EMPLOYMENT TRIBUNALS

Claimant: Mr T W Brophy

Respondent: Marks and Spencer PLC

Heard at: Nottingham

On: 17th, 18th, 19th, 20th and 21st October 2022

Before: Employment Judge Ayre
Mr A Wood
Mr K Chester

Appearances
For the claimant: In person
For the respondent: Mr C Kelly, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The claim for discrimination arising from disability fails and is dismissed.

2. The claim for failure to make reasonable adjustments fails and is dismissed.

REASONS

Background

1. At the time he presented his claim, the claimant was employed by the respondent as a Warehouse Operative working at the respondent's distribution centre in Castle Donington.

2. 0n 20 February 2021 the claimant issued a claim in the Employment Tribunal, following a period of Early Conciliation that started on 9 December 2020 and ended on 20 January 2021. An initial Preliminary Hearing took place before

Employment Judge Ahmed on 10 November 2021. The claimant was represented at that hearing by a Trainee Solicitor from the Equality and Employment Law Centre.

3. Following the first Preliminary Hearing the claimant withdrew his claims for direct discrimination, indirect discrimination and victimisation, and a complaint of detriment under sections 44 and 47B of the Employment Rights Act 1996 and these claims were dismissed.

4. A second Preliminary Hearing took place before Employment Judge Ayre on 31 January and 1 February 2022. At that hearing Employment Judge Ayre found that the claimant was disabled by reason of asthma, was not disabled by reason of anosmia (loss of smell), that the claim should not be struck out and that no deposit order should be made.

5. Employment Judge Ayre then conducted a case management hearing at which the issues for determination at the final hearing were identified and agreed, and Orders were made to prepare the case for final hearing.

6. The claim is about events during the early months of the Covid 19 pandemic. In summary, the claimant alleges that insufficient steps were taken to reduce the risk to him of contracting Covid in the workplace, and that as a result he was forced to stay off work without pay.

7. The disabilities that the claimant relies upon for this claim are:

    7.1 Autism;
    7.2 Type 1 diabetes;
    7.3 Asthma; and
    7.4 Anxiety and depression.

The hearing

8. We heard evidence from the claimant and, on behalf of the respondent, from Mr James Perkins, former Team Manager with the respondent and the claimant's line manager at the relevant time, and from Ms Elizabeth Buxton, HR Support Manager.

9. There was an agreed bundle of documents running to 790 pages. The claimant wished to rely upon an additional 46 pages of documents, which were included in a separate bundle ("the claimant's bundle"). The claimant told the Tribunal that the first section of the additional documents was correspondence he had with his new line manager, Omid Lotfi, after he returned to work in May 2021. The other section was, he said evidence that he had had to sell personal property whilst off work without pay, which was relevant to the question of the disadvantage he says he suffered as a result of the PCPs imposed by the respondent.

10. Having heard arguments from both parties in relation to the claimant's bundle, it was the unanimous decision of the Tribunal that the claimant's bundle should be admitted into evidence. The documents it contained seemed to us to be of potential (if marginal) relevance to the question of whether the adjustments

requested by the claimant were reasonable, and whether the claimant suffered any disadvantage as a result of the PCPs relied upon.

11. Mr Kelly submitted a skeleton argument, for which we are grateful. We also heard oral submissions from both parties. The claimant was given guidance as to the issues to cover in his submissions, by reference to the list of issues,

Adjustments

12. At the start of the hearing, we discussed the question of reasonable adjustments for the claimant. This issue had also been discussed at the Preliminary Hearing in February 2022 when the following adjustments were identified:

    12.1 Regular breaks – we agreed to take at least 10 minutes every two hours;

    12.2 A Tribunal day which finishes by 4pm at the very latest, and earlier if possible; and

    12.3 Permission for the claimant to carry and use his glucose monitoring system, asthma inhalers, insulin pen, food and water to help him manage his diabetes and asthma.

13. These adjustments were made during the final hearing. The claimant was also asked if any other adjustments would assist. He said an awareness of how the autistic mind works and an ability to 'double back' on things that he had not covered. We allowed him this opportunity during the hearing. We also gave him additional time to prepare his closing submissions.

14. At the start of his evidence, the claimant told us that he had ten pages of notes of supplemental evidence that he wished to give, in addition to his witness statement which ran to 21 pages. He said that the additional evidence he wished to give covered six areas:

    14.1 The timescales for submitting his claim to the Tribunal;

    14.2 An extra emphasis on the respondent's 'abandonment' of the reasonable adjustments process;

    14.3 The disciplinary and appeal process;

    14.4 Additional detail on some of the problems he had trying to communicate effectively with the respondent's occupational health providers;

    14.5 Two additional reasonable adjustments; and

    14.6 An increased emphasis on risk assessments.

15. The additional adjustments that the claimant wished to introduce to his complaint under sections 21 and 22 of the Equality Act 2010 were:

    15.1 The use of 'reach sticks' on the Cris plant; and

15.2 The use of radios and/or ‘phones to help with the reporting of faults.

16. The respondent objected to the claimant amending his claim to rely upon two additional reasonable adjustments. The respondent did not have the decision makers in relation to either suggested adjustment present at the Tribunal. Mr Kelly told us that the respondent would therefore be significantly prejudiced if the claimant were allowed to lead evidence on those adjustments.

17. Having heard the arguments of both parties, the Tribunal adjourned to consider whether to allow the claimant to amend his claim to introduce two new reasonable adjustments, and whether the claimant should be permitted to introduce supplemental oral evidence based upon ten pages of notes.

18. The unanimous decision of the Tribunal was that the application to amend the claim should be refused. Applying the factors summarised in ***Selkent Bus Co Ltd v Moore [1996] ICR 836***:

18.1 The nature of the amendment was to include new factual allegations that would require additional evidence and new lines of enquiry. The respondent does not have witnesses present at the hearing who can speak to these allegations;

18.2 The new allegations are made substantially out of time. The claimant began Early Conciliation on 9 December 2020 and filed his claim on 20 February 2021. The first time these adjustments were made was at the start of the final hearing in October 2022.

18.3 There was a detailed discussion about reasonable adjustments at the Preliminary Hearing in February 2022. The claimant did not mention the additional adjustments at that hearing, nor at the start of the Final Hearing when he told the Tribunal that he agreed with the list of issues set out in the Record of the Preliminary Hearing.

18.4 A large number of adjustments have already been suggested by the claimant.

18.5 The respondent would be significantly prejudiced if the claimant were allowed to amend his claim during the course of the hearing, after the exchange of witness statements and the preparation of a hearing bundle, as the respondent does not have evidence to defend the new allegations.

18.6 The balance of injustice and hardship favours refusing the amendment. The claimant is still able to pursue a large number of allegations of failure to make reasonable adjustments, but the respondent is not prejudiced by having to defend a new claim without witnesses to speak to that new claim.

19. The Tribunal also decided unanimously not to allow the claimant to introduce ten pages of supplemental evidence, for the following reasons:

19.1 Paragraph 27 of the Record of the Preliminary Hearing on 1 February 2022 made it clear that witness statements should contain everything

relevant that a witness had to say, and that witnesses would not be allowed to add to their statements unless the Tribunal agrees.

19.2 The claimant had had the opportunity to prepare a detailed witness statement and had produced a comprehensive and well written statement, running to 21 pages.

19.3 The purpose of supplemental evidence is to deal with anything unexpected contained in the other party's witness evidence, not to 'perfect' a witness statement.

19.4 Allowing the claimant to introduce such a large amount of supplemental evidence could put the hearing timetable in jeopardy. A professional representative would not be permitted to put such a large number of supplemental questions to a witness.

19.5 The issues covered by the claimant's supplemental evidence appeared to be ones for submissions (for example, the question of emphasis / importance to be placed on particular documents or issues) and any points the claimant wishes to make can be made in submissions or in cross examination of the respondent's witnesses.

20. Having heard the evidence and submissions, the Tribunal reserved its judgment.

The Issues

21. The parties confirmed at the start of the hearing that the issues for determination by the Tribunal are those in paragraph 46 of the Record of Preliminary Hearing on 1 February 2022, which are also set out below.

Time limits

22. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 10 September 2020 may not have been brought in time.

23. The respondent admits that the complaint under section 15 of the Equality Act 2010 was made in time. The question of time limits is therefore only relevant to the complaint that the respondent failed to make reasonable adjustments.

24. In relation to that complaint, the Tribunal will consider whether the claim was made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

24.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

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

24.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

24.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

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

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

Discrimination arising from disability

25. The respondent admits that it treated the claimant unfavourably by:

25.1 Issuing him with a 12-month written warning for unauthorised absences and non-attendance on 17 September 2020; and

25.2 Re-issuing the 12-month written warning for unauthorised absences and non-attendance on 2 October 2020, after the warning letter dated 17 September 2020 had been withdrawn?

26. Did the claimant's absence and inability to return to work due to his clinically vulnerable status and feeling unsafe with a generic risk assessment arise in consequence of his disabilities?

27. Was the unfavourable treatment because of any of those things?

28. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

28.1 Operating a disciplinary policy to regulate conduct and behaviour; and

28.2 Preventing unauthorised absence.

29. The Tribunal will decide in particular:

29.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

29.2 could something less discriminatory have been done instead; and

29.3 how should the needs of the claimant and the respondent be balanced?

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

Reasonable adjustments

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

32. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

    32.1 The requirement to have good attendance;

    32.2 The requirement to work in a specific job role;
    32.3 The requirement to return to work following the implementation of a generic Covid risk assessment;

    32.4 The requirement to have been designated as needing to shield by the Government to qualify for furlough or paid leave; and/or

    32.5 The requirement to return to work following the implementation of generic Covid secure safety measures?

33. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disabilities, in that he:

    33.1 Was placed at an increased risk of serious illness or death; and/or

    33.2 Suffered a loss of pay, financial hardship and stress, and had to sell his belongings?

34. Did a physical feature put the claimant at the substantial disadvantage referred to in paragraph 32 above compared to someone without the claimant’s disabilities? The claimant relies upon the following physical features:

    34.1 Narrow corridors, blind spots and stairwells where the claimant was at risk of coming into close contact with colleagues;

    34.2 Cramped locker areas where the claimant was at risk of coming into close contact with colleagues;

    34.3 The canteen, where he alleges 2 metre social distancing was not being maintained;

    34.4 The toilets, where social distancing was not possible; and/or

    34.5 The water fountains.

35. Did the lack of an auxiliary aid put the claimant at substantial disadvantage referred to in paragraph 32 above compared to someone without the claimant’s disabilities? The claimant alleges that the following auxiliary aids should have been provided:

    35.1 High visibility vests or some other clear sign or marker identifying vulnerable employees;

    35.2 Mirrors for use on blind corners;

    35.3 Audible warning devices for use on blind corners; and/or

35.4 Warning lights operated by pressure pads on the floor.

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

37. What steps could have been taken to avoid the disadvantage? The claimant suggests:

37.1 Working with the claimant to find solutions to enable him to return to work or work from home;

37.2 Finding a role for the claimant that he could do from home;

37.3 Putting the claimant on furlough;

37.4 Carrying out a specific, personalised risk assessment to identify measure to support the claimant to return to work;

37.5 Making the workplace safer;

37.6 Communicating with the claimant about the Covid safety measures already in place;

37.7 Provision of the auxiliary aids referred to in paragraph 34 above;

37.8 Spacing the lockers out / providing the claimant with a locker in an alternative location and/or with good line of sight;

37.9 Ensuring 2 metre social distancing in at least part of the canteen;

37.10 Limiting the number of people using the toilets at any one time and logging how many people went in and out of the toilets; and/or

37.11 More regular cleaning of water fountains and the provision of a second water bottle for the claimant.

37.12 Was it reasonable for the respondent to have to take those steps and when?

38. Did the respondent fail to take those steps?

Remedy

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

40. What financial losses has the discrimination caused the claimant?

41. For what period of loss should the claimant be compensated?

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

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

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

45. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

46. Did the respondent or the claimant unreasonably fail to comply with it?

47. If so is it just and equitable to increase or decrease any award payable to the claimant?

48. By what proportion, up to 25%?

49. Should interest be awarded? How much?

Findings of fact

50. The following findings of fact are made unanimously.

51. The claimant was employed by the respondent as a Warehouse Operative at the respondent's Distribution Centre in Castle Donington. Approximately 1,300 employees work at the Distribution Centre and of those 1,100, including the claimant, work on picking, packing and distributing online orders.

52. The remaining 200 employees in Castle Donington work in a variety of roles including health and safety, Quality Control, cleaning, catering and administration.

53. Only 60 of the 1,300 roles at Castle Donington are administrative roles which can be done from home. The remaining 1,240 roles can only be performed at the Distribution Centre and are not suitable for home working.

54. Warehouse Operatives, including the claimant, are employed at 'Reward Level A'. All of the administrative roles that can be performed from home are Reward Level B (which is higher than Level A) because they require a higher degree of skill and expertise.

55. The claimant's employment with the respondent began on 23 June 2019 and was subject to a probationary period. The claimant passed his probationary period in September 2019. The claimant worked nights, on a Panama shift pattern, and reported to James Perkins, Team Manager.

56. The respondent has a disciplinary policy and a sickness absence policy. The sickness absence policy makes clear that an employee who is absent from work is expected to remain in contact with the respondent, and that if the employee fails to do so, disciplinary action may be taken for unauthorised absence.

57. The claimant has Type 1 diabetes and is insulin dependent. He also has asthma which has become more severe in recent years and which is triggered by high blood sugar levels. The claimant took steroids to treat his asthma, and the steroids caused his blood sugar levels to spike. There was, therefore, an adverse correlation between the claimant's diabetes and asthma which made both conditions harder to manage. In simple terms, the medication that the claimant was taking for his asthma made his diabetes worse.

58. The claimant initially worked on the packing lines at Castle Donington but struggled to meet the targets set by the respondent, and to control his diabetes. In October 2019 it was agreed, as a reasonable adjustment, that the claimant would work exclusively in an area of the Distribution Centre known as the 'Cris plant'. There are fewer employees and less social contact in the Cris plant than in other areas of the Distribution Centre, and the claimant accepted in cross-examination that working in the Cris plant carried a lower risk of contracting Covid.

59. The claimant's role on the Cris plant involved a mixture of quality control (identifying badly packed and defective products and taking them off the conveyor belts), preventative work and fault fixing. Working on the Cris plant allowed the claimant to better manage his diabetes and reduced his levels of stress because he did not have the targets that applied to general Warehouse Operatives working on the packing lines.

60. In February 2020, shortly before the start of the Covid 19 pandemic, the claimant was diagnosed with autism [248]. The claimant's autism caused him to be particularly anxious about the risks to him should he catch Covid 19.

61. In March 2020 the first national lockdown was announced and government guidance was issued on social distancing.

62. At the start of the pandemic there was some confusion as to whether individuals with type 1 diabetes were required to shield or not. All diabetes patients were initially told to shield on the Gov.uk website, but this guidance changed within 24 hours. Type 1 diabetes patients were classed as clinically vulnerable, but not as 'clinically extremely vulnerable' and were not required to shield.

63. The claimant spoke to his GP and his diabetes care team at the start of the pandemic and was told that he should not be working as a result of the combined impact of his type 1 diabetes and his asthma. He was not however issued with a shielding letter despite requesting one.

64. The claimant, who was clearly very anxious, interpreted the Government guidance that those with diabetes should be "particularly stringent in following social distance measures" as meaning that he had to follow additional or 'extra stringent' social distancing measures. This interpretation appears to have been

based on advice he received from Univeresity Hospitals of Derby and Burton NHS Foundation Trust in March 2020. [115]

65. On 2 April 2020 the claimant wrote to his line manager James Perkins attaching an email from a local NHS Trust with advice for those with Type 1 diabetes. The advice stated that "Although people with diabetes are not more likely to catch Covid-19, the risks of becoming very unwell if you do get it are greater. As such, the government have recently recommended extreme social distancing measures for people living with diabetes. This is for a period of at least 12 weeks from the 16th March…. People with diabetes fall into the 'vulnerable group with an underlying health condition"

66. In the email of 2 April, the claimant told Mr Perkins that working from home was 'highly recommended' for him because of his health, and he also asked how he could practice extreme social distancing at work, and what measures the respondent had in place to facilitate this.

67. Mr Perkins replied on 8 April seeking to reassure the claimant and setting out in some detail the steps that the respondent had taken to protect employees in the distribution centre. He also explained that additional protections would be put in place for the claimant.

68. In the email Mr Perkins referred to a non - exhaustive list of actions taken in Castle Donington to safeguard all colleagues during the Covid 19 epidemic. These included red floor markings asking colleagues to walk in single file and 2 metres apart; a one-way system for entry and exit to the main warehouse with signs directing colleagues which way to go; staggered start and finish times; closing every other packing location; extra hand sanitiser; deactivating most of the internal warehouse doors to avoid the need to use the push button to open them; not requiring colleagues to clock in or out using finger scanners; stopping team briefings and group meetings; asking colleagues to wipe down their workstations after use; reducing the number of seats within the canteen and ensuring that all seats are over 2 metres apart and allowing colleagues to eat food within a separate area allowing more space to spread out.

69. In addition, Mr Perkins told the claimant that there would be further precautions put in place to protect him. These included allowing the claimant to start and finish work at different stop times to his colleagues; allowing him to take lunch at a different time to the rest of the department so that he could sit away from his colleagues when taking lunch; allowing him to use the disabled toilets which would mean he would not have to encounter anybody else when using the toilets; and allowing him to continue to work on the Cris plant which is the most socially isolated area of the warehouse.

70. Mr Perkins also explained to the claimant that this was not a complete list of adjustments and that it could change. He gave examples of places that the

claimant could seek help if he had ongoing concerns and also offered to answer any questions that the claimant may have.

71. It was agreed that the claimant would remain at home in self isolation from 23 March 2020 for a 12 week period which would end on 15 June 2020.

72. The respondent had engaged an external firm of health and safety professionals known as SOS International to advise it in relation to its Covid secure measures. It also had an in-house health and safety team which at Castle Donington was led by Rob Woodward. It took its health and safety responsibilities and the protection of its staff very seriously. A large number of steps were taken to reduce the risk of employees catching Covid in the distribution centre. These included spacing out lockers to reduce the risk of employees coming into contact with other employees when accessing their lockers.

73. The respondent's health and safety advisers considered whether the auxiliary aids which are relied upon by the claimant in this claim were necessary, and concluded that they were not, in light of the other steps taken by the respondent to reduce the risks in the workplace. The respondent relied upon this advice.

74. At the start of the pandemic the respondent put in place a policy that colleagues who did not want to work during the pandemic were not required to. Those colleagues could remain at home on leave. The leave would only be paid however if the colleague had a shielding letter from the NHS or their GP advising them to shield at home because they were clinically extremely vulnerable. If the colleague wanted to stay at home but did not have a shielding letter, the policy was that they would not be paid.

75. Some employees were furloughed, with the respondent topping up furlough pay to full pay. The respondent did not however furlough warehouse operatives because there was an increasing demand for workers in the warehouse. When the pandemic hit an increasing number of sales went online and the warehouse became even busier than before. As a result the respondent did not use furlough either with the claimant or with other warehouse operatives unless they were clinically extremely vulnerable.

76. The claimant remained at home on unpaid leave from 23rd of March 2020 until May 2021 when, having had two Covid vaccinations, he returned to work in the warehouse.

77. On 17 March 2020 the claimant received an email from the University Hospitals of Derby and Burton NHS Foundation Trust entitled 'Covid 19 recommendations for people with Type I diabetes'. That email attached guidance and government recommendations on social distancing for people living with diabetes. The guidance said that although people with diabetes are not more likely to catch Covid 19, the risks of becoming very unwell if they did catch it were greater. As such the government was recommending 'extreme social distancing measures'

for people living with diabetes for a period of at least 12 weeks from 16 March 2020.

78. The claimant forwarded this guidance to James Perkins by email on 2 April 2020. The claimant told the Tribunal that at some point between receiving the email on 17 March and 8 April 2020 he spoke to Mr Perkins by telephone, and that during that conversation, when asked about extra stringent social distancing for those with diabetes, Mr Perkins commented 'that is up to you'. The claimant said that this caused him to believe that the respondent was placing responsibility for social distancing with the claimant.

79. In his evidence to the tribunal Mr Perkins told us that he did not believe that he had made that comment. He said that the comment sounded flippant and was not the type of comment that he would make. He told us that he believed that what he had actually said to the claimant was that responsibility for health and safety and for implementing Covid secure measures lay with individual employees as well as with the respondent. This is consistent with comments made in an email sent by Mr Perkins to the claimant on 8 April 2020 where he wrote that colleagues ha all been made aware that their health and safety at this time was as much their responsibility as it was the respondent's.

80. On balance we prefer Mr Perkins' version of events in relation to this comment and we find that what he actually told the claimant was that health and safety was a joint responsibility between the respondent and the claimant. We do not find that Mr Perkins told the claimant that it was his responsibility entirely to ensure social distancing in the workplace.

81. It was originally anticipated that the claimant would return to work at the end of the 12 week period of self isolation which began on 23 March 2020. On 12 June 2020 James Perkins sent an email to the claimant saying that he had tried to contact the claimant by telephone but had been unable to get an answer. He explained that he was expecting the claimant to return to work on Monday, 15 June 2020 and wanted to confirm that.

82. The claimant replied the following day by email. In that email the claimant stated that he understood that shielding had been extended to the end of June. He asked whether Mr Perkins had any information about changes to procedures at Castle Donington as a result of Covid 19 and in particular whether facemasks were required.

83. Mr Perkins responded to the claimant in an email dated 16 June. He attached to that email some photographs from around the warehouse so that the claimant could see some of the safety measures that had been implemented by the respondent. The photographs included new screens, one way systems and floor markings. There were also pictures of the canteen and communications area where colleagues could eat whilst ensuring that they were at least 2 metres apart. Mr Perkins finished the email by stating that he would continue to record

the claimant as being absent on unpaid leave and contact him with any new information that may come up.

84. Mr Perkins also contacted Elizabeth Buxton in HR to take advice. He told Ms Buxton that the claimant has asthma and diabetes and had been told by his diabetes team to follow extreme social distancing but did not have an NHS shielding letter. He explained that he had extended the claimant's time off and asked whether Ms Buxton had any information that he could send out to the claimant to try and reassure him.

85. Ms Buxton replied to Mr Perkins that if the colleague was shielding without an NHS letter then he was not eligible to be furloughed. She explained that the respondent's policy was only to furlough colleagues who had an NHS or GP letter stating that they must shield. She confirmed that the claimant could remain on unpaid leave for the time being.

86. During her evidence to the Tribunal Ms Buxton told us that a number of colleagues at Castle Donington had chosen to remain on unpaid leave for a number of reasons including, for example, childcare reasons as schools were still closed, and because they were living with someone who was clinically extremely vulnerable.

87. On 19 June 2020 the claimant sent an email to Mr Perkins attaching a document that he had created, and which ran to 4 pages. The document included links to the ACAS website, to the website of a major law firm and to the website of the Equality and Human Rights Commission. It referred in some detail to the Equality Act and stated that it could be unlawful discrimination on the grounds of disability if an employer unreasonably tried to pressure somebody to go to work or unreasonably disciplined someone for not going to work. The document also commented that if there were no adjustments that could be made which would allow a disabled employee to remain at work whilst reducing the risk presented by coronavirus to an acceptable level, the employer should consider whether it would be reasonable to offer the employee disability leave or to furlough them.

88. It is clear from the contents of that document that the claimant was aware of the existence of disability discrimination legislation and of his legal rights. He was also aware of the possibility of bringing a claim in the Employment Tribunal and this document demonstrates his ability to find out information relevant to such a claim.

89. Mr Brophy commented in the document dated 19 June that he did not believe his safety would be guaranteed to a reasonable extent in the workplace. He said that he thought it was simply unfeasible at the time, given the nature of the distribution centre and the respondent's business. He suggested that HR had refused to discuss reasonable adjustments for vulnerable workers and that this, combined with their refusal to offer furlough smacked of starving people back to work in an unsafe environment.

90. The claimant also raised some concerns about the photographs that had been sent to him by Mr Perkins and about some areas of the building where he believed that extra stringent social distancing was impossible at such as the

locker room and toilets and water fountains. One of the photos that had been sent to him showed arrows pointing both ways in a corridor. Ms Buxton told us in evidence that there were some areas of the building, including some stairwells, where it was not possible to operate a one-way system. She said however that those areas of the building which were 'bidirectional' were ones which were not used frequently.

91. We find that the comments that the claimant made in this email and in other emails in which he raised concerns about the measures put in place by the respondent to protect him against the risk of contracting Covid, were the result of extreme anxiety on the claimant's party due to his medical conditions, and in particular his asthma and type I diabetes, which placed him at particular risk should he contract Covid.

92. We make no criticism of the claimant for alleging that the respondent had not done enough to protect his safety and accept that his concerns were genuine. Having said that, we find that his criticisms of the respondent were not justified, when looked at on an objective basis. For example, it cannot be said at this stage or indeed at any other stage that either HR or the respondent generally failed to discuss or refused to discuss reasonable adjustments with him. On the contrary, the bundle contains several emails from the respondent showing attempts that were made to communicate with the claimant and to try and reassure him about the measures that had been taken to protect his safety and that of others in the distribution centre.

93. We also find that the claimant was looking for a very high degree of protection against the risk of contracting Covid 19 because of the potential implications for his health should he contract the disease. The degree of protection that the claimant was seeking went substantially beyond the government guidance for the clinically vulnerable.

94. On 20 June Mr Perkins replied to the claimant's email of 19 June acknowledging receipt and explaining that he would speak to HR about it. He also explained to the claimant that he had passed a copy of his email onto a BIG representative. BIG is the employee consultation forum used by the respondent. There are approximately 80 BIG representatives at the Castle Donington distribution centre.

95. On 24 June, Elizabeth Buxton wrote to the claimant summarising some of the steps that had been taken to ensure the safety of all colleagues at Castle Donington. In the email she stated that if there were any additional measures that the claimant felt would be necessary for himself, James Perkins would be more than happy to discuss how the respondent could accommodate these. She explained that social distancing measures on site had all been risk assessed by the health and safety team and were considered appropriate to help prevent the spread of the coronavirus on site. She also explained that many colleagues had made suggestions which had been incorporated into the site plan.

96. Ms Buxton told the claimant that colleagues who were being told to shield by the NHS were allowed to shield on full pay despite the fact that government

guidance was only to pay SSP, and that those without shielding letters could stay off work but without pay. She also told the claimant that the respondent had set up a colleague support fund to help employees who found themselves in financial difficulties due to Covid 19 and asked the claimant to let Mr Perkins know if he wanted details of how to access the fund.

97. During the period from March 2020 onwards Mr Perkins remained in regular contact with the claimant. He also took advice from HR on the management of the claimant's absence. On 26 June 2020 he wrote to HR setting out the interactions that he had had with the claimant since 23 March. These show that he was in regular contract with claimant. He offered the claimant adjustments and was open and honest with him on what he believed could be done. He accepted that he had told the claimant that he didn't believe it was possible to place a mirror on every corner of the warehouse but that the one-way system reduced the number of places where two-way traffic was an issue.

98. On 24 June 2020 the claimant filled out an online enquiry form on the HSE website raising concerns about working conditions at the distribution centre in Castle Donington. His form was sent to an Environmental Health Officer at North West Leicestershire District Council and subsequently forwarded to Birmingham City Council which was the local authority responsible for the respondent's Castle Donington site.

99. The complaint that the claimant had made to the HSE about working conditions at Castle Donington was forwarded by Birmingham City Council to the respondent where it found its way to Robert Woodward the health and safety business partner at Castle Donington. There was an exchange of emails between Mr Woodward and the Council about the steps that the respondent had taken to protect employees at Castle Donington. On 9 July the Council wrote to the claimant forwarding to him a copy of the response they had received from the respondent and commenting that in light of the information they now had it was not appropriate for them to intervene further at this stage. The Council suggested that the claimant engage with the respondent and with occupational health to try and find a solution that he was satisfied with.

100. On 29 June the claimant wrote to Ms Buxton in response to her email of 24 June. He began the email by saying that the Ms Buxton had 'comprehensively failed to address any of the points that he had raised'. To his credit the claimant accepted during the Tribunal hearing that some of the comments he made in emails he sent to the respondent at the time were not appropriate. He suggested that the tone of his emails was an indication of the stress that he was suffering at the time.

101. There was certainly in our view no justification for a comment suggesting that Ms Buxton had failed to address any of the points that the claimant had raised. We found both Ms Buxton and Mr Perkins to be credible and sympathetic witnesses who demonstrated an incredible amount of patience, empathy and understanding when dealing with the claimant. In a number of the emails that the claimant sent he was critical of the respondent and of Ms Buxton and Mr Perkins. Mr Perkins and Ms Buxton in the email correspondence and during their evidence showed no signs of irritation or frustration with the claimant despite the

unjustified criticisms that the claimant made of them. This was in our view telling of the understanding and supportive approach taken by the respondent towards the claimant.

102. In his email of 29 June, the claimant said that the risk assessment the respondent had carried out for general social distance saying was not sufficient. He raised the question of furlough again and was clearly not happy that he was being 'forced' (as he saw it) onto unpaid leave. He commented that there remained some aspects of the Castle Donington site that precluded extra stringent social distancing and said that he could not see any practical ways to change them. He raised the possibility of wearing a high visibility vest identifying him as a high risk employee and warning others to stay away from him. He commented at the end of the email that James Perkins had given him good advice and instructions and that he appreciated the time that Mr Perkins had taken to keep in touch. He said that he didn't think that either he or Mr Perkins were being properly supported by the respondent and that he should not have to risk severe ill-health, impoverishment or death as a result.

103. In light of the ongoing concerns raised by the claimant about what he perceived to be the insufficient measures taken by the respondent to protect him as an individual from the risk of catching Covid in the workplace, the respondent decided in late June or early July to conduct an individual risk assessment to assess the risks to the claimant and what steps could be taken in the workplace to try and reduce these. Ms Buxton contacted Robert Woodward and Mr Perkins and arranged a meeting to discuss a personalised risk assessment for the claimant.

104. On 5 July Mr Perkins sent an email to the claimant headed 'personal risk assessment'. He wrote in that email that he had tried to contact the claimant by telephone but had being unable to do so. He explained that the respondent wanted to arrange a meeting to discuss a personal risk assessment and that during that meeting the respondent would go through with the claimant what was already in place and discuss what reasonable extra steps could be taken to protect the claimant, with a view to enabling him to return to work. The claimant was offered the options of attending the meeting in person or virtually using either Teams, Skype or a conference call.

105. The claimant responded to Mr Perkins indicating that he was having difficulties maintaining a good mobile telephone signal but that the Wi-Fi at the place he lived appeared to be okay. He commented that he thought a personal risk assessment was excellent news and that due to his autism he often struggled in meetings as it took him a while to process things. He suggested that it would be helpful for him to have a copy of the clinically vulnerable risk assessment in advance of the meeting so that he could consider it and formulate his comments.

106. The claimant also suggested that most of the meeting could be done in writing but did not object to attending a meeting and indeed commented that he thought he would be able to use Skype. He set out eight areas of concern that he had, which were: clocking on and off en masse; restricted space and blind corners in the locker areas; blind corners and pinch points in corridors; restricted space and blind corners in toilets; contagion risk at water fountains; other staff being

unaware of his clinically vulnerable status; a need for extra space in areas that had been rearranged such as the canteen; and his need to have a higher than average use of water fountains and toilets due to his diabetes.

107. Mr Perkins replied to the claimant on 6 July explaining how to download the Skype app. He said that he would look to send the details the claimant had requested out to him before the meeting.

108. Ms Buxton also wrote to the claimant on 6 July explaining that she had forwarded the claimant's main areas of concern to the health and safety manager on site and that he was preparing a draft risk assessment which she would aim to share with the claimant in advance of the call. She reassured the claimant that the respondent did not dispute that the claimant was clinically vulnerable and said that she would provide details of the hardship fund. She said that she would set up the Skype meeting for Wednesday, 8 July. Ms Buxton also explained that many colleagues in the clinically vulnerable group had continued to work throughout the period of the pandemic as had colleagues who live with someone who had been instructed to shield.

109. In advance of the meeting on 8 July Robert Woodward the health and safety business partner also wrote to the claimant asking for more information about his diabetes and his asthma. This was supplied by the claimant in an email sent on the afternoon of 8 July in which he also commented that he was more than happy to work with the respondent on the risk assessment but would prefer to do as much of the work as possible on paper because did not handle high-pressure meetings very well and his short-term memory was not very good.

110. Ms Buxton sent an email to the claimant on 8 July thanking him for the information he had sent through to Mr Woodward and seeking to reassure the claimant that the meeting was not intended to be a formal meeting but more a way of trying to start a dialogue to hopefully resolve some of the claimant's concerns and enable him to return to work. She said that she would do all she could to make the claimant feel comfortable during the meeting.

111. Mr Brophy replied to Ms Buxton in an email which began "*I am afraid your email is a significant misrepresentation of the truth*". He also wrote that one of the statements made by Ms Buxton in the email was a "*complete lie*" and that there was an underlying arrogance that he did not care for. He suggested that the respondent should have carried out a customised risk assessment for everyone in the clinically vulnerable group 15 weeks ago. He said that there was not much point in discussing things because he thought the respondent was refusing to listen to any of the feedback or to modify anything as a consequence. He finished by saying that he had not agreed to the Skype meeting as he would rather do as much of the risk assessment work on paper as he could and suggested that that would be a reasonable adjustment for his anxiety and autism.

112. The comments made by the claimant in this email, whilst driven undoubtedly by his anxiety and his autism, were without justification and were in our view unnecessarily rude and confrontational.

113. As the claimant had indicated that he did not agree to the meeting on the 8 July Ms Buxton, Mr Perkins and Mr Woodward had a brief conversation to discuss next steps. Following that conversation Mr Woodward wrote to the claimant enclosing a draft Covid 19 risk assessment personal to the claimant and based on the information that the claimant had provided. He explained that the draft was not complete because he wanted to confirm some details with the claimant and that the assessment was based on guidance from the Association of Local Authority Medical Advisors. The risk assessment assessed the claimant's vulnerability level as moderate level, which meant that he had a moderately increased risk of infection. The risk assessment gave the claimant a COVID age of 57 which was 12 years older than his actual age at the time which was 45.

114. Mr Woodward commented that he appreciated that the claimant had concerns that the combination of his medical conditions meant he was at higher risk than the assessment had indicated. He recommended that as neither he nor the claimant are medical experts the claimant should be referred to occupational health for a clinical opinion on the claimant's vulnerability in liaison with his GP.

115. On 10 July 2020 the claimant wrote to Mr Woodward enclosing more information about the health and about his interpretation of the advice to those with his medical conditions. Mr Woodward replied to the claimant indicating that the best way forward was for the occupational health referral as occupational health could make a clinical judgement on the claimant's individual circumstances.

116. Mr Perkins tried to contact the claimant by telephone to arrange a referral to occupational health. He was unable to reach him by phone. On 13 July therefore he wrote to him explaining that he wanted to speak to him about the occupational health referral to get permission to forward his personal details to occupational health and also about the colleague support fund. He attached details of the fund.

117. The claimant replied to Mr Perkins telling him that he was having communication issues as the local Vodafone mast was out of service in the marina where he lives. He said that he was happy for his details to be passed to occupational health and suggested that they should try to contact him by email rather than by telephone.

118. On 14 July 2020 Mr Perkins wrote to the claimant attaching a summary of key updates relating to Covid 19 over the past few months. In the email he also wrote that because the government guidance was that shielding would come to an end on 31 July, the respondent was asking those who were shielding and furloughed or on unpaid leave such as the claimant to return to work on or after 1 August 2020. He asked the claimant to confirm that he would be returning on this date and to contact him if he had any concerns about the return date.

119. The claimant replied the following day commenting that he remained in dispute with the respondent over what he described as the refusal to consider any extra adjustments or to furlough him 15 weeks ago. In that email the claimant said that he should be able to attend a Skype or Zoom call with occupational health however he also said that he didn't handle meetings, particularly important

meetings, well due to his autism, so would like to do as much as possible of the occupational health assessment in writing.

120. Mr Woodward sent a further email to the claimant on 18 July attaching a detailed document setting out the measures the respondent had put in place to ensure the health, safety and welfare of colleagues at Castle Donington. He asked the claimant to look through the document and let him know if he had any further queries. The document itself ran to some 14 pages and included a table summarising the government guidance and what the respondent had done to comply with that guidance. There was a section specifically dealing with the protection of people who were at higher risk, in which it was said that colleagues who had not been advised to shield but who had concerns due to an underlying health issue were encouraged to raise this with their manager who could then seek advice from the internal team responsible for providing advice and support on HR -related matters to line managers including in relation to Covid safety on site.

121. On 20 July James Perkins wrote to Elizabeth Buxton asking whether it would be possible for the claimant to be sent written questions in advance of the occupational health assessment as an adjustment for his autism. Ms Buxton raised this with the respondent's occupational health providers and but was told that they were unable to supply specific questions in advance because each consultation was individual and dependent on history.

122. On 23 July Mr Perkins wrote to the claimant to tell him that occupational health had said they would not be able to complete the occupational health meeting over the telephone and seeking to reassure him that as it was an informal meeting there wouldn't be any pressure. He asked the claimant to have a think about how he may be able to get a better signal on his telephone.

123. The claimant replied that he could try sitting in his car or driving somewhere that had a decent signal. He again said that he would like as much as possible in writing because of his autism as well as his current communication issues. Mr Perkins told the claimant that he would forward his email to occupational health and could confirm that the claimant would not be rushed during the appointment.

124. An occupational health appointment was originally arranged for 29 July 2020. This was cancelled by occupational health and rearranged for 3 August. The claimant was informed of the change of date and in an email sent to Mr Perkins on 1 August that said that an assessment on 3 August was okay for him and that he would try to find somewhere close to home where he could get a decent mobile signal. He did not indicate in that email that he did not wish to participate in an occupational health assessment that took place via telephone.

125. The following day, 2 August, Mr Perkins wrote to the claimant about a potential return to work. He reiterated that the government advice to shield and had now ended and explained that colleagues from the warehouse who had been off shielding had now returned to work. He told the claimant that if he wanted to

extend his absence from work, he would need to confirm this either verbally or in writing.

126. On 3 August 2020 an occupational health assessment took place via telephone. It did not go well. The claimant had been told that the consultation would last 90 minutes but discovered during the call but in fact only 45 minutes had been allocated to the call with the other 45 minutes allocated for the occupational health clinician to write up her report. The claimant wanted to talk at length about his medical conditions and this took up a considerable amount of time.

127. The claimant provided a great amount of detail about his diabetes in particular but also about his asthma and his autism. At one point towards the end of the consultation as the claimant was reading out blood sugar figures the clinician told him that she did not need that level of detail and that the HbA1c figure was the key reading she needed. The claimant was unhappy at that and told the clinician that she was not completing an accurate assessment. The clinician tried to explain the level of assessment detail that she needed but the claimant continued to try and talk over her and provide further information. The clinician then had to talk over the claimant and ask him to stop at which point the claimant said he wanted it recorded that he was not happy with her assessment.

128. At this point the 45 minutes had already elapsed and the clinician formed the view that she was not going to be able to get the claimant to focus on only providing her with the information she needed to complete the rest of the consultation and have the report finished in time. She told the claimant this and then ended the call, advising the claimant that for any further consultations he should try to be prepared in advance to just answer the specific questions and that the assessment would not go into as much detail as he wanted to cover because that was not required.

129. Occupational health then produced a brief report that for the respondent in which they stated that the claimant had difficulty engaging in the assessment in the format required for the consultation and as a result did not feel it was appropriate to continue with the consultation and were unable to provide any further advice. They suggested that the claimant was likely to find a further consultation difficult and recommended that the respondent consider requesting further medical evidence from the claimant's GP.

130. On 6 August the claimant wrote to Mr Perkins responding to his earlier email about returning to work. He wanted to be allowed to work from home if possible and wrote that it was still unproven whether it was safe for him to return to work. He also complained about the telephone interview he had had with occupational health earlier in the week and commented that as he refused to answer complicated questions with simple answers that could be misused the session had been cut short. He also commented that occupational health's time restrictions were not his concern. He asked Mr Perkins to tell him what was happening with occupational health.

131. Mr Perkins responded on 15 August apologising for the delay in doing so and explained that he had been on holiday. He expressed his disappointment that the occasional health appointment had not gone well and explained that he had

passed his feedback on to Elizabeth Buxton for advice as to about how to move forward with the report. He reassured the claimant that the Castle Donington site was still following government guidance to make it safe for all colleagues and reiterated his wish to get the claimant back into work and feeling safe.

132. On 16 August Mr Perkins wrote again to the claimant in some detail. He responded to the concerns raised by the claimant in his email of 6 August about it being safe for him to return to work and listed a number of additional adjustments that had been put in place to protect colleagues. These included different start and finish times to reduce the flow of traffic through corridors; floor marking asking colleagues to walk in single file; a one-way system in the warehouse; extra hand sanitiser; the deactivation of the warehouse doors; no clocking in or out using finger scanners; reducing team briefing sizes; requesting all colleagues to wipe workstations down after use; purpose built dividers on canteen benches; extension of the canteen to allow more space and floor markings in the canteen keeping colleagues 2 metres apart.

133. Mr Perkins referred the claimant to the M&S main Covid 19 home page and pointed out some of the resources it contained to support colleagues. Mr Perkins commented that he had explained to the claimant that he was unable to keep him on unpaid leave indefinitely as there was work that needed to be done, and that he was having to cover the claimant's shifts with agency workers thereby incurring an additional cost.

134. Mr Perkins also pointed out that the guidance for the clinically extremely vulnerable was that shielding had been paused and that therefore even the clinically extremely vulnerable could return to the workplace. He asked the claimant to take time to reflect on the measures that the respondent had put in place to protect employees so that they could discuss the any concerns he might have and how best Mr Perkins could support him returning to work. He said he would contact the claimant the following week. He warned the claimant that if after exploring any further adjustments the claimant felt that he was still unable to return to work he may be invited to a formal meeting to discuss his ability to return to work.

135. Although dated 16 August the letter Mr Perkins wrote was actually sent to the claimant by email on 27 August with the comment that the that Mr Perkins would call the claimant the following Friday. The claimant replied with an email that began 'it doesn't work like that'. He asked Mr Perkins to 'stop throwing lists of on-site changes that may still put the onus on me to decide whether there adequate for my level of risk'. He suggested that the risk assessment process still needed to be completed and asked Mr Perkins to arrange a second telephone meeting with occupational health and provide him with the write-up of the first meeting.

136. Mr Perkins wrote to the claimant again on 28 August 2020 inviting him to a return to work meeting on 7 September. He explained that he had tried to contact the claimant on 28 August (as he had told him he would) but that the claimant's mobile telephone went straight to answerphone. At that time the

claimant was not answering any telephone calls from Mr Perkins and Mr Perkins was unable to contact him by telephone.

137. Mr Perkins reminded the claimant that it was important that they were able to talk as it was a formal meeting and a requirement of all employees to attend meetings when required. Mr Perkins told the claimant that the meeting would be a relaxed call with himself and that the claimant could take as much time as he needed within the meeting to have his say, to think through answers and to raise any questions you may have.

138. During his evidence to the tribunal the claimant said that he did not feel under any obligation to attend meetings with the respondent at that time because he was off work and not being paid.

139. The claimant wrote to Mr Perkins on 29 August commenting that whilst the government guidance was that workers could go back to work if the site was Covid secure, this didn't automatically mean that they were safe to do so and that that was where the risk assessment process came in. He also suggested that the respondent was engaging in deliberate time wasting. There was, in our view, no justification for this comment, as the respondent was doing what it could to get the claimant back to work.

140. Mr Perkins replied to the claimant's stating that getting him back to work safely and quickly was his aim. He sought to reassure the claimant that the respondent wanted to avoid time wasting and to keep the claimant's absence to a minimum. He stated that all colleagues that had received an NHS shielding letter had now returned to work from 1 August and that at the meeting he wanted to discuss any extra reasonable adjustments that could be put in place for the claimant. He also said that he would send out a new invite letter inviting the claimant to a further return to work meeting and reminded the claimant that it was an employee requirement to keep adequate levels of contact which included availability for meetings.

141. On 2 September 2020 Mr Perkins wrote to the claimant again re-inviting him to a return to work meeting to take place on 8 September 2020. In the letter Mr Perkins told the claimant to make sure that he was available for a call on the date and time stated in the letter.

142. The claimant did not attend the meeting on 8 September 2020 and so on 14 September Mr Perkins sent an AWOL letter to the claimant. The letter was sent by email and invited the claimant to a disciplinary hearing on 17 September. Mr Perkins explained that at the meeting they would discuss why the claimant did not make himself available for two return to work meetings namely one on 28 August and the other on 8 September 2020. Mr Perkins also explained that he was concerned that the claimant remained absent from work and that he had been unable to contact him via telephone since 28 August. He explained that all employees who are absent from work are expected to maintain regular contact

and to provide a medical certificate of sickness absence over seven days. The claimant was offered the opportunity to be accompanied at the meeting.

143. The disciplinary meeting took place on 17 September and the claimant did not attend. We were provided with the notes from that meeting which recorded that Mr Perkins attended the meeting accompanied by a Mr Badger who was the notetaker. The outcome of the meeting was that the claimant was issued with a written warning. In a letter dated 17 September Mr Perkins told the claimant that he was being given a written warning for 12 months for not making contact since 29 August despite having been invited to return to work meetings and the hearing and also for being absent without leave. The claimant was informed of his right to appeal this decision.

144. On 21 September the claimant sent a letter to Mr Perkins. It is not clear when this letter was received by the respondent but there was some delay. Within the letter the claimant commented that he refuted the request for a disciplinary hearing on the grounds of unauthorised absence. He wrote that his continued absence was primarily down to the respondent being unable to address his valid questions. He also said that he was aggrieved by the respondent's ongoing assumption that he should be available at any time for meetings with no prior consultation and that he was on unpaid leave because the respondent had given him no option but to do so.

145. The claimant wrote again to the respondent on 27 September 2020. It was also unclear exactly when that letter was received by the respondent. In this letter the claimant said that he did not attend the meeting that the respondent had scheduled because in his view there was nothing to discuss until the risk assessment process was completed and that he had never agreed to participate in the first place. He also complained that the respondent had never agreed that vulnerable employees ought to have greater levels of protection and suggested that an extra consideration should be given to people at higher risk of Covid. He set out again a number of concerns he had about returning to work and disputed the reason for arranging a return to work meeting whilst the risk assessment process had not been completed and his concerns had not been resolved. He suggested that the delay lay with the respondent 'repeatedly ignoring his concerns' and delaying the risk assessment and the occupational health process for no good reason stop

146. In the letter the claimant also said that he had been on annual leave in the week that the disciplinary meeting had taken place.

147. Mr Perkins had not been aware that the claimant was on annual leave in the week of the disciplinary hearing. He therefore withdrew the disciplinary warning and rearranged the disciplinary hearing for 1 October.

148. On 30 September the claimant sent a fit note to Mr Perkins by post. The fit note had been signed by the claimant's GP on 7 September 2020 and certified the claimant as not fit for work for the three months between 1 September and 30 November 2020. The reason for absence was stated as being anxiety and depression, autistic spectrum disorder and 'likely ADHD awaiting assessment.'

Mr Perkins did not receive the fit note or the claimant's letter of 30 September until after the reconvened disciplinary hearing had taken place on 1 October.

149. The claimant did not attend the reconvened disciplinary hearing on 1 October, and it went ahead in his absence. Mr Perkins decided to reissue the 12 month written warning. The warning was sent to the claimant in a letter dated 2 October. Mr Perkins commented in the letter that he was disappointed that he had not been able to make contact with the claimant after numerous attempts to do so, and that he considered it a reasonable request for the claimant to return to work after his period of shielding. He highlighted two extra safety measures that had been implemented on site, namely that all colleagues would be asked to wear face masks unless they were medically exempt and that thermal scanners had been placed in the main entrance of the site to take employees' temperatures as they arrived at work. The written warning was for unauthorised absence and for not maintaining contact during his absence. The claimant was informed that he had the right to appeal against the decision.

150. The claimant replied to the written warning in a letter dated 8 October addressed to Mr Perkins in which he stated that the letter had repeated 'numerous false reports'. The claimant also sent further copies of the three latest letters which he had sent to the respondent and which Mr Perkins had not yet received.

151. Mr Perkins responded to the claimant by confirming receipt of the claimant's fit note signing him off until 30 November and suggesting a meeting to discuss the referral to occupational health and the risk assessment.

152. A further occupational health referral was made for the claimant and an appointment was arranged for 17 November 2020. In advance of that meeting Mr Perkins wrote to the claimant telling him what questions he had asked occupational health to answer. He did not however tell him what questions occupational health would be asking him and nor did occupational health.

153. The claimant wrote to Mr Perkins on 15 November 2020 confirming that the date and time proposed for the second occupational health assessment were fine and that he would attend the appointment by telephone. He also wrote 'I don't intend to go over the same ground twice just because a jobsworth in occupational health decided their time limits were more important than my health. That's not acceptable. The second session should be to complete the risk assessment process as Rob Woodward intended several months ago not start all over again'.

154. The second occupational health assessment took place on 17 November 2020. The notes of that assessment prepared by the clinician record that consent had been initially gained from the claimant but that the claimant appeared quite annoyed as he was under the impression that the previous consultation was about 75% complete and that this meeting was just to finish it off. The claimant had said that he was not aware of the questions that needed to be asked that he would complete the assessment under duress but that this should be done on paper as he found assessments extremely stressful.

155. The notes also record that the claimant said that he had had to drive 2 miles up the road from his home and sit in his car in a layby to ensure adequate

telephone signal, and that when he was told that information could be obtained by paper he said that the respondent had said this was not possible. He'd also commented that the previous assessor had been abrasive and complained that it was evident she was just interested in gaining information in the allocated time. The occupational clinician concluded that the claimant had withdrawn his consent to engage with occupational health and informed the respondent of that in a brief report.

156. Mr Perkins contacted Alexander Charles Rowe who had replaced Mr Woodward as health and safety specialist as Mr Woodward had left the respondent's employment. Mr Perkins asked Mr Charles Rowe if he could pick up on the question of the risk assessment for the claimant.

157. On 23 November Mr Perkins wrote to the claimant explaining that an internal investigation was being carried out with occupational health and that occupational health had advised that they write to the claimant's GP. He attached a consent form for the claimant to complete and return. He also stated that he wanted to continue to support the claimant to return to work and wanted to invite him to an ill health meeting. He commented that he was aware that the claimant had reservations about coming onto site and therefore proposed that a review of the risk assessment was conducted with the health and safety team. He told the claimant that he had asked Mr Charles Rowe to call him on 2 December to review the risk assessment and talk through the concerns that the claimant had previously raised about his return to work.

158. Mr Perkins tried to contact the claimant by telephone on 30 November as that was the date upon which the claimant's fit note expired. He was unable to get an answer from the claimant and therefore sent him an email asking him whether he would be returning to work or had visited his doctor for an extension of the fit note. He also asked the claimant to make himself available for a call from Alexander Charles Rowe from the health and safety team on 2 December to review the risk assessment.

159. Mr Charles Rowe attempted to contact the claimant on 2 December but was unable to do so. He therefore wrote to the claimant explaining that he had telephoned him three times on 2 December and that that there had been no answer. He explained that he had been hoping to speak to the claimant so that they could discuss the claimant's concerns and the safety measures in place at Castle Donington and asked the claimant speak to his line manager if he wanted to reorganise the meeting.

160. The claimant replied in a letter dated 3 December 2020 in which he asked what the respondent meant by reviewing his risk assessment and whether that was necessary. He also questioned the independence of the respondent's occupational health advisers.

161. Mr Perkins replied to the claimant in the letter dated 22 December which was sent to the claimant by email on 6 January 21. He told the claimant that they would revisit the risk assessment once his GP had provided the medical information they required and they had the occupational health report back, and

asked the claimant to complete and return the consent form so that they could contact his GP.

162. The claimant did not return the consent form and as a result no progress could be made in obtaining further advice from occupational health.

163. The claimant remained off work on unpaid leave until May 2021 when he returned to work after receiving his second Covid vaccination.

164. The claimant alleged that he appealed against the decision to issue him with a written warning on 2 October 2020. He accepted in evidence that he had not sent in a letter of appeal after receiving the written warning dated 2 October 2020. He said however that his letter of 21 September 2020 should have been treated as an appeal because it included the words 'I refute your request for a disciplinary hearing on the grounds of unauthorised absence'. We find that the letter of 21 September does not constitute an appeal against the written warning issued on 2 October and that the claimant did not appeal against the warning.

165. The claimant complained about the process followed in relation to the disciplinary warning, alleging that Mr Perkins should not have carried out the disciplinary because he was the person who had been trying to contact the claimant and therefore have a conflict of interest. Ms Buxton's evidence was that it was appropriate for Mr Perkins to conduct the disciplinary hearing because he was the claimant's line manager . We accept this evidence and find that it was appropriate for Mr Perkins to conduct the disciplinary hearings in September and October 2020.

166. In many of his written communications with the respondent, the claimant came across as being very angry, very critical of the respondent and very being difficult. Whilst we accept that this may have been driven to some extent by his autism and his anxiety, most of his criticisms of the respondent were in our view entirely unjustified. We accept that the claimant genuinely believed that he was at increased risk from Covid and that many of the behaviours he demonstrated were a consequence of that. The respondent in our view took a great number of steps to try and support the claimant and get him back to work. It also worked hard to maintain communication with him in the face of often robust criticisms.

167. The claimant is clearly an intelligent individual who is able to articulate his views very well, particularly in writing. He is also able to research relevant information and legal principles as demonstrated by the documents sent to Mr Perkins in June 2020 in which he referred to the ACAS website, the Equality and Human Rights Commission website and the website of a notable law firm, and the information contained within those websites. The claimant was therefore able to

access sources of legal advice and to quote relevant provisions of the Equality Act.

168. The claimant was not aware of the time limit for bringing claims to an Employment Tribunal until he took advice on his claim in December 2020 at the stage at which he contacted ACAS.

The law

Time limits – discrimination claims

169. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

170. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(a) Failure to do something is to be treated as occurring when the person in question decided on it.*"

171. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*.**

172. Factors that are relevant when considering whether to extend time include:

172.1 The length of and reasons for the delay in presenting the claim;

172.2 The extent to which the cogency of the evidence is likely to be affected by the delay;

172.3 The extent to which the respondent cooperated with any requests for information;

172.4 How quickly the claimant acted when he knew of the facts giving rise to the claim; and

172.5 The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

173. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*** the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove firstly that the acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Burden of proof

174. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(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…"*

175. There is, in discrimination cases, a two stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In ***Igen v Wong*** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

176. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two stage burden applies to all of the types of discrimination complaint made by the claimant.

Reasonable adjustments

177. Section 20 of the Equality Act 2010 states as follows:-

> "(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*
>
> *(2) The duty comprises the following three requirements.*

(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.

(4) The second requirement is a requirement, where a physical feature 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 that 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…"

178. Section 21 of the Equality Act 2010 provides that:-

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

179. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734.***

180. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A 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…"

181. The following are the key components which must be considered in every case:

181.1 What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

181.2 How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

181.3 Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

181.4 Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

181.5 Is the claim brought within time?

182. Paragraph 6.28 of the EHRC Code of Practice on Employment (2011) ("**the Code**") sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

182.1 The extent to which it is likely that the adjustment will be effective;

182.2 The financial and other costs of making the adjustment;

182.3 The extent of any disruption caused;

182.4 The extent of the employer's financial resources;

182.5 The availability of financial or other assistance such as Access to Work; and

182.6 The type and size of the employer.

183. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law (***Romec Ltd v Rudham [2007] All ER(D***)).

184. It is almost always a good idea for the respondent to consult the claimant about what adjustments might be appropriate. A failure to consult the claimant makes it more likely that the employer might fail in its duty to make reasonable adjustments.

<u>Discrimination arising from disability</u>

185. Section 15 of the Equality Act 2010 states that:

> "*(1) A person (A) discriminates against a disabled person (B) ifr –*
>
> *(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.

186. In a claim under section 15, no comparator is required, and the claimant is merely required to show that he has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

187. In **Secretary of State for Justice and another v Dunn EAT 0234/16** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

187.1 There must be unfavourable treatment;

187.2 There must be something that arises in consequence of the claimant's disability;

187.3 The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and

187.4 The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

188. The Code states, at paragraph 5.9, that the consequences of a disability "*include anything which is the result, effect or outcome of a disabled person's disability*" and gives the example of a woman who is disciplined for losing her temper at work. Her behaviour was the result of severe pain caused by cancer, and was out of character for her. The employer was aware that she was suffering from cancer, and in such a case disciplinary action would be because of something which arose in consequence of her disability.

189. In ***Pnaiser v NHS England and anor [2016] IRLR 170*** the EAT summarised the correct approach to the question of causation under section 15 as being for the Tribunal:

189.1 To identify whether the claimant was treated unfavourably and by whom; and

189.2 To decide what caused that treatment, focusing on what was in the mind of the alleged discriminator. Motive is irrelevant in determining this question, although the Tribunal may need to consider both the conscious and subconscious thought processes of the alleged discriminator.

189.3 Determine whether the reason for the treatment was something arising in consequence of the claimant's disability, which is an objective test.

190. The 'something arising' from the disability does not need to be the only cause for the unfavourable treatment, it merely has to have a significant influence on or be an effective cause of the treatment (***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893***). In ***Risby v London Borough of Waltham Forest***

EAT 0318/15 the EAT held that all that is required is a 'loose connection' between the unfavourable treatment and the something arising.

Submissions

Claimant

191. Much of the claimant's submissions were on the question of time limits. As it has not been necessary for us to decide the question of time limits, we do not summarise those submissions here.

192. In relation to the substantive matters raised in his claim, the claimant submitted that:

192.1 He had been wrong to suggest that 'extra stringent social distancing measures' were required for the clinically vulnerable, and that this suggestion was not contained within the government guidance.

192.2 Rather, social distancing measure should have been applied stringently and without any compromise. Normal social distancing measures did not cover the clinically vulnerable because some rule breaking is allowed.

192.3 Elizabeth Buxton's evidence that the site measures were considered safe by the respondent's health and safety consultants should be disregarded. How would they know whether the measures were enough for a clinically vulnerable employee?

192.4 The one way system in place did not cover the whole building and was compromised. The areas the claimant was concerned about were ones where the normal guidelines were being flexed.

192.5 The occupational health assessments should have been done in writing and not subject to any time pressures. He had been unable to share NHS findings with occupational health. He couldn't get anyone to listen.

192.6 Line managers like Mr Perkins did not have enough time to deal with staff matters. Mr Perkins had not engaged with him to try and complete the occupational health assessment.

192.7 The disciplinary process was not reasonable. There was a conflict of interest in Mr Perkins doing the investigation when he was part of the problem and had caused the breakdown in the relationship.

192.8 The respondent had refused to accept his appeal. His autism had not been taken into account. He had been unfairly and disproportionately treated.

192.9 The respondent's physical features and lack of auxiliary aids placed him at a substantial disadvantage and the respondent should have known that.

192.10 It was reasonable for the respondent to make adjustments, but it failed to do so.

Respondent

193. Mr Kelly submitted that at the heart of this claim is a dispute between the parties over the standard to be applied by the respondent in ensuring employees' safety in the workplace. The respondent says it followed government and independent advice, whilst the claimant insisted that he was entitled to have a higher standard applied, and that the adjustments made for him were not sufficient.

194. In Mr Kelly's submission, the claimant had misunderstood the government guidance on social distancing for the clinically vulnerable, and that 'extra stringent' measures were not required. Normal social distancing measures applied to the clinically vulnerable. The respondent's approach was to implement safety measures for all colleagues and make individual adjustments for vulnerable colleagues who were at higher risk. This was consistent with its interpretation of the government guidance.

195. In relation to the reasonable adjustments claim, Mr Kelly argued that none of the PCPs relied upon by the claimant had placed him at a substantial disadvantage. Rather, any disadvantage suffered by the claimant was a result of the claimant's mistaken interpretation of the government guidance. Moreover, the measures taken by the respondent made it possible for him to safely return to work and avoid financial hardship.

196. The respondent also disputed all of the physical features relied upon by the claimant, and argues that the physical features of the distribution centre did not place the claimant at a substantial disadvantage.

197. In relation to the auxiliary aids sought by the claimant, Mr Kelly submitted that a lanyard had been available, and that the failure to provide other auxiliary aids did not place the claimant at a substantial disadvantage.

198. On the section 15 claim, Mr Kelly submitted that:

198.1 Unfavourable treatment was conceded.

198.2 The 'things arising from disability' relied upon by the claimant did not in fact arise from his disability. Clinically vulnerable people were permitted to return to work, so the claimant's absence and inability to return to work did not arise from his disability. Similarly, the respondent disputed that the claimant was unable to return to work due to feeling unsafe with a generic risk assessment.

198.3 The decision to issue written warnings was not only due to the claimant's absence from work, but due also to his failure to make contact and to attend meetings.

198.4 It is self-evident that the legitimate aims relied upon by the respondent are ones which are legitimate for any employer.

198.5 It was proportionate for the respondent to issue the warnings given the numerous attempts made by Mr Perkins to contact the claimant and the claimant's wilful refusal to engage with him.

Conclusions

199. We reached the following conclusions on a unanimous basis having considered carefully the evidence before us, the legal principles summarised above and the submissions of both parties.

Disability related discrimination

200. The respondent admits that the complaint of discrimination arising from disability is made in the time.

201. The respondent also admits that issuing the claimant with a 12 month written warning for unauthorised absences and non-attendance on 17 September 2020 and then re-issuing the warning on 2 September after the warning letter of 17 September had been withdrawn amounts to unfavourable treatment for the purposes of section 15 of the Equality Act.

202. The 'something arising from disability' that the claimant relies upon for the section 15 claim is the claimant's absence and inability to work due to his clinically vulnerable status and being unsafe with a generic risk assessment.

203. We are satisfied that the claimant's absence from work and his inability to return to work arose in consequence of the claimant's disability. It was clear on the evidence before us that a combination of the claimant's diabetes and his asthma placed him at a higher risk of serious illness and death if he were to contract Covid, and that he was classed as clinically vulnerable as a result of those conditions. The autism and anxiety that he also lives with made him extremely concerned about catching Covid, and anxious about returning to work. As a result of his health, he formed a strong and unshakeable view that the workplace was not safe for him, despite all the reassurance that the respondent sought to provide. He also believed, as a result of his disability that what he considered to be a generic risk assessment, was unsafe for him.

204. We therefore find that the claimant's absence and inability to return to work, and feeling unsafe with a generic risk assessment arose in consequence of his disability.

205. Although it is not necessary for us to decide the point in order to reach a judgment on the section 15 claim, it is in our view appropriate to comment that we do not find that the 'generic risk assessment' rendered it unsafe for the claimant to return to work. It was clear to us that the respondent took its health and safety duties extremely seriously. It engaged external health and safety consultants to help it make the distribution centre Covid secure. It also had an internal health and safety team as well as a team dedicated to advising line managers on Covid related issues.

206. The evidence before us showed that the respondent had considered the risks to all staff of contracting Covid in the workplace, and that the risk assessment had specifically considered the risks to clinically vulnerable staff as well as to those who did not fall into that category. From very early on in the pandemic the respondent demonstrated its willingness to take extra steps to protect the claimant, the email from Mr Perkins to the claimant dated 8 April 2020 being one clear example of that.

207. We accept, on balance, that the reasons for the unfavourable treatment of the claimant (the issuing and the re-issuing of the written warning) were at least in part because of the claimant's absence from work. That was not the only reason however, as the written warnings make clear that the reasons for the disciplinary action were that the claimant's absence from work was, at the time, unauthorised, and that the claimant had failed to stay in contact with the respondent.

208. Applying the principles established in ***Hall v Chief Constable of West Yorkshire Police*** and ***Risby v London Borough of Waltham Forest*** we are satisfied that one of the effective causes of the disciplinary action taken against the claimant was his absence from work which arose in consequence of his disabilities. We therefore find on balance that the reason for the unfavourable treatment was something arising from the disability.

209. We have then gone on to consider whether the respondent's treatment of the claimant was a proportionate means of achieving a legitimate aim. The aims relied upon by the respondent were operating a disciplinary policy to regulate conduct and behaviour; and preventing unauthorised absence. We are satisfied that both of those aims are ones which it is legitimate for the respondent to have.

210. It is entirely reasonable and appropriate for the respondent to regulate the conduct and behaviour of employees through the operation of a disciplinary policy. Indeed the ACAS Code of Practice on Disciplinary & Grievance procedures recommends that employers should have written disciplinary policies and use those policies to deal with issues of misconduct. It is also entirely appropriate and legitimate for the respondent to prevent unauthorised absence from work by employees. It is a necessary part of organising the running of a business that an employer should know who is available for work.

211. We find that the steps taken by the respondent in issuing the written warnings were a proportionate means of achieving the legitimate aims relied upon. The respondent's sickness absence policy makes clear that employees are expected to remain in contact during periods of absence, and that disciplinary action may be taken if they do not.

212. We also accept that the written warning was a proportionate means of achieving those aims. Mr Perkins had taken considerable steps to try and contact the claimant by telephone and to arrange meetings with him. We accept Mr Kelly's submission that the claimant wilfully refused to engage with Mr Perkins at times and that in the circumstances it was proportionate for him to issue written warnings.

213. It is regrettable that the claimant chose not to make contact with the respondent at times despite being able throughout the period of time in question to write very lengthy and detailed letters. He chose to communicate with the respondent on his own terms and at times that suited him, which resulted in him often not being available at times that the respondent reasonably requested that he be available.

214. It was in our view not unreasonable of the respondent to expect the claimant to attend remote meetings to discuss his return to work. The claimant was told to make himself available for meetings but chose not to do so. In evidence he told us that he didn't believe he had to attend meetings with the respondent because he was not being paid. This was in our view not a reasonable approach for the claimant to take, given that he remained an employee of the respondent at the time.

215. It is clear to us that the claimant was treated with a great deal of sympathy. He was also provided with a lot of support when he told the respondent that he was did not wish to attend work because of his health. The claimant eventually returned to work in May 2021 and there was no evidence of any further disciplinary action taken against the claimant. The claimant remained in the respondent's employment for some months after returning to work.

216. In light of the clear statement in the respondent's sickness absence policy, the attempts made by the respondent to contact the claimant and the claimant's failure to remain in contact, it is difficult to see what else could have been done by the respondent to achieve its legitimate aims.

217. The complaint of discrimination arising from disability therefore fails and is dismissed.

<u>Reasonable adjustments</u>

218. The claimant relies upon five PCPs:

    218.1 The requirement to have good attendance. This PCP is admitted by the respondent.

    218.2 The requirement to work in a specific job role. The respondent also admits applying this PCP.

    218.3 The requirement to return to work following the implementation of a generic Covid risk assessment. The respondent does not admit applying this PCP. The claimant accepted in his submissions to the Tribunal that this PCP had not been applied after 8 April 2020.

    218.4 The requirement to have been designated as needing to shield by the government to qualify the furlough or paid leave. The respondent admitted applying this PCP.

218.5 The requirement to return to work following the implementation of generic Covid secure safety measures. The respondent denied applying this PCP. The claimant also accepted that this PCP had only been applied prior to 8 April 2020.

219. In light of the admission by the respondent that it applied three out of the five PCPs relied on, we have only had to consider whether the respondent applied the third and fifth PCPS. We find that the respondent did not apply the third PCP – it did not require the claimant to return to work following the implementation of a generic Covid risk assessment at any time prior to or including 8 April 2020. We also find that the respondent did not apply the fifth PCP – it did not require the claimant to return to work following the implementation of generic Covid secure safety measures at any time prior to 8 April 2020. If we had had to decide the question, we would also have found that the respondent had not applied those PCPs at any time, including after 8 April 2020.

220. The claimant was allowed to remain on unpaid leave from 23 March 2020 until May 2021 and was not required to return to work at any time during that period. Although attempts were made in August and September 2020 to get the claimant back to work given the considerable steps that the respondent had taken to make the site Covid secure and given also the change in the government guidance that meant that even the clinically extremely vulnerable were no longer required to shield, at no point was the claimant actually required to return to work. As a result the third and fifth PCPs relied upon by the claimant were not applied by the respondent.

221. We have then gone on to consider whether the first, second and fourth PCPs placed the claimant at a substantial disadvantage compared to someone without the claimant's disabilities. The disadvantages relied upon by the claimant were firstly that he was placed at an increased risk of serious illness or death and secondly that he suffered a loss of pay, financial hardship and stress, and had to sell his belongings.

222. The first of the PCPs was the requirement to have good attendance. Whilst this was applied in general terms by the respondent, the claimant was not required to attend work at any point between 23 March 2020 and May 2021. It cannot be said therefore that a general requirement for employees to have good attendance placed the claimant at increased risk of serious illness or death in circumstances in which he was not required to be at work.

223. We accept that the claimant suffered a loss of pay, financial hardship and stress by remaining off work and that he had to sell his belongings to support himself financially. We find however that this was not as a result of the requirement to have good attendance. Rather it was a result of the claimant's decision not to return to work, despite not being advised to shield, and of the respondent's requirement that employees should be designated as needing to shield by the government in order to qualify for furlough and paid leave (the fourth PCP).

224. The first PCP did not, therefore, put the claimant at a substantial disadvantage.

225. Similarly, it cannot be said that the requirement to work in a specific job role (the second PCP) placed the claimant at an increased risk of serious illness or death because, although the requirement was applied generally, in practice the claimant was not required to perform any duties during the period of time covered by the claim. In any event, the respondent placed the claimant on the Crisp plant, which was the safest and most socially distanced area of the distribution centre. The requirement to work there did not, in our view, place the claimant at an increased risk of serious illness or death.

226. The claimant suggested that he should have been transferred into another role. We accept Ms Buxton's evidence that there were no roles that the claimant could do from home and that therefore it was not possible for him to work from home.

227. We also accept the respondent's submissions that if there was a disadvantage suffered by the claimant in terms of loss of pay, financial hardship, stress and having to sell his belongings, that disadvantage was not because of the second PCP but was instead a result of the claimant's misinterpretation of the government guidance. The claimant believed that extra stringent social distancing measures had to be applied to those with diabetes. In fact, that was not the case. Rather, the government guidance was that those with certain conditions such as diabetes should be particularly stringent when applying the normal social distancing measures that applied to the rest of the population. There was no requirement for extra social distancing measures for the clinically vulnerable and the claimant was mistaken in his belief that they were.

228. We also find, therefore, that the second PCP did not place the claimant at a substantial disadvantage.

229. Much of this claim turns upon the claimant's extreme focus on his health and his anxieties about Covid 19 and the risks to him. Whilst we accept that the claimant was genuine in his belief about the risks to him, we also find that the approach taken by the respondent to managing Covid risk for the claimant was reasonable.

230. The fourth PCP relied upon by the claimant was the requirement to have been designated as needing to shield by the government in order to qualify for furlough or paid leave. This PCP was applied by the respondent. There was no evidence to suggest that this PCP placed the claimant at increased risk of serious illness or death. We are satisfied however that this PCP caused the claimant to suffer a substantial disadvantage, in that he suffered a loss of pay, financial hardship and stress and had to sell his belongings. It caused him to be off work for many months on unpaid leave.

231. Having found that only the fourth PCP placed the claimant at a substantial disadvantage, we have then gone on to consider whether the respondent could have taken steps to avoid that disadvantage. The relevant adjustment suggested by the claimant was that he should have been placed on furlough without a shielding letter.

232. We find that it would not have been a reasonable adjustment for the respondent to put the claimant on furlough without a shielding letter. The respondent was in our view justified in taking the approach that it did. Furlough was a scheme which was publicly funded. The purpose of the scheme was to protect the jobs of employees whose employers may otherwise have been unable to afford to continue to employ them, and who may therefore have been made redundant. It could also legitimately be used to protect those who were legally required to shield.

233. The respondent needed employees in the distribution centre. There was an increased demand for online goods, which resulted in an increased workload in the centre. The respondent needed the claimant to work. The government guidance was that he could work, provided social distancing was observed. It was in our view entirely reasonable for the respondent to refuse to use public money to pay the claimant to stay at home when government guidance was that he could work, they needed him to work, and they had taken considerable steps to protect him from catching Covid at work.

234. The respondent did not, therefore, fail to make a reasonable adjustment by choosing not to put the claimant on furlough.

235. We also find that the respondent did not fail to make a reasonable adjustment by not finding a role for the claimant that he could do from home. The claimant's role was based in the distribution centre and could not have been done from home. We accept the respondent's evidence that there were no other roles available that the claimant could have done from home, as all the roles which could have been done at home were of a higher grade. It would not, in our view, have been reasonable to require the respondent to promote the claimant or create a role for him.

236. None of the other adjustments suggested by the claimant would have avoided the disadvantage caused to the claimant by the fourth PCP.

237. The respondent did not, therefore, fail to make reasonable adjustments in relation to any of the PCPs relied upon by the claimant.

238. We have then gone on to consider whether any of the physical features relied upon by the claimant placed him at a substantial disadvantage. The claimant relied upon five physical features:

    238.1 narrow corridors blindspots and stairwells where he was at risk of coming into close contact with colleagues;

    238.2 Cramped locker areas;

    238.3 The canteen where he alleges 2 metre social distancing was not being maintained;

    238.4 The toilets where social distancing was not possible and

238.5 The water fountains.

239. The claimant accepted that the fourth physical feature had not been applied to him because he was told at an early stage that he could use the disabled toilets where he would not come into contact with other employees. He also accepted that additional cleaning facilities were provided at the water fountains (the fifth physical feature) so that employees could wipe them down before and after each use. Those additional cleaning facilities, when combined with the other steps taken by the respondent to make the workplace Covid secure, meant that the claimant was not placed at a substantial disadvantage by the water fountains. It would have been possible for him to use the water fountains with minimal risk of contracting Covid.

240. In relation to the canteen (the third physical feature) we find that the respondent did put in place two metre social distancing in the canteen and the claimant was told of this repeatedly from eighth of April 2020 onwards. There was no evidence before us to suggest that two metre social distancing was not being maintained in the canteen, and we therefore find that this physical feature was not in fact applied. There was social distancing in the canteen.

241. We also find that the second physical feature alleged by the claimant (cramped locker areas) was not in fact applied. The respondent took steps to ensure that employees could be socially distanced when accessing their lockers by spacing the lockers out.

242. We accept, based on the evidence before us, that there were some narrow corridors, blind spots and stairwells where the claimant was at some risk of coming into close contact with colleagues. We do not accept however that this placed him at a substantial disadvantage in comparison with those without his disabilities. This was because of the steps taken by the respondent to mitigate against the risk of him coming into contact with people. Those areas were ones which were not often used, and where staff were still required to observe social distancing. As a result, the risk to the claimant was minimal and did not amount to s substantial disadvantage.

243. The claim that the respondent failed to make reasonable adjustments based upon physical features therefore fails.

244. The third limb of the reasonable adjustment claim is an allegation that a lack of auxiliary aids placed the claimant at a substantial disadvantage. The auxiliary aids relied upon were:

244.1 high visibility vests or some other clear sign or marker identifying vulnerable employees;

244.2 mirrors for use on blind corners;

244.3 audible warning devices for use on blind corners; and/or

244.4 warning lights operated by pressure pads on the floor.

245. The respondent admitted that it had not provided these auxiliary aids at the relevant time but disputes that the failure to do so put the claimant at a substantial disadvantage.

246. The failure to provide the auxiliary aids did not in our view place the claimant at a substantial disadvantage. Whilst there was some risk to all employees in coming into work during the Covid 19 pandemic, it was not possible to eliminate that risk entirely. The respondent in our view took substantial steps to try and reduce the risk not just to employees generally but also to the claimant in particular.

247. Whilst we accept that the claimant would have been at some risk as a result of the respondent not providing the auxiliary aids, that risk did not in our view amount to a substantial disadvantage. When taking account of the other steps that were taken by the respondent such as, for example, arranging for the claimant to work in an area of the distribution centre where he was less likely to come into contact with colleagues, by arranging one-way systems and by only allowing bi-directional travel in areas that were less frequently used, the respondent took reasonable steps to reduce the risk to the claimant.

248. We accept that the claimant was a clinically vulnerable person, but he was not clinically extremely vulnerable. In any event the restriction on clinically extremely vulnerable employees was relaxed in August 2020 and they were then allowed to return to the workplace.

249. The respondent had engaged not only its own health and safety team but also an external firm of specialist health and safety consultants, to produce detailed risk assessments and detailed guidance for those working within the distribution centre on ways of minimising the risk of Covid transmission. A considerable number of measures were introduced by the respondent. The situation was also kept under regular revie, as demonstrated by the number of updated risk assessments and internal guidance that was contained within the bundle. The early months of the pandemic were an ever-changing situation and it was therefore appropriate for the respondent to keep matters under review and to change things as government guidance changed.

250. Turning now to the specific adjustments suggested by the claimant, although we are not required to make findings on these in light of our conclusions above, had we been required to make findings as to whether they were reasonable we would have found as follows.

    250.1 Working with the claimant to find solutions to enable him to return to work. We find that this adjustment was made. Mr Perkins, Ms Buxton, Mr Woodward and Mr Rowe all sought to try and find a solution to help the claimant return to work. Considerable effort went in to communicating with the claimant and trying to support him back to work.

    250.2 Finding a role that the claimant could do from home. There were no roles that the claimant could reasonably do working from home given the nature of his work and of the work generally available within the distribution

centre. It would not, in our view, have been a reasonable adjustment to promote the claimant to a more senior role that could be done from home, nor to create a role for home, particularly since there was a requirement for the claimant to do his original role, and the claimant could reasonably have returned to work given the protections in place.

250.3 Putting the claimant on furlough would not, in our view, have been a reasonable adjustment. The respondent was entitled to operate the furlough scheme in the way that it did, and which was consistent with the aims of the scheme. The respondent had an increased need for workers at the distribution centre given the increase in demand for online sales. The claimant did not have a shielding letter.

250.4 We find that the respondent took all reasonable steps to carry out a specific personalised risk assessment to identify measures to support the claimant to return to work. Mr Woodward started this piece of work in July 2020 and communicated with the claimant about it. Whilst the personalised risk assessment was not completed this was because of the claimant's approach to the occupational health assessments and to the question of the risk assessment generally. It was not due to any failings on the part of the respondent.

250.5 We also find that the respondent did take considerable steps to make the workplace safer for the claimant through the detailed risk assessments that they carried out, through their discussions with the claimant and the steps that they took to make him individually safer and through carrying out an individual risk assessment and referring him on two occasions to occupational health so that they could assess his level of vulnerability.

250.6 We have no hesitation whatsoever in finding that the respondent did communicate at length and in great detail with the claimant about the Covid safety measures already in place. The claimant was not ignored as he suggests.

250.7 It would not in our view has been reasonable for the respondent to provide the auxiliary aids suggested by the claimant. We have already found that the failure to provide them did not place the claimant at substantial disadvantage. We also find that the steps that had been taken already to reduce the risk to the claimant and others of contracting Covid, and the fact that the respondent's health and safety team who were the professionals charged with reducing risk in the workplace had decided that they were not necessary, made it reasonable for the respondent not to provide them. It was not in our view unreasonable of the respondent to rely upon the advice of its own health and safety advisers.

250.8 We find that the respondent did provide the claimant with a locker in an alternative location with a good line of sight.

250.9 We also find that the respondent did ensure that there was 2 metre social distancing in the canteen.

250.10 It would not have been a reasonable adjustment in our view to limit the number of people using the toilets at any one time and log how many people went in and out of the toilet. This was quite simply not necessary to reduce any risk to the claimant because he was provided with a pass that enabled him to access an individual disabled toilet and therefore he did not risk coming into contact with other people when using the toilet.

250.11 Finally, we find that the respondent did put in place more regular cleaning of the water fountains and would have allowed the claimant to carry a second water bottle had he returned to work.

251. For these reasons the complaint of failure to make reasonable adjustments fails and is dismissed.

252. In light of our findings above it is not be necessary for us to make any findings on the question of time limits or on the question of remedy.

Employment Judge Ayre
22 November 2022