THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss W N Dowrich	**v**	Marks & Spencer Plc

Heard at: London Central **On**: 6-11 September 2017

Before: Employment Judge Baty
Members: Miss J Killick
Dr V Weerasinghe

Representation:
Claimant: In Person
Respondent: Ms C Ashiro (Counsel)

RESERVED JUDGMENT

1. **The Claimant's complaints of direct disability discrimination and for a failure to make reasonable adjustments were presented out of time and it was not just and equitable to extend time. The Tribunal does not therefore have jurisdiction to hear those complaints and they are dismissed.**

2. **The Claimant's complaints of discrimination arising from disability and of unfair dismissal fail.**

REASONS

The Complaints

1 By a claim form presented to the Employment Tribunal on 29 September 2016, the Claimant brought complaints for unfair dismissal and various complaints of disability discrimination. The Respondent defended the complaints.

The Issues

2 At a case management preliminary hearing of 21 December 2016, before Employment Judge Lewzey, the issues of the claim were agreed between

the parties and set out in the note of that preliminary hearing. Five specific allegations were identified as being of direct disability discrimination and a failure to make reasonable adjustments. Disability was not conceded at that point.

3 At a subsequent preliminary hearing of 10 February 2017, Employment Judge Taylor found that the Claimant was at all material times a disabled person by reason of left knee soft tissue damage and right ankle tendon damage.

4 At a further case management preliminary hearing on 7 March 2017, Employment Judge Taylor allowed an amendment to the claim form to add the words "the dismissal constituted discrimination because of something arising in consequence of disability in that the Claimant's lateness was caused, in part, by her disability", thereby adding a claim for discrimination arising from disability to the existing complaints. In an amended response subsequently submitted, the Respondent included a justification defence to this complaint.

5 At the start of the present hearing, the Judge went through the issues with the parties, who confirmed that there was no change to these issues. The only clarification which was made and agreed at the start of the hearing was that any issues in relation to the unfair dismissal complaint concerning contributory fault on the part of the Claimant or adjustments to compensation under the principles in Polkey v A E Dayton, which were pleaded in the response but had not been included in the list of issues, would be considered at the liability stage and that, therefore, any submissions on those issues should be made at the liability stage.

6 The issues for the Tribunal to determine were therefore as follows:-

Disability Discrimination

1. Did the Respondent know, or should it have reasonably known, that the Claimant was a disabled person by reason of left knee soft tissue damage and right ankle tendon damage?

2. If so, at what point in time (if at all) is the Respondent deemed to have obtained such knowledge?

3. Did the Respondent treat the Claimant less favourably contrary to Section 13(1) Equality Act 2010 because of her disability in respect of the following matters:-

    3.1 Being instructed to move hot food in 2014 as set out in paragraph 16 of the claim form (it was subsequently clarified at the hearing

that this alleged detriment was "being moved to Hot Food on the Move ("HFOTM") (a department at the Respondent)";

3.2 Being instructed to move heavy stock items between 2014 and 2016 as set out in paragraph 17 of the claim form;

3.3 Not being allowed to use the lift from 2014 onwards;

3.4 Changing the Claimant's work times and not allowing her to have a break continuously to date as set out in paragraph 20 of the claim form; and

3.5 Losing the Claimant's medical letter in March 2016.

4. Did the Respondent fail in its duty to make reasonable adjustments in respect of the matters set out at paragraphs 3.1 – 3.5 above?

Time Limits

5. Did the Claimant bring her disability discrimination complaints (as set out above) within 3 months of the alleged act or omission?

6. If not, is just and equitable to extend time?

Discrimination Arising from Disability

7. Did the Claimant's dismissal constitute discrimination because of something arising in consequence of disability in that the Claimant's lateness was caused, in part, by her disability?

8. If so, was the Respondent justified in dismissing the Claimant as a proportionate response to achieving a legitimate aim, namely managing lateness to ensure adequate cover in the store?

Unfair dismissal

9. What was the reason (or principal reason) for the Claimant's dismissal? The Respondent contends that the Claimant was dismissed for misconduct, namely persistent lateness.

10. Did the Respondent follow a fair procedure in reaching its decision to dismiss?

11. If the Claimant was dismissed for misconduct:-

11.1 Did the Respondent carry out a reasonable investigation into the circumstances of the alleged misconduct;

11.2 Did the Respondent genuinely believe that the Claimant was guilty of the alleged act of misconduct;

11.3 If so, did the Respondent have in mind reasonable grounds to sustain that belief; and

11.4 Was the Claimant's dismissal otherwise substantively or procedurally unfair?

12. Did dismissal fall within the range of reasonable responses open to the Respondent in the light of the Claimant's conduct?

13. If the dismissal was unfair, should any adjustments to compensation be made either for contributory conduct on the part of the Claimant or under the principles in Polkey v A E Dayton?

The Evidence

7 Witness evidence was heard from the following:-

For the Claimant:-

The Claimant herself.

For the Respondent:-

Mr Greg Gaby, who at the time of the events relevant to the claim was employed by the Respondent as a Hospitality Commercial Manager in its Kensington Store (Mr Gaby gave his evidence by Skype);

Ms Melissa Niemandt, who at the time of the events relevant to the claim was employed by the Respondent as a Section Manager in the Kensington Store;

Mr Ensa Badjie, who at the time of the events relevant to claim was employed by the Respondent as a Section Co-ordinator in the Kensington Store;

Ms Roxi Moon, who at the time of the events relevant to the claim was employed by the Respondent as a Commercial Manager at the Kensington Store and who heard the Claimant's appeal against dismissal; and

Ms Trudy Dupres, who at the time of the events relevant to the claim was employed by the Respondent as a Section Manager in the Kensington Store and who was the dismissing officer in relation to the Claimant.

8 An agreed bundle of documents numbered pages 1-389 was produced to the hearing. In addition, Ms Ashiru produced a "Respondent's chronology and reading list". The chronology was not agreed.

9 The Tribunal read in advance the witness statements and any documents which were in the bundle and which were referred to in the witness statements, together with (to the extent these were not already covered) the documents on the reading list provided by Ms Ashiru.

10 As already noted, Mr Gaby, who was not in the UK, gave his evidence by Skype and, by agreement, his evidence was heard on the afternoon of the first day of the hearing (as that was that only time when he was available to give evidence) and before the evidence of the Claimant.

11 The Claimant provided two witness statements from herself.

12 In addition, the Claimant provided a witness statement from a Miss S V Hernandez. It had been agreed at a previous preliminary hearing that, whilst the Respondent did not necessarily accept the evidence set out in this brief statement, it would not be challenging it as it did not consider it relevant to the issues and it was therefore agreed that Ms Hernandez would not have to attend the hearing. The Tribunal read Ms Hernandez's statement and took it into consideration to the extent it was relevant.

13 A provisional timetable for cross examination and submissions had been agreed between the parties and the Tribunal at an earlier case management preliminary hearing on 27 March 2017 and the parties agreed with the Tribunal at the start of the hearing that this would apply. The timetable was adhered to by the parties.

14 At the start of the hearing, the Judge asked the Claimant whether there were any adjustments which would need to be made for the Claimant to enable her properly to participate in the hearing. The Claimant confirmed that no adjustments were needed.

15 During the Claimant's cross examination of the Respondent's witnesses, the Judge had to interject on a large number of occasions variously to ask the Claimant to reformulate her question where it was put in a way which was not intelligible to the witness and to assist the Claimant in reformulating her questions so that they were clear; to remind the Claimant what the issues of her claim were and, consequently, to seek to discourage the Claimant from pursuing certain lines of questioning which were not relevant to those issues. The Judge also had to stop a line the Claimant was taking in re-examination

as she appeared to be seeking to adduce new evidence in chief rather than merely re-examining on material that had come out of cross examination.

16 Ms Ashiru produced written submissions. By agreement with the Tribunal, Ms Ashiru agreed to send a copy of her written submissions to the Claimant by noon on the Sunday in the middle of the hearing prior to the Tribunal hearing submissions on the morning of the fourth day of the hearing (Monday 11 September 2016). The Claimant produced written submissions on the morning of the fourth day of the hearing. The Tribunal took time to read both sets of submissions. Both parties then also made oral submissions.

17 The Tribunal reserved its decision.

The Law

Direct Disability Discrimination

18 Under section 13(1) of the Equality Act 2010 ("the Act"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Disability is a protected characteristic in relation to direct discrimination.

19 For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Discrimination arising out of disability

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

21 However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Reasonable adjustments

22 The law relating to the duty to make reasonable adjustments is set out principally in the Act at s.20-22 and Schedule 8. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice of an employer 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.

23 A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

24 In relation to the above provisions, where there are facts from which we could decide, in the absence of any other explanation, that the employer discriminated against the employee, we must hold that the discrimination did occur unless the employer is able to show a non-discriminatory explanation.

Time extensions and continuing acts

25 The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

26 It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

27 In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

28 As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA.

Unfair Dismissal

29 The tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

30 The Tribunal then has to decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The tribunal refers itself here to a 98(4) of the Employment Rights Act 1996 and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

30.1 Whether the employer adopted a fair procedure This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; and

30.2 Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee's length of service, previous disciplinary record, declared intentions in respect of reform and so on.

31 In respect of these issues, the tribunal must also bear in mind the provisions of the relevant ACAS code of practice 2009 on disciplinary and grievance procedures to take into account any relevant provision thereof. Failure to follow any provisions of the Code does not, in itself, render a dismissal unfair, but it is something the tribunal will take into account in respect of both liability and any compensation. If the employee succeeds, the compensatory award may be increased by 0-25% for any failures by the employer or decreased by 0-25% for any failures on the employee's part.

32 Where there is a suggestion that the employee has by her conduct caused or contributed to her dismissal, further and different matters arise for consideration. In particular, the tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.

33 Under the case of Polkey v AE Dayton [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost her employment.

Findings of Fact

34 We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

35 The Respondent is Marks & Spencer Plc.

36 The Claimant commenced employment with the Respondent on 19 October 2003. She was at all times material to her claim employed as a Customer Assistant at the Respondent's Kensington Store.

37 The store hierarchy is, in ascending order of seniority, Customer Assistant, Section Co-ordinator, Section Manager and Commercial Manager.

38 We have seen two Occupational Health referral response forms in relation to the Claimant. The first of these is a pre-employment document dated 16 October 2003. It states that the Claimant is fit for work but requires workplace adjustments on a "permanent" basis of avoiding heavy workloads and freezer work. The referral to Occupational Health came because the Claimant mentioned in her interview that she had slight backache and a bit of a problem with kneeling down, and she was therefore referred to Occupational Health. The Occupational Health response does not state the medical reason why the adjustments should be made. Furthermore, it makes no reference to left knee soft tissue damage or right ankle tendon damage, which we understand were conditions that did not arise until much later on anyway.

39 A further Occupational Health referral response in relation to the Claimant, this time dated a few months later on 17 March 2004, sets out that the Claimant is fit to work and indicates that no workplace adjustments are applicable. In the comments box on that Occupational Health Report, however, it states that the Claimant "needs to take particular care when lifting" and that "it is advisable for Wendy to only lift moderate loads, and take

time to split heavier loads such as drink cans when stocking the machine". Again, no medical condition is referred to in this Occupational Health response.

40 On 5 August 2014, the Claimant's then manager, Barbara Muller, issued her with an "informal performance improvement note", which the Claimant countersigned. In amongst the issues for improvement were included "poor swiping behaviours" (which relates to the Respondent's process of employees swiping in and swiping out) and "taking longer time to complete tasks and wandering around the store with no urgency".

41 On 8 December 2014, the Claimant's then manager, Ms Irene Ali, had an informal discussion with the Claimant, which is evidenced by an "informal discussion record" countersigned by the Claimant, prompted by four instances of lateness in the week commencing 30 November 2014. The informal discussion record records that "immediate improvement" is required and that the Claimant will ensure that she is on time. It also records that the informal discussion record will be placed on the Claimant's P-file and destroyed after 2 years.

42 There was a subsequent investigation, carried out by Ms Ali, into two further periods of lateness in one week, the Claimant being late by 15 minutes on 12 February 2015 and 26 minutes on 13 February 2015. The Claimant attended an investigation meeting with Ms Ali on 16 February 2015. The Claimant said that she missed the train on one occasion and that she could not remember the other day. She was asked by Ms Ali whether she had any problem getting in for 6am (the start of her shift) and she said "not always no"; she was also asked whether she wanted to reconsider the hours she worked and she said "not yet".

43 She was then invited to a disciplinary hearing in relation to these incidences of lateness. This took place on 19 February 2015 before Ms Niemandt. Ms Niemandt made notes of this meeting and sent them to the Respondent's central HR function to be placed on the Claimant's personnel file ("P-file"); however the Respondent has not been able to locate these notes for the purposes of this hearing.

44 The Claimant again at the disciplinary hearing mentioned that she had transportation issues. Ms Niemandt did not feel that this was a reasonable explanation since it was, in her opinion, up to the Claimant to find a route to work which got her there on time. She issued a written warning as the informal discussion had not seemed to have delivered the improvement in the Claimant's time keeping that the Respondent expected. Ms Niemandt confirmed the written warning in a letter of 23 February 2015 to the Claimant. That letter set out that the standard of conduct expected of the Claimant was that she should arrive on time for each and every shift and should allow herself enough time to travel to work to ensure that she was not late and to be on time for when her shift was due to start. The letter further warned that any further acts of misconduct may lead to a final warning or dismissal and

that the warning would remain on her personnel file for 12 months. The letter provided that the Claimant could appeal and that any appeal needed to be put in writing within five days of the letter. At no stage did the Claimant indicate that there was any health reason for her lateness.

45 The Claimant did not appeal the decision immediately. However, she did submit an appeal in August 2015, almost 6 months after the written warning was issued. The appeal disclosed no ground of appeal. It was therefore rejected. The rejection was reviewed at the Claimant's request and was upheld. The Respondent had received the appeal letter in relation to this written warning from the Claimant on 24 August 2015, despite it being dated 2 March 2015. 24 August 2015 was the day after the Claimant was late for work again by 13 minutes, which happened on 23 August 2015.

46 At this Tribunal hearing, the Claimant maintained that she had in fact submitted her appeal against the written warning shortly after the written warning was issued. However, if that was the case, we find it surprising that she did not chase the Respondent given that, had that happened, the Respondent would have been doing nothing for several months after she had handed in the appeal. Furthermore, the fact that the Respondent did receive it the day after a further instance of lateness which could have involved further disciplinary action further indicates that, on the balance of probabilities, the Claimant submitted the appeal against the written warning not shortly after the warning was issued but, in the light of her concerns regarding further disciplinary action, following the further instance of lateness in August 2015. We find that to have been the case.

47 Through 2014 and up to March 2015, the Claimant had been working in the "satellite shop" at the Kensington Branch. The satellite shop is on the ground floor and is a food outlet for the general public. The satellite shop can be quite a fast paced environment because it involves serving customers, for example preparing coffees for them. Part of the Claimant's daily duties in the satellite shop involved collecting stock and refilling areas for onward sale. When a member of staff collects stock, it is separated by department so no member of staff should ever collect stock for others. The stock is loaded on trolleys or in cages so that staff do not have to carry the stock far if at all. The Claimant, in common with other employees, would have needed to break down cases of, for example, cans of drink. This involved opening the packaging and lifting the individual cans onto the shelf. The lifting of a whole case would be extremely limited. The stock room was located on the basement floor below the ground floor where the satellite shop was located. If staff were required to collect stock, they were encouraged, particularly with larger amounts of stock, to use the service lifts to take the stock from the basement to the first floor. The Claimant at no point complained that she was required to move heavy stock. In addition, Mr Badjie, who was at the time the Section Co-ordinator in the satellite shop (in other words someone of a higher rank), gave evidence that he did not issue any specific instruction to the Claimant in relation to moving heavy stock. We have no reason to doubt his evidence and accept it. We therefore find that, on the balance of

probabilities and for the reasons set out above, whilst the Claimant was required to collect stock, she was not required to move heavy stock.

48 On 25 March 2015, there was a disciplinary hearing, conducted by Mr Greg Gaby (a Commercial Manager) in relation to the Claimant's conduct in relation to Mr Badjie. This followed an investigation carried out by Ms Niemandt. The Claimant admitted that she had called Mr Badjie, her superior, a "useless immigrant". Mr Gaby could have dismissed her for gross misconduct for this; however, he did not do so but issued her with a final written warning as he considered that, in mitigation, the Claimant had explained that she felt that Mr Badjie had provoked her and that there had been ongoing tension between them. The warning was to be kept on the Claimant's personnel file for 12 months. Although the Claimant was notified in the letter of 25 March 2015, confirming the decision, that she could appeal the final written warning, she did not do so.

49 It was also agreed, on the Claimant's request, that she and Mr Badjie would be separated and would no longer work together.

50 The Claimant was therefore transferred, at the end of March 2015, out of the satellite shop and into Hot Food on the Move ("HFOTM"). She was to work in the basement in HFOTM, primarily preparing baguettes. Mr Gaby asked the Claimant if she was prepared to move to HFOTM, where the Respondent at the time had a vacancy, and she agreed to it. The Claimant was at the time also offered a start time of 7am but wanted to continue on her existing start time of 6am which was agreed.

51 When the Claimant moved down to HFOTM, she reported directly to Ms Niemandt, who was the Section Manager responsible for managing the daily operation of HFOTM. In HFOTM, the Claimant could access stock from the stock room which was now on the same floor as she was. At times, there would be a need for a batch of prepared baguettes to be taken upstairs to the satellite shop. In these circumstances, with a large batch, staff were encouraged to use the service lifts to do this. At times, however, when there was a particular spike in demand in the satellite shop, a request might come down for a couple of additional baguettes to be brought up. In those circumstances they were generally brought up by hand. The Claimant could have taken them up in the service lift had she wanted to. However, it was far quicker, given that the service lifts were at the other end of the floor, to take them up either using the escalator or the stairs. Mr Gaby gave evidence that, in terms of the speed element, he suggested to the Claimant that she "walk them up", by which he meant take either the escalator or the stairs as it was quicker. However, he was entirely happy for her to take the escalator up and there was no instruction that she should specifically use the stairs to take these up. The Claimant may at times have used the escalator and may at times have used the stairs, but there was no compulsion as to which she should use and she never made any complaint about these arrangements at the time.

52 As well as the service lifts, there were also customer lifts at the Kensington Store. Staff were encouraged generally not to use the customer lifts during store opening hours, as these were for customers. Rather, they were encouraged instead to use either the service lifts, the escalators or the stairs as appropriate. In certain circumstances, the Respondent would make an exception to this rule because of, for example, the particular circumstances of a particular employee.

53 The Claimant maintains that she had previously agreed an exception for her in this respect with her previous manager, Ms Ali, such that she could use the customer lifts. Mr Gaby and Ms Niemandt were not aware of any such arrangement. Ms Niemandt stated to us that the general policy was that, if such an exception was in place, the previous manager of an employee, when that employee moved department, would inform the new manager of that exception in relation to that employee but that Ms Ali had not said anything to her about an exception in relation to the customer lift for the Claimant. By contrast, Ms Ali had specifically told Ms Niemandt about such an exception in relation to another employee. We accept, therefore, that Mr Gaby and Ms Niemandt were not aware of any such exception in relation to the Claimant.

54 Ms Moon gave evidence that she was aware that there was an exception in place for the Claimant to be allowed to use the customer lift because of her mobility. She became aware that this had been agreed between a line manager and the Claimant but she did not know why or question the reasons. When asked how she came to this understanding, she explained that the likelihood was that in enforcing the Respondent's policy about employees not using the customer lift during store opening hours, she may have questioned the Claimant at one point when she was using the lift and the Claimant would have told her that she was using it because there was an exception agreed with her line manager, that she would have checked with the line manager in question who would have confirmed that there was such an exception in place and Ms Moon would then not have questioned the Claimant about use of the customer lift in future. In the light of the evidence above, we accept that there was an exception agreed between the Claimant and a previous manager such that she could use the customer lifts.

55 Mr Gaby gave evidence that, whilst he would have told employees from time to time not to use the customer lift because that was the Respondent's policy, he could not remember whether or not at any point he had specifically told the Claimant not to use the customer lift. The Claimant was very vague in her allegations about who is said to have stopped her from using the lift. From her evidence, it appears to us likely that what she was getting at was Mr Gaby's instructions to "walk it up" (either by means of escalators or stairs) in relation to taking a couple of baguettes upstairs to the satellite shop rather than a direct instruction specifically not to use the customer lift. Therefore, on the balance of probabilities, we find that Mr Gaby did not specifically say to the Claimant that she should not use the customer lift; he did, however, as we have already found, instruct the Claimant to "walk it up" in relation to the baguettes in the circumstances already described.

56 Ms Niemandt has never informed the Claimant that she should not use the lift (be it the service lift or the customer lift) although it is possible that she may have said something to the team about not using the customer lifts during trading hours generally.

57 As an employee in HFOTM, the Claimant was entitled to take breaks.

58 Ms Niemandt offered the Claimant breaks during her shifts in HFOTM to take into account the needs of the business and the Claimant's own needs. There was a great deal of flexibility for the Claimant as to when she chose to take her breaks. The Claimant was never refused a break and she did not complain to Ms Niemandt at the time about the timing of her breaks. There was one occasion when the Claimant stayed upstairs having some tea and, when she returned, Ms Niemandt told her that that time would have to come out of her break time; however that was not a refusal to let the Claimant have a break.

59 During the Claimant's time working in both the satellite shop and in HFOTM, none of Mr Gaby, Ms Niemandt or Mr Badjie knew that the Claimant had problems with left knee soft tissue damage or right ankle tendon damage. Furthermore, whilst they regarded her as an employee who worked more slowly than others, there was nothing to indicate to them that this was anything more than slow work; specifically (and most of them were asked about this in evidence by the Claimant) they never saw her limping or taking pills. The Claimant never complained to any of them at the time about any problem with her leg or made any request that any adjustments should be made in connection with any problems with her leg.

60 As already noted, the Claimant was late for work by 13 minutes on 23 August 2015. This was despite the fact that her start time that day, which was a Sunday, was 9am. The Kensington Store opens later on Sundays; for the rest of the week, however, the Claimant's working hours commenced at 6am.

61 This was followed by further instances of lateness of 10 minutes on 31 August 2015; 17 minutes on 15 September 2015; 17 minutes on 17 September 2015; and 48 minutes on 24 September 2015.

62 On 29 September 2015, the Claimant moved house from Wandsworth to Caterham. This increased her travel distance to work. In connection with this, the Claimant was offered by the Respondent a start time of 7am rather than 6am, but she said that she only needed an extra half an hour and, therefore, her start time was changed (with her consent) to 6.30am.

63 The Claimant was late to work again on both 2 and 3 October 2015 but these were not counted towards her lateness record as she had just moved house and was given time to settle into her new journey.

64 On 5 October 2015, Ms Niemandt carried out an investigation interview with the Claimant prompted by the five occasions of lateness prior to the Claimant's house move referred to above. In that interview, the Claimant stated that her lateness on 24 September 2015 (by 48 minutes) was because her alarm went off early and she snoozed it and dozed off again. She referred, in relation to the other instances, to issues to do with the bus and said that some days she felt sick and had to push herself. However, the interview was cut short because the Claimant left the meeting.

65 On 18 October 2015, the Claimant was 14 minutes late to work, despite her start time of 8am (another Sunday).

66 On 2 November 2015, the investigation interview was reconvened by Ms Niemandt. In relation to the five instances of lateness which the investigation concerned, the Claimant gave the following as reasons:-

1. She could not remember the reason (for 23 August 2015);

2. She used a C3 bus and had to wait for the barrier to raise at Chelsea Harbour (for 31 August 2015);

3. She needed to use the toilet and so missed the bus (for 15 September 2015);

4. She used the C3 bus and had to wait for the barrier to raise at Chelsea Harbour (for 17 September 2015); and

5. She overslept (for 24 September 2015).

67 She made no suggestion that the reasons for her lateness were anything to do with leg problems or that leg problems might have caused her to be late for the bus.

68 Ms Niemandt found that there was a disciplinary case to answer, and the Claimant was invited to attend a disciplinary hearing on 6 November 2015, before Ms Vala Dhanapal. She continued to explain her lateness by reference to the transport and other issues set out above. She was asked at the beginning of the meeting whether there was any evidence she wanted to present and so had an ample opportunity to raise anything which she felt was relevant.

69 At one point in the meeting with Ms Dhanapal, the Claimant was asked if she noticed that she was late on 23 August (she was late by 13 minutes). The Claimant replied "you just walk in don't you? I was probably rushing. I must have realised – but it doesn't bleep off saying you are late? But sometimes it takes me a while to get up the stairs because my legs aren't very good. I don't always check the time." That is the only reference to her legs in that

meeting. However, it is not in the context of the reason why she is late for work but a side comment about what she did on one particular day after she had got to work. There was no suggestion that the reason for her lateness was in any way connected to any knee or ankle issue.

70 Following the hearing, Ms Dhanapal decided that, notwithstanding the fact that there was a final written warning on file in relation to the issue with Mr Badjie, that she would reissue a final written warning in respect of these instances of lateness.

71 The final written warning was given at the disciplinary hearing on 6 November 2015, and confirmed in a follow up letter dated 5 December 2015. The letter confirmed that if the Claimant's behaviour fell below the expected standard in any area of conduct in future this may lead to her dismissal. The final written warning was stated to be kept on the Claimant's file for 12 months. The Claimant did not appeal it.

72 There were then two further instances of lateness by the Claimant (by 20 minutes on 19 February 2016 and by 15 minutes on 1 March 2016). By this time, Ms Niemandt had moved to a different store and Mr John Judd had taken over as the Claimant's Line Manager. The Claimant gave the excuse of "several occurrences of road works on her route to work" as the reason for these two instances of lateness. Rather than enforce the disciplinary procedure again, Mr Judd held an informal discussion in relation to this. We have seen the informal discussion record, countersigned by the Claimant, which is expressed to be placed on the Claimant's P-file and destroyed after 2 years.

73 The Claimant was then 12 minutes late for work (on 21 April 2016); 11 minutes late for work (on 22 April 2016); and 12 minutes late for work (on 26 April 2016).

74 Mr Judd held an investigation interview with the Claimant on 28 April 2016 into these three instances of lateness. In relation to two of these, the Claimant stated that her bus came late and that she missed her connecting bus. In relation to the third instance, she said that there was a strike and there was a lot of people on the road and buses were busy.

75 The Claimant was duly invited to a disciplinary hearing held by Ms Trudy Dupres on 5 May 2016. She reiterated her reasons for her lateness on the three occasions, all of which were transport related.

76 The Claimant said that it was not easy getting in for 6.30 am given that she had to get two buses. Ms Dupres asked the Claimant why she did not leave any earlier and she said that she could but felt that she would still be waiting for buses. Ms Dupres asked if the Claimant had ever tried and she said that she had on one occasion when her brother had offered her a lift. She went on to say that she did have an option of the train but it was more expensive

so she did not want to do it. She went on to explain that as well as the cost the train route was complex and tiring.

77 The Claimant went on to say that she had asked to change her hours but was told that she needed to start at 6.30. (This was not in fact correct; she had in fact been previously offered a 7am start but, at her volition, stated that 6.30 was enough and her start time was then changed to 6.30). Ms Dupres asked the Claimant whether she had spoken to her manager about changing her shifts and she said that she had not. She said that she was waiting to see how the disciplinary went and whether there was any improvement.

78 Ms Dupres explored whether the Claimant could work late shifts to combat the difficulties and the Claimant said that she could not. In the context of this discussion, the Claimant indicated that she had to manage her lifestyle because of a "bad knee and a bad ankle". However, she did not raise this with Ms Dupres as the reason for any of the lateness which was being considered; she was clear in that meeting that the reasons were transport related (and indeed she reiterated that at this Tribunal). The Claimant did not suggest that she needed changes made to accommodate any difficulties with her leg.

79 Ms Dupres considered her decision. She considered that lateness causes significant issues for the business as they roster staff to provide appropriate cover throughout the day and that when a member of staff is late this puts pressure on colleagues to cover work to ensure that the Respondent complies with standard operating procedures and meets customer demands; that persistent lateness is unfair on colleagues, takes management time to monitor and manage and risks tasks not being completed as required; and that the Respondent employs a considerable number of customer assistants and in the interests of fairness lateness is managed throughout the organisation. She did consider the Claimant's length of service but felt that for someone as experienced as the Claimant she would know how to raise concerns if there were any problems and she had not done so. This suggested to her that there were no problems which the company could address and that the Claimant was simply not giving herself enough time to get to work in time to start her shift. She considered that the Claimant's lateness spanned a considerable period of time and despite multiple efforts by different managers to get her to improve her punctuality, the Claimant was still turning up late for the same sorts of reasons. In those circumstances she felt that no further warning was appropriate and that dismissal was the right sanction.

80 She therefore decided to dismiss the Claimant. This was further confirmed in a letter of 6 May 2016. The Claimant was dismissed with 12 weeks' notice and her final date of employment was 28 July 2016.

81 There is an error in Ms Dupres' notes of the hearing, which is repeated in the dismissal letter of 6 May 2016, namely that Ms Dupres refers to the Claimant having been issued three final written warnings for misconduct. In fact, she

had been issued with two final written warnings for misconduct (one in relation to lateness and the other in relation to her behaviour towards Mr Badjie). Ms Dupres gave evidence before this Tribunal, however, that whilst acknowledging the mistake, this made no difference to her decision and that, on the basis of the fact that there were two final written warnings in place, she would have dismissed the Claimant for the same reasons.

82 The Claimant completed and submitted an appeal form appealing the decision to dismiss which the Respondent received on 16 May 2016. The appeal hearing was postponed twice at the Claimant's request but took place on 3 June 2016 before Ms Moon.

83 At the appeal hearing, the Claimant did make reference to her having problems with her leg. She said that she had to walk to the bus stop to get in and could not run which was hard.

84 However, she did not provide any evidence to suggest that her knee or ankle caused her issues with punctuality. In terms of the reasons for her punctuality, these remained, in relation to the three incidents for which she was dismissed, the transport issues already referred to. There was nothing to suggest that she could not, for example, get up half an hour earlier in order to ensure that, whatever the transport difficulties, she got in on time. All of the reasons that she had previously given for specific instances of lateness were, in any event, not that she missed the bus because she could not run, but rather that she had variously overslept, needed to use the toilet and that buses were delayed/on strike. It did not seem to Ms Moon that any issues with her leg had caused her to be late on the occasions in question.

85 The Claimant was given a full opportunity to make any points which she wanted and these were duly considered by Ms Moon.

86 Ms Moon turned down the Claimant's appeal by letter of 19 June 2016.

87 We have identified above the various discussions in relation to the Claimant's work times potentially changing. In fact the only permanent change to her hours was the change from a 6am start to a 6.30am start, which was done with her consent and reflected the fact that she herself had moved house further away from her place of work.

88 More generally, the Respondent has a rota system in place which is agreed and put in place in advance. If any changes are needed to that rota because of, for example, short term sickness absence, those changes are only implemented in relation to employees' shifts with prior discussion with and the consent of the employee in question.

89 In relation to the Claimant's allegation that the Respondent lost her "medical letter in March 2016", it was difficult at the start of the hearing for the Tribunal and the Respondent to identify which letter the Claimant meant by this.

During the course of the appeal, Ms Moon reviewed the Claimant's medical file in the context of the appeal and found no reference to Occupational Health referrals in the previous 10 years (the referrals of 2003 and 2004 were before that). She had no discussion with the Claimant about any sick note being lost. She found nothing on file in relation to issues about leg problems (albeit there were occasional sick notes for unrelated issues such as, for example, returning to work at one point after a chest infection). Ms Moon did not focus on this because it was not relevant to the decision she had to take in relation to the Claimant's appeal. She was, however, careful to establish that any of the Claimant's periods of sickness identified in the file were not related to any lateness.

90 There is nothing in the Claimant's witness statement which identified what letter it was she is referring to in this allegation. It was only in response to one of the Judge's questions at the end of the Claimant's cross-examination that the Claimant identified the relevant medical records as being those on pages 302 and 303 of the bundle. These two print outs dated 12 July 2012 reference an MRI scan to the left knee. The Claimant stated that these were documents which she gave to Ms Ali in either 2014 or 2015 when she obtained her exception from Ms Ali to the policy of staff not using the customer lifts. However, whilst we have accepted that the Claimant did obtain this exception from Ms Ali, we consider it unusual that the Claimant would have sought an exception in 2014/15 using a historic reference to an MRI scan from July 2012 which does not give any indication of adjustments which the Respondent ought to make in relation to her. Furthermore, if these documents had been handed in, and whilst we accept that there were some items missing from the Respondent's HR records (for example Ms Niemandt's notes of one of the earlier investigation meetings), it seems to us more likely that firstly they would have been included in the Claimant's P-file and that secondly further action would have been taken, such as an Occupational Health referral, to consider the impact of these documents on the Claimant's working arrangements. It is unusual that there was nothing in the claim form or in the Claimant's witness statement identifying these documents as being the document which was said to be lost and that it was not until right at the end of her cross-examination when the Judge asked a specific question that the Claimant identified these documents as being the ones which she said were handed in and subsequently lost by the Respondent. Furthermore, on the Claimant's account in cross-examination, they were handed in to Ms Ali and Ms Ali was not here to give evidence (quite understandably as, prior to this point, there was no reason for her to attend to give evidence in relation to the issues of this claim). Furthermore, during the evidence, the Claimant's evidence has at times been somewhat confused in places. For all these reasons we consider that, on the balance of probabilities, the Claimant has not proven that she handed in these documents to Ms Ali and we therefore find that she did not.

Conclusions on the Issues

91 We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Disability Discrimination - Knowledge

92 We turn first to the question of whether the Respondent knew or should have reasonably known that the Claimant was a disabled person by reason of left knee soft tissue damage and right ankle tendon damage.

93 Part of the problem about the lack of specificity in the claim is that, even on the basis of the list of issues before us, it is not always entirely clear which individual at the Respondent is said to be responsible for which alleged acts of discrimination and, even in her evidence in her witness statement and in cross-examination, the Claimant was very often not specific in this respect. However, in terms of four of the five actions which are said to be acts of direct disability discrimination/failure to make reasonable adjustments, the only individuals against whom these allegations seem to have been made are variously Mr Gaby, Ms Niemandt and Mr Badjie and, in relation to the allegation of the loss of the medical letter, the Respondent in general.

94 As we have found, neither Ms Niemandt, Mr Gaby, nor Mr Badjie at any time to which this claim relates were aware that the Claimant had left knee soft tissue damage or right ankle tendon damage. Furthermore, they were not aware that there was any problem with the Claimant's leg at all. In addition, they had not observed her walking with a limp or awkwardly or taking any pills; all that they had observed was that she seemed to carry out her duties more slowly than the average employee. Therefore, not only did they not have knowledge of her disability but, on the basis of this evidence, it cannot be said that they should have reasonably known that the Claimant was a disabled person. Therefore, to the extent that any of the disability discrimination complaints are levelled against these individuals, the complaints fail for this reason. If an individual does not know that a person is disabled, he cannot take action against that person because of her disability for the purposes of the direct disability discrimination complaints. Similarly, there is a specific defence in the legislation that there cannot be a failure to make reasonable adjustments if the alleged perpetrator did not know or could not reasonably be expected to know that the person was disabled.

95 Turning to Ms Dupres, who took the decision to dismiss the Claimant, the only example of her hearing any reference to anything to do with the Claimant's knee/ankle was when, in the disciplinary hearing, the Claimant mentioned in passing about needing to manage her lifestyle with her knee and ankle problems. She did not suggest that this caused her to be late on any of the occasions being discussed and for which she was being disciplined, nor did she suggest that she needed changes made to accommodate those difficulties. Therefore, understandably, this was not

something which Ms Dupres explored further as it was not, on the basis of what the Claimant herself said, relevant to the decision that she had to make. Furthermore, no medical evidence of any sort was before her. There was no indication of exactly what was wrong with the Claimant's knee/ankle nor the extent and we therefore find that Ms Dupres was not aware, based on this, that the Claimant was disabled. Furthermore, particularly as we have found that it was not incumbent on Ms Dupres to explore this issue further given the remit of her disciplinary hearing, we do not find that she should have reasonably known that the Claimant was a disabled person in relation to her knee/ankle.

96 Finally, Ms Moon knew that the Claimant had a dispensation to use the customer lift. However, she did not know why. She did not therefore know prior to the appeal hearing that the Claimant had a disability nor could she have reasonably known that. The reason why the Claimant had such a dispensation could have been for a number of different reasons, not all of which were necessarily concerned with health and certainly not with a health issue which amounted to a disability.

97 Again, the Claimant referred to knee and ankle problems in the appeal hearing before Ms Moon. However, she did not go into detail about these and Ms Moon did not explore them further as the Claimant did not suggest that her knee or ankle caused her issues with punctuality. That was entirely reasonable; the reasons given for her lateness were to do with transportation and other non disability related issues; even if it had been the case that the knee/ankle problem made it difficult for her to run for the bus, that issue could have been dealt with simply by the Claimant choosing to start off a bit earlier than she was doing in order to get into work. In view of the lack of medical evidence provided to her and the lack of particularisation of this, we find that Ms Moon did not, even following the appeal, know that the Claimant had a medical condition which amounted to a disability or, given that Ms Moon quite reasonably did not explore the issue further for the reasons already given, that she ought reasonably to have known that the Claimant had such a disability.

98 Therefore, to the extent that allegations of disability discrimination are made against Ms Dupres and Ms Moon (including most specifically in their case the complaint of discrimination arising form disability in relation to the Claimant's dismissal), those too fail from the start on the grounds of lack of knowledge of the Claimant's disability.

99 In addition, we would add generally that the Claimant did not complain about her knee/ankle issue or taking painkillers/pills during her employment and carried out her 8 hour shift without any such complaints; Ms Hernandez in her witness statement explained that the Claimant did not complain about work and just got on with the job; the Claimant admitted in her evidence that she chose to use the stairs sometimes, which is a further reason why a reasonable observer could not reasonably have been expected to know that the Claimant had a disability; it is notable that throughout the Tribunal

hearing, the Claimant bent, stretched and walked without showing any signs of difficulty (she was not limping), she also carried a heavy load (a full lever arch file, the witness statement bundle, other notes in the bag, as well as pulling a suitcase) and she also moved the heavy Tribunal table on the first day, which is indicative of the way she went about her tasks at the Respondent, without complaint and not showing any signs of difficulty which would alert observers to any possible disability. Furthermore, as we have found, the Occupational Health Reports from 2003 and 2004 were before the onset of the Claimant's knee and ankle issues and did not relate to those issues. It is therefore unsurprising that the Respondents' witnesses did not know and could not reasonably have been expected to know that the Claimant was disabled.

Disability Discrimination – Direct Discrimination and Reasonable Adjustments

100 We turn now to the individual allegations of direct discrimination/failure to make reasonable adjustments.

Being instructed to move to Hot Food on the Move in 2014 as set out in paragraph 16 of the claim form

101 The Claimant did move to HFOTM, albeit in March 2015 as opposed to 2014 as set out in the list of issues. However, she did this by agreement, and worked there without complaint for the rest of her employment with the Respondent; indeed she welcomed the move because she did not want to work with Mr Badjie. She did not raise any concerns as to physical impediments in relation to the move or to the tasks to be carried out within her role in HFOTM.

102 There is nothing to suggest that the move to HFOTM amounted to less favourable treatment because of the Claimant's disability; indeed there is a non discriminatory reason for the move, namely the Claimant's desire to be separated from Mr Badjie combined with the shortage of staff in the HFOTM area which facilitated that move, and the direct discrimination complaint fails for this reason. The Claimant did not object to the move. As it was to her advantage, it cannot be considered to be a detriment to her and the complaint therefore fails for that reason too. Furthermore, as Mr Gaby, who arranged the move, did not know and could not reasonably have been expected to know that the Claimant had a disability, he could not have made that decision because of her disability. This direct discrimination complaint therefore fails for this reason too.

103 As to the reasonable adjustments complaint, whilst it could be said that the practice of moving staff with their consent to cover shortages is a provision criterion or practice ("PCP"), given that the Claimant agreed to this move, made no complaints about it and did not ask for any adjustments, the Respondent did not know and could not reasonably have been expected to know that moving the Claimant to HFOTM might put her at a substantial

disadvantage (whether because of her disability or otherwise). For this reason this reasonable adjustment complaint fails.

104 Furthermore, we are not satisfied that the Claimant was, in fact, put to a substantial disadvantage as a result of the move to HFOTM. Firstly, we have seen no medical evidence to suggest this. Second, the Claimant was moving down one floor but was able to use the lift or escalator so she was at no disadvantage in this respect. Thirdly, the duties associated with the role were not worse than those working in the satellite shop in terms of putting her at a disadvantage. Therefore this reasonable adjustments complaint fails for this reason too.

105 Finally, we note that these complaints are prima facie out of time as the move took place in March 2015 and any complaints prior to 5 May 2016 (having taken into account the impact of ACAS early conciliation on the time limits) are prima facie out of time. We will return to this in due course.

Being instructed to move heavy stock items between 2014 and 2016 as set out in paragraph 17 of the claim form

106 We have already found that the Claimant was not required, whether in a satellite shop or in HFOTM, to move heavy stock. Any stock that needed to go upstairs in the lift to the satellite shop was moved using the lift and the use of a trolley/cage; the Claimant never had to lift it herself. Furthermore, she could always split stock; in other words opening packaging and removing individual items of, for example, drinks, so there was no requirement to carry heavy stock. The allegation has not therefore been made out on the facts and this direct discrimination complaint therefore fails.

107 Furthermore, none of the relevant managers knew or could reasonably be expected to know that the Claimant had a disability and therefore they could not have, even if the allegation had been made out, made her carry heavy stock because of her disability. For that reason too this direct discrimination complaint would fail.

108 As to the reasonable adjustments complaint, there was no PCP of making the Claimant carry heavy stock and therefore this complaint fails. It also failed on the basis of lack of knowledge, as indicated earlier.

109 In addition, these complaints too are out of time. The allegation is that the requirement to lift stock was imposed from 2014 onwards. Time runs from the date of the decision to make the Claimant (as alleged) carry heavy stock and therefore this allegation is about 2 years out of time. We return to this later.

Not being allowed to use the lift from 2014 onwards

110 This allegation is not made out on the facts; the Claimant was not told that she could not use the lifts. We have found that in relation to carrying a couple of baguettes up the satellite shop, Mr Gaby asked her to "walk them up", by which he meant use the escalator or the stairs rather than the service lifts as they were nearer. However, he never stopped the Claimant from using the lifts. The direct discrimination complaint fails for that reason.

111 However, even if Mr Gaby asking the Claimant to "walk them up" in relation to the baguettes amounted to a prohibition on her taking the lift (which we have found it did not) it was not done on the basis of the Claimant's disability. Firstly, as noted, Mr Gaby did not know and could not reasonably be expected to have known that the Claimant was disabled. Secondly, it was clearly done for good business reasons which were nothing whatsoever to do with disability, namely that operationally it would be quicker to take the baguettes up the escalators. This direct discrimination complaint therefore also fails for these reasons.

112 Furthermore, the reasonable adjustments claim also fails.

113 Firstly, the Respondent does not operate a PCP that employees are not allowed to use the lifts; quite the contrary. Employees are encouraged to use the service lifts to move stock, they are merely discouraged from using the customer lifts during trading hours, but employees are allowed to if necessary or if they have permission.

114 Furthermore, there is a set of escalators available to use even when the use of customer lifts is discouraged. Therefore, the Claimant was not put at a substantial disadvantage even if she was discouraged from using the customer lifts. Furthermore, given that the Claimant has admitted that she sometimes chose to use the stairs herself, we accept that we cannot be satisfied that the use of the stairs on odd occasions in fact put the Claimant at a substantial disadvantage. Furthermore, we have seen no medical evidence that using the stairs would put the Claimant at a substantial disadvantage.

115 Furthermore, as set out above, the Claimant never complained about using the stairs and in fact chose to use the stairs instead of the lifts at times. The Respondent did not know and could not reasonably have been expected to know that the Claimant was placed at a substantial disadvantage.

116 Furthermore, a reasonable adjustment would be to allow the Claimant to use the lifts, which she says she was already allowed to do (including the customer lifts through her permission from Ms Ali) or the escalators. This was therefore already in place so any duty to make a reasonable adjustment was complied with.

117 For all of these reasons, the reasonable adjustments complaint in respect of lifts also fails.

118 In addition, the Claimant's case is that the prohibition on using the lift (which we have not accepted) took place from 2014 onwards. This complaint is therefore also prima facie around 2 years out of time. We will return to this later.

Changing the Claimant's work times and not allowing her to have a break continuously to date as set out in paragraph 20 of the claim form

119 In relation to work times, work times on the rota might, on occasion, have been changed to ensure that the department was appropriately covered. However, this was only ever done with employees' consent.

120 The only occasion on which we found that the Claimant's work times actually changed was in October 2015 in connection with the fact that she moved house such that she lived further away from her place of work. This change was put in place not only with the Claimant's consent but in order to assist her given that she had moved house; it was therefore a benefit to her and not less favourable treatment. On this basis alone the direct discrimination complaint fails.

121 It also fails because the Respondent was not aware and could not reasonably have been expected to be aware that the Claimant had a disability at the time and the change could not therefore have been because of a disability. By contrast, there is an obvious reason as to why the change was made, namely through the Claimant's own agreement in order to make it easier for her to get into work on time given that she from that point lived further away.

122 Furthermore, in terms of any roster changes which may have affected the Claimant, not only where these done with the Claimant's consent but they were done for business operational reasons; they were nothing to do with her disability, and therefore the direct discrimination complaint fails in this respect too.

123 As to reasonable adjustments, the Respondent did operate a PCP of changing work times as required. However, we accept that we cannot be satisfied that this put the Claimant at a substantial disadvantage because of her knee/ankle issues. There is no evidence, medical or otherwise, to this effect; there is simply no connection between the Claimant's work times and her disability. Furthermore, on the occasions when her work times were changed, she agreed to those changes and did not complain. This is further indicative that she was not put at any disadvantage, let alone a substantial one.

124 In addition, as we have found, the Respondent did not know and could not reasonably have been expected to know that the PCP put the Claimant at a substantial disadvantage.

125 For all these reasons this reasonable adjustments complaint fails.

126 Turning to the issue of breaks, we have already found that the Respondent did not stop the Claimant from having a break. This allegation is therefore not made out on the facts. Therefore, the direct discrimination complaint fails in this respect.

127 Furthermore, the Respondent does not operate a PCP of not allowing employees to have breaks and therefore the reasonable adjustment complaint fails at the first hurdle. In addition there is no evidence to suggest that the Claimant would have been put to a substantial disadvantage in this respect. Furthermore, the Respondent did not know and could not reasonably have been expected to know of such a disadvantage. For all these reasons this reasonable adjustments complaint fails.

128 Finally, whilst the allegation regarding changing works times and having breaks is vaguely worded, it appears to relate to operational practices from 2014 onwards or at the latest 2015 onwards. The allegations regarding work times and breaks are therefore also prima facie out of time. We return to this later.

Losing the Claimant's medical letter in March 2016

129 As noted in our findings of fact, in the end the Claimant suggested that the medical letter that she did give to the Respondent was the document at page 302 – 303 of the bundle. However, we found on the balance of probabilities that she did not give this document to Ms Ali. Therefore, it could not have been lost by the Respondent. This complaint therefore fails from the start as the Claimant has not established that the allegation is made out on the facts.

130 Furthermore, there is nothing to suggest that, even if the medical letter had been given in and lost by the Respondent, that it amounted to less favourable treatment because of a disability as opposed to, for example, a simple administrative error. Therefore, the direct discrimination complaint would fail on this basis too. In addition, it would fail due to lack of knowledge.

131 Furthermore, the reasonable adjustment complaint would also fail; the Respondent does not operate a PCP of losing medical letters. In addition, there is nothing to suggest that the Claimant was put at a substantial disadvantage because of her disability as a result of any loss of a medical letter and/or that the Respondent knew or ought to have known of such disability.

132 Finally, it was said that the medical letter was given in in 2014/2015. Therefore, the allegation is also prima facie out of time. We will return to this below.

Direct Discrimination and Reasonable Adjustments – Time Limits

133 As we have found, all of the above complaints were presented out of time. Furthermore, they are all, even as alleged, individual incidents which allegedly involved a range of different managers. We do not find that they amount to a continuing act. In particular, they do not amount to a continuing act with the one in time allegation of disability discrimination (namely the discrimination arising from disability complaint in relation to the Claimant's dismissal) as that again involved different disciplining/appeal managers and completely different issues to do with lateness which are nothing to do with these individual allegations of direct discrimination/failure to make reasonable adjustments as set out above. Therefore, there is no in time allegation to attach them to such as to bring them in time. These allegations are all therefore out of time.

134 Furthermore, we do not consider that it would be just and equitable to extend time in relation to any of the above allegations. The burden of proof is on the Claimant to show that it would be just and equitable to extent time and the Claimant has offered no reason in this respect nor have we ascertained one from the evidence. The Tribunal does not therefore have jurisdiction to hear these allegations of direct discrimination/failure to make reasonable adjustments and they are therefore struck out.

Reasonable Adjustments and Dismissal

135 Although the matter under this heading is not set out in the list of issues, and does not therefore form part of the issues for determination by us, Ms Ashiro has made some submissions on it. She submits that at the preliminary hearing on 7 March 2015, the Claimant stated that as a matter of remedy she would contend that if the reasonable adjustments she alleged should have been made had been made, she would not have been dismissed. We therefore address those submissions here.

136 Firstly, we have found that none of the alleged reasonable adjustments set out above did amount to a breach of the duty to make reasonable adjustments. However, Ms Ashiro cross referred to the document at pages 37 F and G of the bundle and maintains that the Claimant contends for the following adjustments: having more people to work with; being allowed to work in the catering unit, the sales floor or the tills; having more time to process the workload; and being allowed to start at 7am (which she was offered but refused).

137 However, we accept Ms Ashiro's submission that, in relation to the first three of these, there is no discernible link whatsoever between these alleged

adjustments and the Claimant's lateness. It is difficult to see how the adjustments for which the Claimant contends would have stopped her from being late on the occasions in question (especially bearing in mind the reasons which she gave why she was late on those days). Therefore, even if those adjustments had been made, the Claimant would still have been dismissed for lateness.

138 In relation to the fourth allegation, concerning a later start time of 7am, this was offered to the Claimant but she declined it; and in any event it is unlikely that changing the Claimant's start time to 7am would have prevented the Claimant from being late in any event because, regardless of the Claimant's start time she was still late – see for example the two examples of her being late when her start time was respectively 9am and 8am on a Sunday. Therefore, the Claimant would have been dismissed for persistent lateness regardless of the adjustments that she now claims. We accept the Claimant was late because she had a relaxed attitude towards punctuality and failed to accommodate for transport difficulties on her way to work. The Claimant would still have needed better to plan her journey to work even if she was working with more people, in a different role/department, with more time or starting later. Therefore, the Claimant's assertion that she would not have been dismissed if these adjustments had been made cannot be upheld.

Discrimination Arising from Disability

139 The Claimant's complaint in this respect is that her dismissal constituted discrimination because of something arising in consequence of her disability in that she now alleges that her lateness was caused, in part, by her disability.

140 However, most notably, this is not what the Claimant said during the numerous meetings (both investigatory and disciplinary) when asked why she had been late on the days in question. It was not what the Claimant said in her claim form and it is also not what the Claimant said in her witness evidence. We cross refer to the explanations which she gave which we have set out above in our findings of facts.

141 The Respondent was entitled to rely on these explanations in reaching its decision to dismiss and, indeed, the Claimant stood by those reasons in her oral evidence before this Tribunal. They demonstrate that the lateness for which the Claimant was dismissed was not caused by her disability. Therefore, her knee/ankle issues are of no relevance when it comes to the Claimant's lateness on the dates in question. Furthermore, as noted, there is no medical evidence, contemporaneous with the lateness or otherwise, in support of the Claimant's more recent assertion that her lateness was caused, in part, by her disability. The "something" relied on for the purposes of the discrimination arising from disability complaint, namely the lateness for which the Claimant was dismissed, did not arise in consequence of the Claimant's disability and this claim therefore fails.

142 In any event, even if the Claimant had established this, we accept that the Respondent would have justified its decision to dismiss her as being a proportionate means of achieving a legitimate aim. It is self evident that managing lateness to ensure adequate cover in the store is a legitimate aim. In addition, the fact that, especially in retail and catering, managing lateness serves to ensure that employees arrive to work in time in order for the department to be appropriately covered to meet standard operating procedures, food safety guidelines and customer demands further enforces this. We also heard further evidence from Ms Moon of the impact on the customer of employees being late.

143 Furthermore, it was proportionate to dismiss the Claimant when the Respondent did in circumstances where the Claimant had been given numerous opportunities to improve her punctuality, had declined a later start time or shift pattern, had had multiple warnings and was on a live final written warning. Other than ignoring the lateness and letting the Claimant come and go as she pleased (which would not have been proportionate or reasonable), there was no other option. As noted, the Claimant was even late when she started later on Sundays, so a later start time would not have cured the problem. Equally, the Claimant was late before she moved when she lived closer to work, so a shorter distance to work was not the answer either. Regardless of her start time or store, in all likelihood the Claimant would have continued to be late, meaning the legitimate aim would not have been achieved and the Respondent would continually be faced with the same issues. Therefore, dismissal was a proportionate means of achieving the legitimate aim in these circumstances.

Unfair Dismissal

144 There is no real challenge to the fact that the reason why the Respondent dismissed the Claimant was conduct, namely her persistent lateness. The record of investigatory and disciplinary meeting speaks for itself in this respect. Furthermore, the fact that the Claimant was late was never disputed and the records that we have seen in the bundle demonstrate that lateness.

145 Furthermore, the Respondent followed its procedures in terms of the disciplinary hearings and the dismissal disciplinary hearing and appeal. We have not seen anything which we consider to be a procedural unfairness.

146 In terms of investigation, there was relatively little that was required to be done as the incidences of lateness were clear, obvious, proven and not disputed by the Claimant. It is clear that the Claimant was persistently late. Therefore we accept that the Respondent genuinely believed that the Claimant was guilty of the lateness and had reasonable grounds for doing so.

147 Furthermore, we consider that the decision to dismiss was well within the range of reasonable responses open to a reasonable employer. The

Claimant had persistently been late over a considerable period of time. She had had several informal discussions about lateness as well as a written warning and then a final written warning for lateness (as well as being on a final written warning for the separate misconduct of calling Mr Badjie a "useless immigrant"). Not only, therefore, was the Claimant on a live final written warning, but that warning was for conduct of the same nature as the conduct for which she was being disciplined/dismissed. There were no exceptional circumstances apparent to excuse or mitigate the Claimant's lateness. Furthermore, there was no indication to Ms Dupres that the Claimant was likely to improve in terms of her punctuality at work; quite the contrary in the light of her history.

148 Therefore, we consider that the decision to dismiss was within the range of reasonable responses and the dismissal was not therefore unfair. The unfair dismissal complaint therefore fails.

Polkey/Contribution

149 Given that the unfair dismissal complaint has failed, it is not strictly necessary for us to consider these two issues.

150 However, we do accept Ms Ashiro's submission that, had there been a procedural flaw in the dismissal process (albeit no such flaw has been found by us) any such flaw would have made no difference to the outcome in the circumstances and the Claimant would still have been dismissed in any event at the same time. Therefore, we would have reduced any compensatory award by 100% to reflect this.

151 Furthermore, we would also have found that the Claimant contributed 100% to her dismissal by her persistent lateness. Therefore, had the Claimant succeeded, we would have reduced the basic and compensatory awards for unfair dismissal by 100% to 0.

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Employment Judge Baty
18 September 2017