EMPLOYMENT TRIBUNALS

Claimant: Miss S St Hilaire

Respondent: T J Morris Limited T/a Home Bargains

Heard at: **Leeds** **On:** **31 January and 1 February 2018**

Before: Employment Judge Keevash
Mr W Roberts
Mrs N Arshad-Mather

Representation
Claimant: Ms A Nanoo Robinson, Counsel
Respondent: Mr D Northall, Counsel

JUDGMENT

1 By consent the complaint of victimisation is dismissed on withdrawal by the Claimant.

2 The complaints of disability discrimination succeed.

3 The Respondent is ordered to pay to the Claimant compensation in the sum of £9,315.07.

4 In respect of loss of earnings the Respondent is ordered to pay to the Claimant a sum to be agreed by no later than 8 February 2018. In default of agreement, the Claimant is at liberty to apply for a further Remedy Hearing.

REASONS

Background
1 By her Claim Form the Claimant complained of disability discrimination. By its Response the Respondent resisted the complaints. Among other matters it did not admit that the Claimant was disabled.

Issues
2 The Tribunal noted that the issues for determination had been identified at a Preliminary Hearing on 30 October 2017. Subsequently the Respondent

confirmed that it accepted that the Claimant was disabled within the meaning of the definition in section 6 of the Equality Act 2010 ("the 2010 Act").

Hearing
3 At the outset of the Hearing Ms Nanoo Robinson stated that the Claimant withdrew her complaint of victimisation. The Tribunal adjudged that by consent that complaint be dismissed on withdrawal by the Claimant.

4 The Claimant gave evidence on her own behalf. Antony Daly, Area Manager, and Kirsty Louise Downey, Assistant Manager, gave evidence on behalf of the Respondent. The Tribunal also considered a bundle of documents.

Facts
5 The Tribunal found the following facts proved on the balance of probabilities:-

5.1 On 15 May 2007 the Claimant was employed by the Respondent at its Huddersfield store ("the store"). At the material time she worked 20 hours a week (5 days a week).

5.2 The Respondent is a national retailer of discounted household goods with about 500 stores across the UK. It employs about 17,000 employees.

5.3 The Claimant was born with hip defects which have caused her significant problems when walking and generally with her mobility. Before May 2007 she had two hip replacements. Since May 2007 she had three operations. She had treatment including physiotherapy, acupuncture and conventional pain relief to help her recover). She had to attend regular medical appointments. At the time of this Hearing she expected to have another hip replacement in the near/medium future and a knee replacement.

5.4 The toilet at the Respondent's store is located upstairs and the Claimant was unable to use it because of her mobility difficulties. She used a toilet in the shopping centre in which the store was located. From about October 2014 that toilet was no longer available for her use. She then used a toilet which was located in the local market area – about four to five minutes walk each way.

5.5 By a letter dated 10 July 2017 addressed to the Respondent the Claimant raised a complaint about bullying by her manager, Ms Willis.

5.6 On 19 July 2017 she attended a meeting which was conducted by an area manager.

5.7 By a letter dated 24 July 2017 the Claimant informed the Respondent that she did not want to take her grievance any further.

5.8 On 10 September 2007 the Claimant began a period of absence due to sickness.

5.9 On 23 November 2007 the Claimant attended a welfare/wellbeing meeting which was conducted by Ms Wakefield, area manager. The notes of the meeting record that the Claimant informed Ms Wakefield about her hip replacements and that she was "classed disabled". She explained that during her interview for the job she talked about her inability to lift and carry. Initially she had only been given till duties. Gradually she was asked to do additional duties including pulling cages

out of the lift. At the end of the meeting Ms Wakefield stated that when the Claimant was ready to return to work the Respondent "will establish exactly what you can and can not do and where possible make any necessary adjustments to return you to work successfully."

5.10 On 8 February 2008 the Claimant attended a progress meeting which was conducted by Ms Wakefield. The notes of the meeting record that Ms Wakefield stated:- "Obviously because of your disability due to hips and how you were handled previously we will need to have a meeting to see what duties you are able to do, but very light duties and possibly bring in reduced hrs to ease back in."

5.11 On 7 March 2008 the Claimant attended a back to work meeting which was conducted by Ms Wakefield. It was agreed that the Claimant could use the disabled toilet in the shopping centre in which the store was located. She had to inform the manager when she was leaving for that purpose and when she returned. Ms Wakefield also agreed that the Claimant would only be required to work on the tannoy till except that she would have to undertake light duties (counting) on stock take days.

5.11In or about 2013 the Claimant asked the Respondent whether she could reduce her hours to 16 a week. She was told that there were no 16 hour contracts.

5.12 In or about July 2015 the Claimant began a period of absence from work during which she had her hip replacement.

5.13 On 11 January 2016 the Claimant's GP signed a Fit Note advising her that she may be fit for work "taking account of the following advice". It stated:- "If available, and with your employer's agreement, you may benefit from amended duties" and added the following comments:- "can return to work 12/11 (sic) if avoids bending and has light duties".

5.14 On 12 January 2016 the Claimant returned to work. She did not have any welfare or return to work meeting with a manager.

5.15 On or about 22 January 2016 Ms Downey told the claimant that in future she would have to clock out when leaving the store to go to the toilet and to clock in when she returned. The Claimant did as she was instructed. When she discovered that the Respondent had made deductions from her pay in respect of the time when she was clocked, she told Ms Downey that she would not be clocking out any more.

5.16 On 23 February 2016 the Claimant began a period of absence due to sickness.

5.16 By a letter dated 14 March 2016 addressed to the Respondent the Claimant raised a complaint about Ms Downey. Among other matters she complained about the instruction to clock out when leaving the store to go to the toilet and the deduction from her wages.

5.17 By a letter dated 30 March 2016 addressed to the Claimant Ms Stott, Human Resources Advisor, apologised for the delay in responding to the letter of

complaint and explained that she would be invited to a meeting to discuss her grievance and her ongoing sickness absence.

5.18 On 30 June 2016 the Claimant attended a meeting which was conducted by Mr Edwards, area manager. The notes of the meeting record that Mr Edwards stated that he "would speak to HR and see where we can go from here and also investigate the issues you've raised with the management … When we arrange another meeting I shall have answers for yourself …".

5.19 On 28 March 2017 the Claimant attended a meeting which was conducted by Mr Daly.

5.20 By a letter dated 6 June 2017 Mr Daly informed the Claimant as to the outcome of her grievance. Among other matters he stated that he would arrange for a payment for three hours pay to be made to her in the next available pay run. He concluded:-
"I am aware that your most recent fit note is due to expire on 8 June 2017 and during our meeting I asked you to discuss with your GP that the Company is willing to offer support as you stated that GP was agreeable to you returning to work earlier if appropriate support was in place. I confirmed during the meeting that a phased return could be agreed which would utilize reduced hours and/or amended duties. With this in mind I propose that you contact me within the next week in order to agree a mutually convenient date and time for us to meet to discuss a structured plan for your return to work ...".

5.21 After receipt of the letter dated 6 June 2017 the Claimant did not contact Mr Daly. The Respondent did not contact her.

5.22 On 24 August 2017 the Claimant presented a Claim Form to the Tribunal.

5.23 The Respondent's Handbook provides:-
"…
Return to work meeting
It is the responsibility of the Employee's immediate Manager to ensure that a return to work meeting is held with the Employee as soon as possible on the day of return to work after every occasion of absence. The return to work meeting confirms that the Employee is well enough to return to work, the details of absence and gives opportunity to discuss the Employee's individual circumstances …

Long term sickness
An Employee is deemed as absent on long-term sick leave if they have been absent from work for a continuous period of four weeks or more. It is the responsibility of the Employee to send their medical certificates into their normal place of work and, to keep in regular contact, at least once per week with their immediate Manager to inform them of their progress and the likelihood of their return to work.
The Company's long-term absence process will be initiated after a period of 4-weeks continuous absence. Further information may be obtained from the Company's HR Department…

Equality and Diversity Policy

Company Statement
TJ Morris Ltd is committed to eliminating discrimination and encouraging diversity amongst our workforce. Our aim is that our workforce is truly representative of all sections of society and each Employee feels respected and able to give of their best.

We oppose all forms of unlawful and unfair discrimination
The purpose of this policy is to promote equality and fairness for all in our employment and not to discriminate on the grounds of gender, marital status, race, ethnic origin, colour, nationality, national origin, disability, sexual orientation, religion or age. We encourage an atmosphere in which all staff embrace the benefits of working in a diverse workforce and to promote faie and equal treatment for all Employees, job applicants, customers, suppliers and visitors, irrespective of their individual differences or personal characteristics …".

5.24 The Respondent's Store Assistant Job Guide provides:-
"…
Job Functions
Job functions can include all of the following:

- Filling shelves with stock.
- Serving customers.
- Cleaning store: shop floor, checkouts, canteen, toilets etc.
- Assisting in all store stock takes.
- Other store duties as required…".

Law
6 Section 15(1) of the 2010 Act provides:-
"A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Section 20 of the 2010 Act provides:-
"(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 …"

Section 21 of the 2010 Act provides:-
"(1) A failure to comply with the first, second or third requirement is a failure to to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person …".

Section 39(2) of the 2010 Act provides:-
"An employer (A) must not discriminate against an employee of A's (B) –

(a)…
(d) by subjecting B to any other detriment."

Section 136 of the 2010 Act provides:-
"(1) This section applies to any proceedings relating to a contravention of this Act.
(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 …".

The Tribunal also considered **the Equality and Human Rights Commission: Code of Practice on Employment (2011) ("the Code")** paragraphs 5.13 to 5.22 inclusive, 6.15, 6.23 to 6.29 inclusive, 6.32 and 6.33.

Submissions
7 Ms Nanoo Robinson made oral submissions. Mr Northall made oral submissions. He referred to **Williams v The Trustees of Swansea University Pension & Assurance Scheme and anr** [2017] EWCA Civ 1008 CA

Discussion

Complaint that the Respondent failed to comply with the duty to make adjustments when failing to allocate to the Claimant a purely sedentary role

Did the Respondent have a provision, criterion or practice ("PCP")?
8 Mr Northall accepted that the Respondent had a PCP whereby those it employed in the role as sales assistants were required to stand, walk around, negotiate stairs and lift and carry items of stock.

Did that PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled?
9 The Claimant gave evidence that Ms Downey asked her when she was not busy to restock the batteries on a gondola near her till. The batteries were in packs and often had been left on the floor by the till. She had to bend down which caused her pain. Some of the batteries were in packs of twenty which were heavy. She did not lift these; she asked a colleague to do this for her and the colleague did assist. Also she did not stock the batteries on the bottom shelf which was too low; if she did, she suffered pain. Ms Downey also asked her to to tidy the towels which were on shelves near her till. This involved standing and bending which caused her pain.

10 The Tribunal accepted the Claimant's evidence which was credible. It found that since 2008 she carried out additional duties including restocking batteries and folding towels without any formal complaint until March 2016. Sometimes she experienced pain when she did this work; sometimes she coped by obtaining assistance from a colleague. The Respondent was aware of the effect on the Claimant and the manner in which she tried to cope. However, over time her health deteriorated and in July 2015 she was absent from work while she had a hip replacement. When she returned to work in January 2016 she was still unable to carry out the additional duties of restocking batteries and folding towels without experiencing pain or asking a colleague for assistance.

11 The Tribunal understood that "substantial disadvantage" was one which was more than minor or trivial (see section 212(1) of the 2010 Act and paragraph 6.15 of the Code). It decided that the PCP did place the Claimant at a substantial disadvantage when compared with others who were not disabled. When doing some of the additional duties the Claimant experienced pain which clearly was a substantial disadvantage. Further the mere fact that an employee had to ask another colleague for assistance in carrying out some of the additional duties also constituted a substantial disadvantage because she was placed in the difficult position of choosing between doing that work without assistance and experiencing a lot of pain, refusing to do that work or asking for help. The provision of help depended on the goodwill of the colleague.

Did the Respondent know that the PCP put the Claimant at a substantial disadvantage or should it reasonably have been expected to know?

12 Mr Northall submitted that it was significant that the Claimant carried out the additional duties for about eight years without complaint. The Respondent had no notice of any significant deterioration in her health. There was no obligation to revert to her GP in January 2016 when she was about to return to work.

13 The Tribunal rejected that submission. The Code made clear that employers must do all they can reasonably be expected to do to find out whether an employee has a disability and, if so, whether a PCP was likely to place that employee at a disadvantage. In January 2016 the Claimant was about to return to work after a six months absence during which she had a hip replacement. The Respondent was aware of her medical history and, in particular, how her physical impairment had affected her ability to work. She provided the Fit Note dated 11 January 2016 which stated that she might be fit to return to work if she had amended duties and that she should avoid bending and carry out light duties. The Respondent ought reasonably to have ascertained in what way she considered her duties should have been amended. It failed to make any enquiry whatsoever of the Claimant as to what her GP had in mind. There was no evidence that there was any return to work discussion. Neither the Claimant nor Ms Downey stated that there was any discussion. If the Respondent had discussed the matter with the Claimant, it might have been prompted to make enquiries of the GP. Alternatively it might have led to the Respondent obtaining an Occupational Health report. Such steps would have placed the Respondent in a better position to understand whether the Claimant was fit to return to work performing the duties of a Customer Assistant and, if not, what reasonable adjustments could be made. In the Tribunal's judgment the Respondent should reasonably have been expected to know that the PCP was likely to place the Claimant at a substantial disadvantage.

Did the Respondent take such steps as was reasonable for it to take to avoid the disadvantage?

14 Mr Northall submitted that the Claimant should have suggested adjustments before issuing these proceedings. In any event the Respondent did make adjustments after March 2008. It allowed the Claimant to work predominantly on the till and only occasionally required her to carry out other light duties.

15 The Tribunal rejected that submission. Paragraph 6.24 of the Code made clear that there was no onus on the disabled worker to suggest what adjustments should be made and that it was good practice for employers to ask. As previously discussed, the Respondent ought reasonably to have discussed this matter with the Claimant before she returned to work in January 2016. It knew that she might

benefit from being allocated light duties and avoiding bending. Ms Nanoo Robinson submitted that the Respondent ought to have required the Claimant only to work on the till and occasionally to assist with stock takes. In the Tribunal's judgment, that would have been a reasonable adjustment having regard to the factors set out in paragraph 6.28 of the Code. It would have been effective in preventing the substantial disadvantage; it was practicable; it would have involved neither additional cost (as confirmed by Mr Daly) nor any disruption; the Respondent had sufficient financial and other resources (ie personnel).

16 Accordingly the Tribunal decided that the complaint under this head succeeded.

Complaint that the Respondent discriminated against the Claimant when requiring her to clock out and clock in when she left its premises so as to go to an accessible toilet external to its premises

Was the Claimant treated unfavourably when she was required to clock out and clock in?

17 The Tribunal considered the Court of Appeal's judgment in **Williams**. In that case the Claimant's disability caused him to reduce his working hours to part time working and then to take ill health retirement at the age of 38. The benefits to which he was entitle under his employer' pension scheme were far more advantageous to him than anything which would be available to a non-disabled colleague. However, they were less advantageous than those which would be payable to a colleague with a disability of a different kind. The Court held that he had not been treated unfavourably.

18 In this case the Tribunal found that the Claimant was treated differently form other employees who left the store for reasons other than the need to go to the toilet. Occasionally employees would go out to get photocopying done. Also employees frequently went out and stood in the loading bay where they would smoke cigarettes. Unlike the Claimant these employees were not required to clock out. In the Tribunal's judgment that understandably created a perception that in January 2016 the Claimant was singled out for special treatment. She did perceive it in that way. That constituted unfavourable treatment.

Did the unfavourable treatment arise because the Claimant's disability rendered the respondent's staff toilet inaccessible so that the Claimant was required to leave the premises when she required the toilet?

19 Mr Northall accepted that, if this was unfavourable treatment, it was something arising in consequence of the Claimant's disability.

Was the treatment a proportionate means of achieving a legitimate aim?

20 Mr Northall submitted that the legitimate aim was to ensure that fire evacuation procedures were carried out smoothly. It was important that the Respondent knew who was on and off the premises when conducting the exercise. Requiring employees to clock out when they left the store was a proportionate means of achieving that aim. It did not matter that previously employees had not complied with that requirement and that employees who left the store to smoke a cigarette did not clock out.

21 The Tribunal rejected that submission. The Tribunal found that the Respondent had a legitimate aim of seeking to ensure that its Fire Evacuation

procedures ran smoothly. It considered whether the treatment was proportionate. There was no evidence to suggest that there had been any problem since March 2008 when it allowed the Claimant to leave the premises to go to the toilet. It had required her to inform a manager when she left and when she returned. Presumably the manager used to arrange for another employee to sit at the till during the Claimant's absence. If there had been any need for evacuation, the manager would have known where the Claimant was. The Tribunal decided that introducing the clocking in and out requirement was not a proportionate means of achieving the aim. It did not place the Respondent in any better position than it would have been between March 2008 and January 2016. It was not reasonably necessary to achieve the aim.

22 Accordingly the complaint under this head succeeded.

Complaint that the Respondent discriminated against the Claimant when it failed to pay her for the "clocked out" time when she was attending the toilet

Was the Claimant treated unfavourably when she was not paid for the "clocked out" time when she was attending the toilet?
23 Mr Northall accepted that this was unfavourable treatment.

Did the unfavourable treatment arise because the Claimant's disability rendered the respondent's staff toilet inaccessible so that the Claimant was required to leave the premises when she required the toilet?
24 Mr Northall accepted that the treatment was something arising in consequence of the Claimant's disability.

Was the treatment a proportionate means of achieving a legitimate aim?
25 Mr Northall accepted that the answer to this question was "no".

26 Accordingly the complaint under this head succeeded.

Remedy Hearing
27Following the announcement of the Judgment on liability the Tribunal proceeded to determine the issue of remedy. The Claimant gave evidence on her own behalf.

Submissions
28 Ms Nanoo Robinson made oral submissions. Mr Northall made oral submissions. He referred to **Sarwar v West Midlands Fire and Rescue service** (Birmingham) (Case No 1304522/06) (23 April 2007); **Ncheke v Her Majesty's Courts & Tribunals Service** (Leicester) (Case No 1201468/2011) (13 March 2013); **Dean v Abercrombie & Fitch** (London Central) (Case No 2203221/08) (7 August 2009); **Crisp Iceland Foods Ltd** (Birmingham) (Case Nos 1604478/11, 1600000/12) (8 May 2012).

Discussion

Injury to feelings
29 The Claimant gave evidence that whenever she was taken off till duties she felt very upset, ashamed and belittled. Sometimes she would ask a colleague to help her with tidying the towels and stocking up the batteries. When she had to carry out the additional duties herself, she experienced pain and had to take

medication. She felt let down, hurt and upset; she felt she "had been kicked in the stomach". She felt bullied when she was asked to clock out when going to the toilet and when she discovered that the Respondent had made deductions from her pay. She felt degraded and embarrassed by having to come to the Tribunal. As at the date of this Hearing she remained angry and upset because she still had not been reimbursed.

30 The Tribunal accepted the Claimant's evidence. Counsel agreed that it was appropriate to consider the Guidance issued by the Presidents of the Employment Tribunals in September 2017. Ms Nanno Robinson submitted that an award in the middle band (£10,000 to £13,000) was appropriate. Mr Northall submitted that an award in the lower band (£3,000 to £4,000) was appropriate. He referred to several cases reported in **Harvey** and submitted that **Ncheke** was broadly comparable. The Tribunal decided that this was a less serious case which warranted an award towards the top of the lower band. In reaching that decision it took into account matters including the degradation she felt when asked to clock out, the significant delay after she raised her grievance, the delay before even a partial apology was given to her and the fact that even on Day 2 of the Hearing she had not been reimbursed. The Claimant's injury was more serious than that suffered by the claimant in **Ncheke** but not as serious as that submitted by Ms Nanno Robinson. An award of £8,000.00 was appropriate.

Interest on the injury to feelings award

31 The Tribunal decided that it was appropriate to make an award of interest under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations. It assessed the amount of interest as follows:-

12 January 2016 to 1 February 2018 (750 days)

$$\frac{750}{365} \times £8{,}000 \times \frac{8}{100} = £1{,}315.07$$

Total award of compensation

32 Accordingly the Tribunal ordered the Respondent to pay to the Claimant compensation in the sum of £9,315.07.

Loss of earnings

33 The Tribunal understood that the Respondent had deducted an amount in the region of £12 from the Claimant's wages. Since neither party had produced evidence of the exact amount and there was no agreement as to that amount, the Tribunal ordered that in respect of the loss of earnings the Respondent pay to the Claimant compensation in an amount to be agreed by 8 February 2018. In default of agreement, the Claimant is at liberty to apply for a further Remedy Hearing.

Other comments

34 The Tribunal expressed concern at the way in which matters had been allowed to slip after the Claimant raised her grievance in March 2016. There was unacceptable delay on the part of Mr Edwards. He failed to make any decision on the grievance. He appeared to have ignored the Claimant's long term absence. After Mr Daly became area manager, he did restart the grievance process. However, after he provided the Claimant with his decision, there was an inexplicable failure to achieve the Claimant's return to work. The Claimant did not contact the Respondent to explore the possibility of working in another store. The Respondent did not contact the Claimant to find out what she wanted to do. In

these proceedings the Tribunal had not been asked to make any recommendation. However, it trusted that steps would be taken to resolve any outstanding differences between the parties.

Employment Judge **Keevash**

Date: 14 February 2018