehouse Operative. From September 2014 he had 3 months off work with pain in his leg and hip. The Claimant informed him that he had this problem for 7 or 8 years on and off but it got worse, prior to going off the pain starts in the middle of his back and radiates downwards into his hip and knee joint. It gets worse when he does his work and easier when he is off work. He has had, it was recorded, physiotherapy and has had an x-ray of his knee and hip which did not find any abnormality.

21. The Claimant informed him that when he first started the target rates were much lower than they are now, and he says what he is contracted to do is all he is prepared to do. He generally managed to achieve 85% target, which is the minimum target, because he chose to work more slowly on picking and work more quickly on loading to bring up his average. Dr Thornley expressed the view that there seemed little prospect of the Claimant changing his opinion that he could not work any faster. He reported that the Claimant did not take pain killers because they did not work. Dr Thornley expressed the view that the reason for the pain was not clear, but is most likely a muscular type pain. It did not appear to be a slipped disk or sciatica. In his conclusions, Dr Thornley found that the Claimant stated he had a long-term problem with pain in his back and hip, and notwithstanding no underlying cause had been found for this reported pain, it seemed unlikely that the problem would go away in view of the many year history. The Claimant's apparent hostility towards the current picking targets may be a contributory factor to his perceived pain level; the Claimant said he cannot or will not work faster on picking because of the pain. Dr Thornley was not sure how much that was matter of principle and how much is limitation caused by the pain. He recorded the Claimant's position that there would be less pain if there was more variety in his work. Given the long-term nature of the problem, it was quite possible that the Claimant would report further exacerbations which could potentially lead him to going off sick. Dr Thornley concluded his letter with an opening to a sentence saying:-

"In view of the fact that he does manage to continue working albeit more slowly he should be"

and Dr Thornley's recommendation is missing. It is of course an unfortunate matter that - and the Respondent has no documentary evidence that the Respondent obtained Dr Thornley's final position. But what is clear from Dr Thornley's account is that as the Tribunal has already intimated much is going to turn on whether what the Claimant says is genuine or whether he's in a sense making it up as part of a political - as it were - campaign against the level of targets set.

22. The Respondent submits the Claimant is not being truthful about what he cannot do. The Claimant describes in his witness statement a position he has repeated before us: he says that he was first off in 2006 with hip and groin pain after falling down a few steps and over the years he has taken pain killers whenever the same type of pain would occur. The Claimant says he never thought much of the injury at first, or if the fall was the main cause; all he knows is that the more years he has worked, the more the pain levels increase. This mostly happened when he was picking as opposed to doing other functions of the warehouse operative because of the intense way of working. He had targets of 85%, the 100% target is 210 cases per hour to load from the warehouse bays onto a pallet. As the years went by he found himself picking more, and taking more pain killers to help him get through the shift. Even when

away from work he told us that he would have days when the pain would kick in, he would take pain killers and in 2014 the pain was almost every day, reaching his knee cap as well. He finally went to the Doctor in April 2014 and he was sent for an x-ray on the left side of his hip and knee. The results came back as no problem with the bones, so he was then sent off for physiotherapy and given exercises in respect of muscles. He tells us that at around that time, so 2014 onwards, his ability to pick became less because he knew if he rushed around, the pain would become unbearable and he would probably have to go off sick again. Even when following Health and Safety precautions the pain was there. He could only manage so much and picking every day never gave him a chance to get better. He went to see an osteopath in July 2015 and we have made reference to that. 85% of the target he struggled to achieve.

23. The Respondent in its submissions, and after cross examination conducted by Mr Ashwood, has pointed to a variety of matters that the Claimant can do. We are reminded that the Claimant can do household and cleaning tasks, he can do the entire range of work of a hygiene employee which includes sweeping a room, cleaning a floor, emptying bins, cleaning of toilets, hovering carpets, dusting – all of those are normal day to day activities which we know the Claimant does also at home, being the primary carer for his two children. The Claimant worked nights to earn money and looked after the children during the day and we know he can cook, and bathe the children although a posture for holding the baby in the bath for an extended period of time can cause some pain. Turning to what he can do at work and this really represents the Respondent's principal position in support of submission that the Claimant is not disabled. The Claimant can lift and move cases of up to 25kgs in weight, indeed on his evidence he could pick 700 to 1000 cases a day depending upon their weight without causing himself any pain and that is what he did from mid 2015 until his dismissal. We do need a cautionary note about that submission because of course 700 to 1000 cases is significantly below the target level and would and did lead to dismissal for incapacity. We are also reminded that the Claimant told us that whilst he cannot run and play football anymore he can walk for 1 to 2 miles as he told us he did on holiday in Tenerife.
24. There are then some references to the guidance on the definition of disability, for example the guidance tells us that total inability to walk obviously leads to a position of disability; some tiredness or minor discomfort as a result of walking unaided for a distance of about 1 mile is an example of something which is not likely to lead to a conclusion of finding of disability.
25. It is important that we make the finding of fact as to what we accept as being true from the Claimant because there have been a number of suggestions that his evidence is unreliable. We accept from the Claimant that the physical impairment, which is accepted as a physical impairment by the Respondent, is aggravated by repeated picking. We accept from him that attempts to up the picking rate from more than the

700 to 1000 he was comfortable with, depending on the weight of the cases, did involve a greater likelihood of inflammation and pain in the groin area. The 700 to 1000 cases per day is significantly less than the target of 1575 which is the 100% figure and 1338 which is the 85% figure. We have seen a graph in the papers prepared by the Respondent which shows a gradual reduction in the Claimant's ability to lift these cases, comparing positions as it was in 2013 and then at the end of his employment, he was lifting something like two thirds of what he lifted previously. We do not find that this is some cliff edge political response by the Claimant to a campaign to change his working conditions. We find that there has been a genuine reduction in his ability to move the loads consistent with aggravation to his physical condition. We accept the Claimant's account of his injury and the effect of it.

26. So on those findings what do they mean for the preliminary question we have to answer? The pivotal question in this disability enquiry is whether the evidence amounts to a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. We are most grateful to the Respondent's Solicitor Mr Ashwood who has brought to the Tribunal's and indeed the Claimant's attention the case of **Banaszczyk v Booker Limited** [2016] IRLR 273 a decision of the Employment Appeal Tribunal, one of His Honour Judge David Richardson which was handed down on the 1st February 2016. The decision relates to a warehouse operative who was also employed in the Respondent's distribution centre at Hatfield, as was the Claimant. The same target applied to Mr Banaszczyk as did the Claimant namely 210 cases per hour on a 100% basis. Mr Banaszczyk was involved in a car accident in February 2009 and suffered a spinal injury, he too was referred to Dr Thornley who concluded in a letter dated 16th October 2012:-

"He has a long-term problem with back pain. He is genuinely unable to reach his target picking speed. His performance is not likely to improve in the foreseeable future. He may have further set back leading to absences from work. If he cannot sustain the present arrangement with his impaired performance you may eventually need to consider his continuing employability."

27. Mr Banaszczyk was not hitting his target, he was achieving the 85% for half the time and for the rest of the time was at 70-80%. He was dismissed for incapability in July 2013. His Honour Judge Richardson overturned the decision of the Employment Tribunal that the Claimant was not disabled. Important elements of the decision were as follows:-

13.1 European Law requires that normal day to day activities are to be regarded as including normal work activities. Picking is a normal work and therefore day to day activity and that includes lifting weights up to 25kgs.

27.2 Whether an impairment has the substantial or adverse effect on the normal day to day activity requires a focus on the impact of the

impairment on the individual. The question is not whether the individual is disadvantaged compared with the population as a whole.

27.3 In the light of Dr Thornley's report on Mr Banaszczyk, Mr Banaszczyk did have an impairment which had a substantial adverse effect on his ability to carry out his normal day to day activities, indeed His Honour Judge Richardson said "no other reading of the evidence was feasible".

27.4 The time taken to perform an activity must be considered when deciding whether there was a substantial effect. The effect of the Claimant's long term physical impairment in the Banaszczyk case was that he was significantly slower than others and significantly slower than he would have himself been but for the impairment when carrying out the activity of lifting and moving cases. Lastly, at paragraph 50 of the Judgment His Honour Judge Richardson summarised the matter he said:-

"Put shortly the day to day activity was the lifting and moving of cases up to 25kgs, the substantial adverse effect was that the Claimant was by reason of his back conditions significantly slower in carrying out this activity. The pick rate imposed by the Respondent was not the activity, but it was potentially a barrier which interacted with the Claimant's disability to hinder his full participation in working life."

28. To conclude then on the issue of disability in the present Claimant's case, we remind ourselves that substantial means more than minor or trivial. We find that the impairment did have a substantial adverse effect on the Claimant's ability to pick such that he could not pick at the rate required of him. He picked slower than he would have picked were it not for the impairment; he would have been able to pick at the rate required of him were it not for the impairment. We have already made reference to the gradual decline in his performance shown by the graph which is consistent with the aggravation of the impairment from 2014 which is consistent with the description given as to the history from the Claimant.
29. We do not see a cliff edge refusal as a protest at increased targets. Because of the gradual aggravation of the impairment, the Claimant was not able to achieve tasks he previously was able to do, indeed we note he was picking eventually in the end at a rate significantly less than Mr Banaszczyk did. The difference in rates between what he might have done and what he could do towards the end of his employment was a substantial one, it was adverse. That towards the end he was able to pick 700 to 1000 cases per day, and indeed was not taking time off work, both points relied upon by the Respondent, do not mean in our judgement he was not disabled. The Claimant was disabled because his physical impairment was having a substantial adverse effect on his ability to carry out the normal day to day activity of picking; as we say, at

the end of his employment he was picking at a fraction of the rate he was picking for example at 2013.

30. Therefore, we find that the Claimant was legally a disabled person at the latest from the period relevant to this case, mid 2015 to the 6th May 2016.

Liability

The Evidence Heard

31. The Tribunal heard evidence from the Claimant and his former colleague Mr Joseph Saah. Mr Saah remains an employee of the Respondent, Mr Saah accompanied the Claimant to a number of meetings. On the Respondent's side, we heard evidence from Mr Andy Tabois who is the Operations Manager at the warehouse, he made the decision to dismiss. We also heard from Mr David McCallum, he is the General Manager for the South.

Findings of fact

32. The Respondent is a cash and carry wholesalers that provides retailers and restaurants with food, drink and other goods. The Respondent either delivers directly to its customers or customers visit one of the cash and carry branches across the UK to buy items in bulk at wholesale prices. The relevant warehouse for the purposes of this claim was the distribution centre in Hatfield. We were told that the Respondent handles 1.8 million cases of stock each week at the warehouse. The warehouse is about the size of 8 football pitches with 68 aisles containing approximately 20,000 spaces for pallets. The aisles range from about 45-75 metres long and have racking on either side which is 10.3 metres high. The warehouse receives goods in bulk from suppliers. There are four types of goods at the warehouse; "ambient" (goods which are held at room temperature throughout the warehouse); "chilled" (held in a refrigerated area at +3°C); frozen (held in a refrigerated area at -25°C) and "tobacco" (held in a secured area owing to their high value).
33. The Claimant started at the warehouse in November 2003. He was employed as a warehouse operative. There are a variety of duties or combination of duties within the role, the first is picking, secondly fork lift driving/counter balance; goods in checking; repair and recouping of damaged products; battery changing of manual handling equipment; loading; and lastly hygiene.
34. In 2005 the Respondent introduced a new incentive scheme with reference to picking rates. The minimum pick rate was 144 cases per hour, in July 2007 this was increased to a minimum of 155 cases per hour which was 85% of the target of 182 cases per hour, and then from

June 2009 the 100% pick rate was increased to 210 cases per hour, the 85% minimum being 179 cases.

35. The day was 7.5 hours long with a break in the middle of 45 minutes. The cases vary in terms of size and weight, the maximum weight of a case is 25kgs, bleach and alcohol is regularly packed to that weight. Other goods such as tissues, crisps and sweets although large in size would be relatively light in weight. A shift could involve picking a variety of weights, sometimes there would be a greater concentration of heavier weights than others. The warehouse was laid out in terms of bus stops, sometimes there could be a considerable distance between the bus stops for picking. Between bus stops the picker would drive an electrical vehicle known as a low level order picker or "LLOP" which lifts and carries two wooden pallets behind it. The picker then places the cases onto the pallets in accordance with electronic instructions given over the equivalent to a large wrist watch. The target then for the full 7.5 hours shift would be 1575 cases as a 100%, and the 85% target equates to 1339 cases.

36. The targets were the subject of a collective agreement with USDAW in April 2015 when there was an update to the September 2014 version. Section 21 of the agreement related to performance management. Poor performance was defined as a failure to carry out any role to the required company standard. The minimum standard required for a colleague is an 85% performance, any performance below that figure is defined as poor performance. Identifying and reviewing poor performance would be done on a weekly basis. In circumstances of poor performance for one day in a normal working week data will be excluded unless there are repeated patterns and trends emerging. If a colleague under performs on a single task repetitively i.e. picking but a performance of 85% or above is achieved for the week overall by over achieving on another function i.e. fork lift truck work or loading, then the colleague may be performance managed for the under performed task. Qualifying this however, was a provision that each individual may have different circumstances to their performance which would be taken into consideration; certain situations and circumstances would necessitate an individual action plan. There was then a procedure for performance management. Before September 2014 the 85% related to overall performance. In September 2014 we have the development that there has to be performance of 85% in relation to each function. This was explained to us as ensuring that colleagues would not deliberately under perform on one area, for example picking, and over perform on another. This was felt to disincentivise those who could pick at the required rate. It seems to have been universally agreed that picking was the most physically demanding of tasks. For example, loading would require loading of completed assembled pallets onto vehicles by a specified time as assigned on the load plans. The loading was done with a small electric vehicle similar to a fork lift truck called a powered pallet truck (PPT). It is the Claimant's case that this involves significantly less bending and lifting than picking. Whilst we did not see these, we were

told that provisions relating to reasonable adjustments are contained in the Respondents sickness absence management policy.

37. In his appeal outcome letter Mr McCallum suggested that all colleagues were expected to be able to achieve the minimum pick performance provided they did not have a medical condition that prevented them. Whether that was followed in this case is one of the issues that concerns us.
38. The Respondent operates three shifts – two during the day and one at night. The Claimant had to work night shifts because he had caring obligations for young children during the day.
39. On the 5th February 2010, the Claimant was issued with a verbal warning for failing to reach the minimum company standard in Week 43 when he achieved 83.75% and Week 44 when he achieved 77.16%. The warning followed a meeting with Andy Gower the Warehouse Section Manager, with Alan King the Night Section Manager present. The Claimant did raise the argument that to achieve the rate could compromise safety. It was explained that the Respondent had introduced a company to conduct a time study analysis, and they concluded that the revised target was appropriate. The Claimant appealed the warning but unsuccessfully.
40. Between 2010 and March 2015 the Claimant tells us he mixed loading and picking duties with the effect that he met his targets. He tells us that it was the loading which assisted him in reaching the target. It seems he over performed on loading and on his account under performed on picking.
41. He was observed on the 8th April 2010 by Scott Grant which is the company that conducted the work/time study which resulted in the increase of the target. The assessment was that the Claimant was perfectly capable of good performance but was deliberately working excessively slow. In the course of the observation, according to the person conducting the observation, there was no obvious impediment to the Claimant's achieving a standard performance, that was back in 2010.
42. The new policy that there had to be 85% achievement in each type of activity came in September 2014. The Claimant was absent from work for 3 months, the 23rd September 2014 to the 4th January 2015, which is 67 working days. He had a problem with the left hip as recorded above. We have been shown a graph recording the Claimant's performance between April 2013 and the end of his employment in or around January 2016 when he went off sick prior to his ultimate dismissal in May 2016. The graph records both the number of cases per hour and the performance as a percentage of the target. From the end of November 2013 down to January 2016 there is a consistent decline in performance from one hitting the 85% minimum rate to one around the 50-60% mark. This covers a period of about a year and half.

43. At the time the Claimant started not to hit his rates he was placed on picking duties only, this was because it is the Respondent's position that a warehouse operative must be able to pick at the rate of 85%, picking being the most onerous duty. As Mr Tabois tells us in his witness statement, it was agreed with the Trade Union that short fall on picking rate could not be made up elsewhere such as loading because to do otherwise would undermine the principle that those that achieved on picking were rewarded with being given other functions or tasks. On the 26th March 2015 the Claimant had a performance review. He was counselled for performance on the 13th April 2015. He was referred to Occupational Health on the 14th April 2015. He was given a verbal warning on the 28th May 2015 and a first written warning on the 8th July 2015. A further referral to Occupational Health was not an effective meeting on the 11th November 2015, as described above. A final written warning was issued on the 1st December 2015 following a disciplinary hearing. There followed several attempts at arranging a further disciplinary hearing which ultimately took place on the 6th May 2016 when the Claimant was dismissed.
44. It is important to track what the Claimant was saying about the reasons for his under performance and what the Respondent did in response or to inform themselves of the situation.
45. Following his return to work on the 4th January 2015 there was a return to work meeting. The reasons for absence were recorded as problems with his hip/leg left side. It was agreed that there would be a referral to Occupational Health and the reference had been made on the 8th January 2015. The Claimant informed the manager the he was fully fit to return to work and to use the manual handling equipment, at the same time he informed the Respondent that he was continuing treatment. The manager made the comment on the form that he had informed the Claimant that a long term sick review would be held with Mr Carpenter, the Night Time Training Officer, but also that the stage 1 disciplinary meeting that had been arranged before he went sick would still be held.
46. We see that in March 2015 the Claimant achieved in a week a performance of 55.12%.
47. On the 13th April 2015, it was confirmed that he would be staying on picking functions until he could improve his picking performance before going on any other functions. This was 5 days after an appointment had been organised for the Claimant with Occupational Health. The letter informing him that this had been organised was the 8th April 2015. The appointment was the 13th April 2015 the same day.
48. So on the same day we have a meeting with Occupational Health there was also issued a counselling form in which he was told he would be working on the heaviest duties only.

49. We have referred above to the Occupational Health report dated the 14th April 2015 in which Dr Thornley expressed a view that it would be unlikely that the performance problems associated with the perceived pain in the back and hip would improve, together with a degree of scepticism about whether there was an underlying medical cause or whether there was a hostility towards the targets which may have been contributing to the failure to meet them. As noted above, of course, this is the report with the missing recommendation.
50. On 1st June 2015, the Claimant wrote to the Respondent's HR Department pointing out that when he was first employed 14 years ago he was picking on average 900 case per shift which was not mandatory. It had now become a compulsory requirement to pick 1400 cases per shift and if you don't you're at risk of disciplinary action. The Claimant asserted that Health and Safety needed to be taken into consideration as he was never told that the workload would increase to the level that it had when he took on the job, and this was now having an impact on his health owing to new practices that were never outlined on his contract when he took the job. The Claimant was making a clear association between his health and the workload.
51. The disciplinary hearing that took place on the 7th July 2015 was conducted by Mr King. The Claimant repeated his position that his hip inflames and the pain increases dramatically when trying to pick 1400 cases, and that his doctor had advised him to pick in the way that he had been trained originally when the requirements were less. Mr King asked the Claimant whether we was telling him that he could not reach the company minimum levels of 85% because of his ongoing injury or was it for any other reason. The Claimant replied stating amongst other things that top management had not listened to him about his condition even after the report from Occupational Health was sent to them, which the Claimant understood would talk about giving him other duties. The Claimant complained that he had been told that he could not go onto any other function until he could pick 1400 cases, "So where was the help in that?" was the point he made. The Claimant did however ask to take pick re-training which would help him.
52. Between the 21st and 23rd July 2015 the Claimant undertook this re-training with Richard Chapman, the night shift trainer. The Claimant was described as picking steadily and without rushing. He made good use of time when waiting for other members of staff in the aisles for example wrapping, he was also helpful to other members of staff, he kept socialising to a minimum, his stacking was very good to the point of being overly neat if that were possible, he picked defensively to look after his own wellbeing. The Claimant could save some time by starting more promptly at the start of the shift, he did not take more than the permitted breaks and worked to the end of the shift. The Claimant stated to Mr Chapman that if his workload was split between other tasks

it would give him a greater chance of achieving 85% or above. He will continue to try and improve his rate.

53. It seems therefore that the Claimant undertook this re-training in good faith and received support from the Night Shift Trainer. Following this training it seems from the graph that the Claimant had a good week, a bad week and then two good weeks in terms of meeting the minimum target before going off with a back injury, not said to be related to his disability, but nonetheless sustained at work.
54. On the 27th July 2015 the Claimant passed a gym medical which said he was fit to use the gym. It seems later the Respondent placed some reliance on it. For the Tribunal's part being fit to use the gym is not the same as being fit to pick at a target rate over 7.5 hours, 5 days a week.
55. The Claimant returned to work from the back injury on 5th October 2015, he had been off for 4 weeks. It was recorded that it was his view that he was fully fit to return to work.
56. HR on 11th November 2015 wanted the Claimant re-referred to Occupational Health because of his absences and back injury, that is to say 5 weeks after his return at which point the Claimant's initial position was that it was a waste of time. Ultimately, he did agree to see the OH Doctor on 11th November 2015. As recorded above, this was an unsatisfactory event in that the Claimant, apparently suspicious of the Respondent's motives, declined to sign consent forms. The Claimant made the point that he had no feedback from his first visit to OH when he expected to be put on amended duties. This, of course, relates to the apparently incomplete report that we have seen dated the 14th April 2015. Dr Thornley required a consent form to be signed, the Claimant refused and the meeting did not progress. The Claimant has made the further point to us that the subject matter of the referral was back injury, he says he had fully recovered from the back injury and did not see the point of the meeting in any event.
57. At the disciplinary hearing on the 1st December with Mr King and Mr William, the Claimant stated his position that he felt it unlikely that he would hit 85% target rate again. To attempt to hit that rate in his opinion involved compromising on safe manoeuvres with the effect that he would sustain injury in trying to hit the targets most latterly back injury. Indeed, that had been the subject of a conversation with a Union Solicitor. The Trade Union's Solicitor's advice, he willingly told us, was that there was no personal injury cause of action in respect of the back injury because the Claimant had not been complying with safe lifting manoeuvres. The Claimant stated his position, which he has also repeated before us, that the target of 85% compromised Health and Safety. The Respondent points to this as indicating a wilful refusal to hit the 85%. This resulted in the final written warning dated the 8th December 2015.

58. It may be of note to record that the Claimant resigned his Trade Union membership on the 28th December 2015. He has claimed that the Trade Union did not consult the night shift workers when agreeing increases in rates. The Claimant regards the increases in rates as being potentially injurious to personal safety. He has brought this claim wholly under his own steam and without Trade Union support.
59. In mid-January 2016, the Respondent made attempts to organise a disciplinary hearing following a breach of the standards required under a final written warning. The Claimant went off with a knee injury from the 28th January to the 23rd March 2016.
60. In January 2016, the Respondent advertised a vacancy as a Hygiene Operative. The Claimant did not apply for it.
61. The return to work form in respect of the 31 days' knee absence recorded that the Claimant felt that he was fully fit to return to work, and to need manual handling equipment as appropriate. The Claimant said he would let them know if he was having problems.
62. There had been four attempts by the Respondent to arrange a disciplinary hearing, when on the 12th April 2016 Mr Tabois the Operations Manager had a letter hand delivered to the Claimant at work. The letter included a number of questions. It noted that the Claimant was saying the 85% performance rate was unachievable. The Respondent then suggested that the company Scott Grant, the firm of time/study engineers who were responsible for the recommendation that the 85% rate be introduced in the first place, prepare a report studying whether the Claimant was able to hit the performance. The Claimant was asked to co-operate. The Claimant was also asked to see the Occupational Health Doctor again, and give consent for the Occupational Health Doctor to write to his own doctor. It noted that the Claimant's position as expressed in disciplinary hearings was that the contractual rate as he understood it originally was to pick 700 cases per day which the Claimant felt able to do. He was asked to answer the question as to who told him that 700 cases per day was an acceptable performance. He was asked whether his gym membership had an impact on his health, and he was asked whether he would like to transfer from the ambient section to the tobacco section. On the 11th April 2016, the Claimant was handed the letter by Mr Carpenter, the Senior Section Manager Nights, and having read it handed it back to him. A further version of the letter was prepared on the 18th April 2016 which added the question why the Claimant had not applied for the Hygiene Operative vacancy. The preamble to the question read as follows:-

“You have continually stated that you are unable to achieve the company pick rate of 85% as to do this causes you back and hip pain. In the past and more recently we have advertised vacancies on the Hygiene function which although not lighter in job content is

a more varied function where you are not having to continually bend and lift as in picking.”

Indeed, to be fair it is the Claimant's case that hygiene is actually significantly lighter in content.

63. The absence due to the knee injury, as recorded in the return to work note, triggered a stage 2 absence review which took place on the 31st March 2016. We are not clear what happened on that occasion, indeed we do not have the sickness and absence management policy in the bundle. We are told that there are provisions in that about reasonable adjustments and disability and so forth, unfortunately we have not benefited from having them before us.
64. The disciplinary hearing eventually took place on the 25th April 2016, Chaired by Mr Tabois. The meeting took 22 minutes and was not a happy one. Mr Tabois posed his questions about Scott Grant; the company Doctor; 700 case pick rate; sickness levels; and use of the gym; whether the Claimant would work in tobacco to which the Claimant said he had tendonitis and that he had already said he could not pull pump trucks; that he could not do the tobacco in the same way that he could not do the ambient; in any event tobacco is a day shift duty, not a night shift duty, and because of his child care obligations the Claimant has to work on the night shift.
65. He was asked about Hygiene. The Claimant said no one had sent him the letters. He had never been told that there were vacancies. No one had ever asked him to work in Hygiene. The Claimant said it did not say anything in his contract that he had to pick 85%, to which Mr Tabois said that his contract could be amended.

The dismissal letter

66. On the 6th May 2016 Mr Tabois sent his letter dismissing the Claimant. The reason for the dismissal was that following a final written warning the Claimant had continued to fail to achieve the minimum level of performance which was 85% of the target picking performance. He was paid in lieu together with outstanding wages and holiday pay. Mr Tabois recorded that the Claimant's approach to the disciplinary process had given him the clear impression that the Claimant did not care about his level of performance or whether or not he was dismissed. He had not attended earlier attempts to arrange disciplinary hearings and had elected not to submit written answers to the questions he had sent out. The letter dealt with other matters.
67. As to co-operation with the Scott Grant time study exercise: the Claimant was asked whether he would co-operate. There had been a time study examination in 2010 with Scott Grant who had found there was no obvious impediment to the operator achieving the standard performance,

indeed it was noted on the report that the Claimant was perfectly capable of performance but was deliberately working excessively slowly. In the disciplinary hearing the Claimant had said to Mr Tabois that he had already been subject to a review and that that was in 2010. Inferentially, Mr Tabois was saying that there was no reason to think that the position had been changed from 2010.

68. The next matter covered was reference to Occupational Health. The Claimant had made reference to the ineffective meeting with Occupational Health in November 2015, he also stated that the GP signed the sick certificates and that there was no need for the Respondent to make any further contact with his GP. Mr Tabois looked into the Occupational Health Doctors record of the meeting on the 11th November and noted that the Doctor had made reference to the Claimant giving a 5 minute tirade on why he was not prepared to sign the consent form. He also made reference to the earlier Occupational Health report dated 13th April 2015 which we have set out above and which records a certain scepticism on the part of the Occupational Health Doctor in respect of the claims made, but also concluding that it was unlikely that there would be an improvement in performance. Mr Tabois cited four of the seven of Dr Thornley's conclusions from the 14th April 2015, namely that the Claimant says he has a long-term problem with pain in his back and hip. Secondly that there was no significant underlying cause that had been found. Thirdly, apparent hostility towards the current pick rate targets may be a contributory factor to perceived pain levels. Fourthly, that the Claimant had said he could not and would not work faster on picking because of the pain, but the doctor was not sure how much of that was a matter of principle for him and how much limitation was actually caused by pain. He did not record the other conclusions that it seemed unlikely that the problem would go away in view of the many year history; that the Claimant felt he would have less pain if he had more variety in his work. And lastly given the long-term nature of the problem it was quite possible he would report further exacerbations which could potentially lead to him going off sick again.
69. Reference was also made to the recent absence history. There were 78 days (actually 67) ending on the 4th January 2015 owing to problems with hip and leg left side (that is to say the disability in this case), there were further 20 days ending on the 5th October 2015 with a bad back, and 31 days ending on the 23rd March 2016 arising from the right knee. Mr Tabois pointed out for what its worth, that in his return to work meetings the Claimant reported back as being fully fit.
70. Next reference was made to the Claimant's position that 700 cases per day was what he was contracted to do when he started and what it was safe for him to do. It was noted however, that he had been picking on occasions at something like 50% of the company's actual target. Mr Tabois pointed out further that the 700 cases per day had been the target in the chilled section when the Claimant started. In August 2003

the ambient pick requirement target rate however equated to 1051 cases for the day at the then acceptable target of 80%.

71. Mr Tabois made reference to the fact that the Claimant used the company gym and had been signed off to use it by the Occupational Health Nurse. He wondered whether the gym had any negative impact on the Claimant.
72. Reference was made to the tobacco section option, and Mr Tabois records the disciplinary hearing position of the Claimant that he had tendonitis and could not pull the pump up trucks and couldn't do tobacco because the shift was 1400 to 2200 hours when the Claimant still had child care responsibilities.
73. Next Mr Tabois intimated that the Claimant had never applied for a hygiene position although they had been regularly advertised on noticeboards.
74. In conclusion Mr Tabois expressed his opinion that the Claimant was able should he want to pick at the rate required. He noted that he went to the gym regularly, that Scott Grant recorded that he was capable of good performance but was deliberately working slowly (that of course was 2010) and that the Occupational Health Report following the appointment on the 13th April 2015 recorded no significant underlying cause had been found for his pain and the doctor was not sure how much not picking faster was a matter of principle as the Claimant disagreed with the target rates. In addition, when returning to work he had always declared himself fully fit.
75. In the alternative if the Claimant was not able to pick at the performance rate required, picking rate of approximately 50% cannot be accommodated when a minimum 85% picking rate has been independently measured, ratified and agreed with the Trade Union. He had not applied for Hygiene vacancies and had refused the offer of a transfer to the tobacco section. In addition he had refused without good reason a return to see the Occupational Health Doctor and consent to write to his Doctor. As a result, he could not see what more could be done to help should the Claimant not be able to pick at the required rate.

The Appeal

76. The Claimant appealed by letter dated 11th May 2016. He took issue with the view that he did not care whether or not he was dismissed. He pointed out that he had 15 years service with the Respondent and indeed had built his personal life around it. He did suggest the workload had doubled, he still maintained that he had to threaten his Health and Safety to meet the rates. The appeal was to be conducted by Mr McCallum.

77. Mr McCallum conducted a thorough appeal. The Claimant co-operated fully with the appeal in something of a stark contrast to the attitude towards the disciplinary hearing. Mr McCallum adjourned the appeal proceedings so as to get a further medical opinion from Dr Thornley the Occupational Health Doctor who was on this occasion authorised by the Claimant to approach his GP. Ultimately Mr McCallum relied upon the letter from Dr Thornley together with the fact that the Claimant had been signed fit to use the gym.
78. The Tribunal would like to register its concern about the emphasis Mr McCallum placed on the fact that the Claimant had been signed as fit to use the gym. Being signed as fit to use the gym is very different matter from being vulnerable over a 7.5 hours shift 5 days a week to physical strains and injuries caused by the manner of working and requisite speed. Be that as it may the gym report was not the principal evidence Mr McCallum relied upon.
79. The principal evidence was the letter of Dr Thornley that is dated the 8th August 2016. Dr Thornley was written to by Mr McCallum on the 17th June 2016, he did so with the Claimant's consent. He asked Dr Thornley to write to the GP on the Respondent's behalf, and to ask the GP to confirm in his or her professional medical opinion whether or not they consider the Claimant to be fully fit and capable of carrying out the full range of his duties as a warehouse operative including the regular lifting of weights of up to and including 25kgs, being able to walk long distances and without restriction on occasions when required to do so. No criticism can be made of Mr McCallum's identifying that paragraph as the issue, although of course we do note that he does not raise the possibility of disability as a concept.
80. Dr Thornley replied on the 8th August 2016 saying that he had now heard back from the GP. The GP stated that the Claimant did not have a specific diagnosed medical condition. He did describe a number of episodes when he has complained of musculoskeletal type pain. Reference was made to the fact that in April 2014 the Claimant had said he had been getting pain in his left groin and knee for several years. Nothing was found on examination or x-rays. In September 2014 he had pain in his left hip. In August 2015 he had sharp pain in his back that occurred when lifting and twisting at work. In February 2016 he had pain in his right knee sustained when picking up crates, there was tenderness over the knee. He had been referred to a Physiotherapist on a couple of occasions including in March 2016. He had no attendance at the surgery since 8th February 2016. Dr Thornley's conclusion was whilst he should avoid struggling or straining to lift very heavy items and should not do sudden jolting movements in which he might jar his shoulder, provided he follows good manual handling techniques and does not lift or strain more than he is supposed to, it does not appear that his performance is impaired by any medical condition.

81. On the 9th August 2016 Mr McCallum disclosed a copy of Dr Thornley's letter to the Claimant and invited comments. There was no response to it, for example there was no communication from the Osteopath giving the detail of any medical impairment.
82. Mr McCallum dismissed the Claimant's appeal by letter dated 19th August 2016. In the appeal letter Mr McCallum understood the Claimant's position that the outcome he was seeking was to return to work and be allowed to do loading and online exclusive picking. He would prefer not to do picking and instead have a Hygiene job. He would like a Hygiene job as that would not involve having challenging targets to achieve whilst he accepted that picking was part of his job he would like to avoid it and not have any picking targets.
83. Mr McCallum went on to discuss the primacy of picking. Picking was the primary role of all warehouse operatives employed at Hatfield. All colleagues are expected to be able to achieve the minimum pick performance provided they do not have a medical condition that prevents them. Mr McCallum referred to the Occupational Health Report of 13th April 2015, and as with Mr Tabois, pointed to four out of seven of the Occupational Health Doctor's conclusions, those which were perhaps the least favourable to the Claimant.
84. Mr McCallum reproduced the entirety of the latest letter from the Occupational Health Doctor on 8th August 2016.
85. Mr McCallum noted that the Claimant had not applied for Hygiene jobs in the past but fundamentally his conclusion was that it was clear to him that it was not the Claimant's physical capability that stopped him from achieving the minimum acceptable performance but his own decision to pick nearly 50% less cases than he did previously. He was happy that the Company's minimum acceptable performance standard had been made clear at every stage of the performance management process. The Claimant, he thought, had been given every opportunity to improve his own performance and maintain it to an acceptable level. He had had every stage of warning, he was satisfied also that the Claimant's circumstances had been taken into consideration during the process. The reason given in the penultimate paragraph of the letter for dismissal was capability namely not reaching or achieving the company minimum standard of 85%.

Discussion and Conclusions

86. The role of the Tribunal is to adjudicate issues between the parties. At the end of the hearing the parties positions have crystallised, and the Tribunal is to give its conclusions based upon the position reached at the end of the hearing. In this case the Respondent has conceded knowledge of those elements amounting to a disability throughout the relevant period. There are passages in the contemporaneous

documentation where the Respondent is not acting at all times consistently with knowledge of disability, both Mr Tabois and Mr McCallum seem not to have believed the Claimant that he was suffering from any condition which interfered with his ability to perform normal day to day activities; be that as it may we have the concessions from the Respondent that we do. The Claimant was a disabled person, pursuant to our finding, and the Respondent knew the relevant circumstances at all material times.

87. There is the difficult somewhat contradictory period in April 2015. On the 8th April 2015 the Claimant is referred to Occupational Health further to his hip pain issue. He had been off for over 3 months between the 23rd September 2014 and the 4th January 2015 with hip pain. The idea to refer him to Occupational Health was first expressed on the 8th January 2015 but it seems that this was not put into practice until 8th April 2015. On the 13th April 2015, because he had not been hitting targets in March and April 2015, he was put on picking functions only with effect from 13th April 2015. This was an attempt by the Respondent to enforce its rules that Warehouse Operatives have to be able to pick at 85% and not make up for poor picking performance with other duties such as loading, as had been taking place in the Claimant's case. There then followed the letter from the Occupational Health Doctor on the 14th April 2015 which, on the one hand made reference to long-term problem with pain in his back and hip which seemed unlikely would go away in view of the many year history, and which given the long term nature of problem meant it was quite possible he would report further exacerbations which could potentially lead him to going off sick again; and on the other hand, was an apparent scepticism of Dr Thornley, countenancing the possibility that it was the apparent hostility towards the current picking targets which may have been a contributory factor to perceived pain.
88. That said, the Respondent has conceded that for the entirety of the relevant period there was knowledge of disability. It is a combination of what the Occupational Health Doctor said in the letter of the 14th April 2015 together with what the Claimant was telling them that formed the basis for that knowledge. In the disciplinary hearing on the 7th July 2015 the Claimant is recorded as having said that he told the Respondent at the last meeting which seems to have been 28th May 2015 that his hip inflames and his pain increases dramatically when trying to pick 1400 cases, and that his doctor had advised him to pick the way he was trained, by which the Claimant meant to pick defensively so as not to cause himself injury. That practice had been observed by Mr Chapman who gave an otherwise supportive assessment of the Claimant's work on the 24th July 2015.
89. Going back to the letter of the 14th April 2015, it is a matter of disquiet to this Tribunal that we do not have the completed sentence from Dr Thornley at the foot of his letter dated 14th April 2015; and if the

Respondent did not know what it was that they did not obtain further clarification. That sentence reads;

“In view of the fact that he does manage to continue working albeit more slowly he should be....”

and the Tribunal can only guess at the missing answer. But “*put on amended duties*” would fit.

90. It seems then to the Tribunal that in or around April to May 2015 the Respondent had the knowledge of the disability and indeed its impact on the Claimant namely that he struggled to meet the 85% target with picking only.
91. At this point the Respondent could have put a portfolio of duties together which would have ensured that the Claimant worked, and continued to work, at rates acceptable to them. That could have been a mixture of picking, loading and for that matter hygiene responsibilities. The Claimant had mentioned online picking - that too could have been part of the portfolio. This position was mentioned by Mr Chapman on the 24th July 2015 who did not comment adversely on the idea.

Reasonable adjustments

92. The Respondent accepts that it had a provision, criterion or practice that required pickers to achieve the minimum 85% picking rate and that a failure to do so may result in a picker such as the Claimant being placed on a performance management process and may ultimately be dismissed. Further, they accept that this dismissal/loss of employment is a substantial disadvantage.
93. Turning then to Section 20 Subsection 3 the provision, criterion or practice is the requirement to pick at 85% it put the Claimant at a substantial disadvantage because we accept from him he struggled and ultimately failed to meet it. The provision, criterion or practice applied to those who are not disabled and this put the Claimant at a comparative substantial disadvantage.
94. Turning then to what steps it was reasonable for the Respondent to take to avoid the disadvantage, well the Claimant himself had suggested those and the Tribunal sees no difficulty on the part of the Respondent to put together, as we have said, a portfolio of such duties. We do not understand that this would cause difficulty with work place relations or incur disapproval from the Trade Union because this would be an adjustment in respect of a disabled person. We have seen, moreover, a reference in the collective agreement itself that each individual may have different circumstances to their performance which will be taken into consideration. That is consistent with the concept of reasonable adjustments. Mr McCallum in his decision letter stated that an exception

to achieving the minimum pick performance could be a medical condition that prevents them; plainly, a disability that prevents them would be in the same category.

95. The Tribunal finds that this position was continuing throughout the remainder of the employment. That is to say, the Respondent applied a PCP that had a substantial disadvantage to the Claimant in comparison with persons who were not disabled and that the Respondent was under a duty to take such steps as it was reasonable to have to take to avoid the disadvantage, namely provide a portfolio of duties which would have enabled the Claimant to perform to a satisfactory standard.
96. We have noted the Respondent's argument that there were no or limited vacancies. However, we note that there was widespread usage of Agency Workers in all areas of the warehouse function, including hygiene. Accordingly, we reject the suggestion that a variety of duties was not practicable. It was and the respondent in this case has failed to make reasonable adjustments, including at the time of dismissal.

Discrimination arising from disability

97. The Respondent accepts that the dismissal was something arising in consequence of the Claimant's disability. It is for them then to show justification for it being a proportionate means of achieving a legitimate aim. The difficulty with the Respondent's position on this is that they do not purport to apply the PCP to disabled people, they acknowledge in the collective agreement, as we have seen, that exceptions can be made in relevant circumstances Mr McCallum in his appeal outcome letter points to a medical condition as justifying amendments to the requirements. The Respondent is not saying, as we understand it, that it would refuse to employ or dismiss someone who became disabled in the course of employment with them. We have not been shown the sickness and absence management policy but we are told that there are references to disability and reasonable adjustments in it. As the Respondent is not purporting to justify the imposition of the picking rule in relation to a disabled person, the Respondent does not and cannot purport to justify unfavourable treatment arising from the Claimant's disability. It seems that Mr Tabois and Mr McCallum were at the time of their decisions apparently not accepting the Claimant was a disabled person or that the disability was having any relevant interference with normal day to day activities, they thought he was choosing not to meet the targets deliberately. However, it seems to us that once the concession is made that the unfavourable treatment arose in consequence of the disability the Respondent will not justify the dismissal, because they were not purporting to invoke their picking rules against someone who was disabled, on the contrary they thought they were invoking it against someone who was hostile to the performance requirements.

98. Furthermore, they cannot justify failing to introduce amended duties in relation to which the Claimant could hit performance targets.
99. The Respondent discriminated against the Claimant by dismissing him.

Indirect disability discrimination Section 19

100. Again, the Respondent concedes the provision, criterion or practice to require 85% of target on picking; the PCP would be applied to someone who was not disabled, it would put a disabled person, disabled with a tendency of inflammatory groin muscles amounting to a tendonitis to a particular disadvantage when compared with persons who do not share that disability. It did put the Claimant at that disadvantage. We accept from him that it caused him initially to struggle and ultimately to fail to meet the targets. The Claimant did not put this on. Can the Respondent show this to be a proportionate means of achieving a legitimate aim? Again, whilst it is appropriate to have targets so as to control the workforce and to enable the planning and performance of the warehouse, the Respondent is not purporting to justify the application of this PCP to a disabled person. Its own collective agreement envisages exceptions being made, as does the appeal rejection letter from Mr McCallum. The difficulty for the Respondent here, as with discrimination arising from disability, is that the dismissing and appeal managers did not regard him as disabled. They regarded his position as being a refusal to co-operate because of hostility towards the targets in question, in other words that it was not genuine. Our finding to the contrary on the issue of disability and the respondent's concession of knowledge combine to defeat the Respondent's position. They did indirectly discriminate against the Claimant on the grounds of disability.

Unfair dismissal

101. Mr Tabois emphasised the reason as misconduct and in the alternative capability. It seems that Mr McCallum could have done the same but seems to have gone for capability first. Both of these are potentially fair reasons for dismissal. The Tribunal finds that as both Mr Tabois and Mr McCallum believed that the Claimant could have hit the targets and was refusing to do so pursuant to his own decision to pick nearly 50% cases than he did previously, then misconduct seems the principal reason for dismissal; alternatively it was capability; it does not really matter.
102. Due process was followed. What causes the Respondent problems here is that neither Mr Tabois nor Mr McCallum regarded the Claimant as a disabled person, when now the Respondent concedes it knew of the elements that amounted to disability. It concedes that they knew he had a hip/groin issue. Their failure to acknowledge the disability was unreasonable. There was a failure to take into account the evidence now

produced by the Respondent in graph form that there was a decline in performance over time, which was caused by the 'hip/groin' issue. This in turn meant that there was an unreasonable failure to consider reasonable adjustments; in particular, an amended portfolio of duties could have been arrived at which would have resulted in the Claimant working productively and to target. The insistence on the 85% pick rate in relation to someone known to be injured is not reasonable.

103. We have noted that both Mr Tabois and Mr McCallum cited four of the conclusions in the incomplete report of Dr Thornley of April 2015, and did not mention the three conclusions supporting the Claimant. They also omitted to establish what Dr Thornley's recommendations were in the missing part of the letter. All of this amounted to an unreasonable failure to take into account that which was or could have been relevant. This is consistent with them ignoring that which is now conceded, namely that they knew of the elements amounting to a disability. Accordingly, the Tribunal is of the view that the dismissal was unfair. It would not have been practicable to arrange amended duties.

Contributory fault on the part of the Claimant

104. We have been invited at this stage to make findings of contributory fault both for unfair dismissal under sections 122(2) and 123(6) of the Employment Rights Act 1996 and for disability discrimination under section 124(2)(b) of the Equality Act 2010.
105. The Claimant was rude and uncooperative in the second Occupational Health meeting in November 2015, his position was unreasonable. Further Mr Tabois had some perfectly sensible ideas and questions to put to the Claimant in preparation for the Disciplinary Hearing. After all, the Claimant was in breach of a final written warning, the fact that the Claimant simply handed back to Management the letter dated 12th April 2016 and did not engage with the perfectly sensible matters raised therein was again rude and uncooperative behaviour and is disappointing.
106. We have found the Claimant to be an intelligent person who has been able to represent himself effectively in a disability discrimination and unfair dismissal case brought before the Employment Tribunal without the assistance of either a Trade Union or lawyers. To that extent, the Claimant is an impressive individual. He had however let himself down significantly whilst still employed with this rudeness and lack of cooperation.
107. We do see some cause for his exasperation. The Claimant was expecting amended duties to be recommended following his first Occupational Health visit to Dr Thornley. And for all we know from the incomplete document that we have, perhaps they were. That said the Claimant's conduct put him at a disadvantage. It did amount to

blameworthy conduct and contributory fault. It did have an effective cause on his ultimate dismissal. Accordingly, his compensation both for disability discrimination and unfair dismissal will be reduced by 50%.

108. The Tribunal is not uncomfortable with this result: the Respondent is fairly criticised for not looking at this matter with sufficient consciousness of disability discrimination law; the Claimant conducted himself rudely and with lack of cooperation at important moments.

Time Limits

109. The only time limits matter that might in theory arise is the position on reasonable adjustments. The Respondent was first in breach of its duty to make reasonable adjustments in or around April/May 2015. The claim form was presented on the 27th September 2016. The dismissal was on the 6th May 2016. The ACAS conciliation period was the 1st August to the 1st September meaning that the deadline for presenting the claim was the 1st October 2016, calculating the limitation period from the date of dismissal.

110. It seems to us sensible to regard there being discriminatory conduct extending over a period from the end of April/beginning of May 2015 up to the date of dismissal. The dismissal of course is in time as an act of discrimination. If we were wrong about that, we would regard it as just and equitable for the reasonable adjustments claim to be brought when it was notwithstanding that it stretched back to April/May 2015. This was precisely because the Claimant was engaged in a process challenging his working not to company targets and he was repeatedly stating his position therein. The Respondent could not be said in any way to be taken by surprise or prejudiced by the late presentation of the claim, if late it is, in respect of the reasonable adjustments matter. This was an ongoing debate from April/May 2015 right up to the time of his dismissal. It was not until he was dismissed that the Claimant began to investigate what his rights were, and we understand why it was not until then that he did so; he hoped to win the argument whilst still employed.

Employment Judge Smail, Watford

Dated: 28 September 2017

JUDGMENT SENT TO THE PARTIES ON

.....28 September 2017

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FOR THE SECRETARY TO THE TRIBUNALS

