EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss G Zak	**v**	Hilton Meats (Retail) Ltd

Heard at: Cambridge

On: 16,17, 18, October 2023
20 November 2023

In Chambers: 20 and 21 November 2023

Before: Employment Judge L Brown

Members: Mr C Davie and Ms S Goding

Appearances
For the Claimant: In person
For the Respondent: Ms Duane, Counsel.

RESERVED JUDGMENT

1. The Claim for Disability Discrimination contrary to s.13 of the Equality Act 2010 (the 'EqA') fails and is dismissed.

2. The Claim for Disability Discrimination contrary to s.15 of the EqA 2010 partially succeeds.

3. The Claim for Disability Discrimination contrary to s.20/21of the EqA fails and is dismissed.

REASONS

INTRODUCTION

1. At the commencement of these proceedings, and at the hearing, the Claimant was still an employee of the Respondent. The Respondent is a provider of meat processing and packing services. The Claimant commenced employment with the Respondent in 2014 as a General Operative, [P59] and remains employed to date, [P66]. The nature of the Claimant's role involves working on a rotating production line in a food production factory assembling various products for packaging which are then distributed to retail stores.

2. On the 9 October 2018 the Claimant fell off her bike and broke her left radius and began suffering with severe elbow pain. She developed a condition known De Quervain's Tenosynovitis and she started to suffer with increasing pain in her wrist and it affected her ability to perform her duties. The Respondents accept the Claimant is disabled but the date of knowledge is said to be from October 2019 onwards.

3. By way of an ET1 claim filed on the 25 January 2022 the Claimant brought claims for Disability Discrimination contrary to s.13, s.15 and s.20/s.21 of the EqA.

4. The Claim was presented following Acas Early Conciliation between the 7 December 2021 and the 17 January 2022.

5. On the 18 March 2022 the Respondent filed their ET3 form denying all claims.

Procedure

6. The Claimant gave evidence. She also called a witness, Katarzyna Bodzak, on her behalf.

7. The Respondent called Mr Murowany to give evidence on their behalf but did not call any other witnesses.

8. We had an agreed bundle that ran to 271 pages.

9. We also had the following documents provided to us throughout the hearing: -

   7.1 Clocking in cards of the Claimant for April to October 2021.

   7.2 Weekly Labour Plan of the Respondent for the period the 29 July 2021 to the 6 August 2021.

10. The Respondent also provided visual aids of the type of products that the Claimant was required to assemble in her role at various times during the period to which her claim related. Pictures of the size, weight and dimensions of the products were also detailed by the Respondent **[P235-241]**.

The Case Management Hearing on the 26 September 2022

11. A preliminary hearing for case management took place by telephone in Norwich before Employment Judge S Moore. The Case Management Order of Employment Judge Moore ("the Moore CMO"), arising from the Case Management Hearing ("the Moore CMH"), summarised the issues in dispute in this case. However it recorded that no List of Issues had been prepared prior to that hearing, and there were communication difficulties due to the Claimant having to rely on the assistance of her friend interpreting for her on the telephone at the Moore CMH, as noted in the Moore CMO, and these communication difficulties also persisted in the final hearing before this Tribunal to a very significant degree.

12. In particular the Moore CMO said as follows: -

   "**The Issues**

   (5) No attempt had been to identify the issues prior to the hearing. At the hearing the issues were identified as far as possible, although the process was hampered by the fact that this was a telephone hearing and since the Claimant does not speak English her case had to be explained by a friend who took instructions from the Claimant and translated between English and Polish."

13. With a litigant in person whose first language was not English, and where a Respondent is professionally represented it is always helpful where, in accordance with the overriding objective to assist the Tribunal, the

professionally represented party prepares and attempt to agree a List of Issues prior to a preliminary hearing with the litigant in person, or if not then prior to the final hearing. This did not occur at either the preliminary or final hearing in this claim.

14. The issues this Tribunal had to determine are set out in full below, but one part of these issues took up a disproportionate amount of time throughout the hearing. This occurred because the Respondent waited until the final hearing to complain that the Claimant had not particularised her claims.

15. When this Tribunal enquired why the Respondents had not requested Further Information from the Claimant at the Case Management Hearing, and asked for an order to that effect no satisfactory explanation was forthcoming.

16. In particular the claim for s.15 Unfavourable Treatment Arising from Disability was defined as follows in the Moore CMO: -

C. Discrimination Arising from Disability

5. The overarching question is, did R treat C unfavourably because of something arising in consequence of C's disability? The alleged unfavourable treatment relied upon by C is:

(i) On some occasions R sent her home without pay because she was unable to work on certain meat lines, and

(ii) R didn't treat her with respect and made her feel she had done something wrong for needing adjustments and/or time off. This raises the following issues:

Case Management at the Outset of Day 1

17. On the first day of the hearing at the outset we had the draft List of Issues from Counsel for the Respondent, which had brackets in various places which indicated missing information in the Claimants claim. We also had her opening note, and a chronology.

18. In the absence of an agreed List of Issues and with only a draft to work from with various gaps, this Tribunal set out to finish defining the issues before commencing the hearing. Counsels draft list of issues was not a replication of the List of Issues set out in the Moore CMO, but we did our best to define the

gaps identified by Counsel in her draft List of Issues. This was hampered by the Claimants language difficulties. We adopted Counsels draft List of Issues when refining, determining, and deciding the issues in this claim.

19. We firstly defined the missing PCP for the Claimants claim under s.20/s.21 of the EqA. I suggested it should be that the Claimant was required to come to work and perform her full duties. Counsel agreed she had no objection to this.

20. In relation to the Claimants claim under s.15 of the EqA Counsels draft List of Issues, prior to it being amended by this Tribunal, set out as follows: -

8) Did the following arise as a consequence of the Claimants Disability:

a) ***[C to confirm]***

9) Did the Respondent treat the Claimant unfavourably? The Claimant relies on the following acts:

(i) On some occasions R sent her home without pay because she was unable to work on certain meat lines, and

(ii) The Respondent didn't treat her with respect and made her feel she had done something wrong for needing adjustments and/or time off. ***The Respondent asserts that this allegation lacks specificity.***

21. After some discussion it was initially agreed with Counsel for the Respondent that the missing words in paragraph 8 (a) of the List of Issues prepared by her should read as follows: -

8) Did the following arise as a consequence of the Claimant's disability:

a) <u>Put on lines that the Claimant says were too high and too fast and too heavy.</u>

22. There was also a discussion about the unfavorable treatment, and this was as follows, which for the purposes of this Judgment adopts the wording in Counsels List of Issues at 9 (i) with additional wording added by this Tribunal and underlined: -

On some occasions R sent her home without pay *when Line 19 was not working because she was unable to work on certain meat lines.*

23. I also explained to the Claimant that she would need to tell the Tribunal what she was saying the Respondent should have done i.e. which lines they should have taken her off, and whether she was saying they should have given her different light duties or whether there was another specific line that she wanted to be working on, and that she would need to provide clarification of that in relation to her claim for reasonable adjustments. At this point, the only clarification obtained from the Claimant about her reasonable adjustments claim was a reference to having a break every 20 minutes.

24. Discussion then took place about the reference in the List of Issues in the Moore CMO where it was said the '*Respondent did not treat her with respect.'*

25. The Claimant then gave details of an incident where she alleged that she came to work on the 2nd of August 2021 at 6.00 am and when she turned up for work, she alleged that her Line Manager, Krystoff Murowany, came to her and shouted at her and told her she should not be there and had to leave. The Claimant said she then had to wait in the canteen until the disciplinary hearing started at 2:00 PM and that it was very distressing. The hearing had been convened to discuss her absence levels later that day.

26. Counsel stated that this was a brand-new allegation and didn't arise out of the original claim. I pointed out that it was referred to in the Moore CMO in the sense of an allegation that she was 'not treated with respect' and I asked if a request for Further Information had ever been made. I did not receive a satisfactory answer to this apart from a general statement that they had not been able to seek clarity on the claims at the case management hearing due to the Claimant requiring a translator.

27. I pointed out that I could see no record in the case management hearing of any complaints of lack of specificity by the Respondent on the Claimant's part. I said that a Request for Further Information could have been requested at the case management hearing and that the Judge would have made an order for the Claimant to provide Further Information. I said it would not have been clear to the Claimant that this part of her claim needed clarifying.

28. Discussion also took place about the section 15 claim and the Unfavourable Treatment Arising From Disability. The Claimant replied that if there was no meat on Line 19, she was sent home but other workers would be sent to other

lines. This was a clear example of potentially unfavourable treatment. I clarified whether that was because the other lines the workers were sent to were faster and higher and so she was not sent to those and she confirmed this was the case.

29. During the course of the discussion about the failure to pay her when Line 19 was not working there was a discussion about non-payment on the days she was sent home unpaid when Line 19 stopped working. In relation to the time period when the underpayment appeared to have occurred, I asked Counsel for the Respondent about this and she said: -

> *'Yes Judge – where looking at Claimant being sent home – paragraph 9 of the List of Issues – sent home without pay as unable to work on certain meat lines – page 18 – under first hole punch – 15.1.2020. It is the Respondents understanding that is when that allegation arises – I ask you to limit it to that period.'*

30. I then asked the Claimant as follows: -

> *'So, one question I have for you is that at page 18 it says that on the 15 January 2020 the occupational health nurse recommended that you work on Line 19 and 30 but you were only given the option of working at Line 19 or staying at home and I assume that on this date you went home and lost pay, did you?'*

31. The Claimant replied: -

> *'I was still paid no money in 2020.'*
>
> This was clearly not a direct answer to my question on the issue of the date being on the 15 January 2020.

32. I asked again and said that the barrister was suggesting that this was the only time it happened on the 15 January 2020 or that that was the only incident she was referring to in her claim, and I asked again what was the period during which she lost pay.

33. The Claimant then replied, *'Since April 2021 to today.'*

I was not clear why the Claimant was referring to 2021 when the claim form referred to a date of the 15 January 2020.

34. A further discussion then took place with Counsel, and I said to Counsel after trying to clarify when the Claimants hours were reduced as follows: -

> *'On this so there's the 15 January 2020 she said she was sent home and so the question is whether there were any other incidents after that day when she was sent home?'*

35. I then asked the Claimant a third time as follows: -

> 'Are you able to tell us prior to October 2021 (from when you are paid in full up until going back to work in January 2022 after sick leave) so in the period prior to October 2021 what days are you saying you were sent home, and you lost money so prior to October 2021?'

36. She replied: -

> *'I don't know I did not record it – because when attending asked to take off authorised that my absence was accepted.'*

37. I asked again in a different way: -

> *'Tell us how much pay you lost prior to October 2021 when you were sent home or how many times were you sent home prior to October 2021 even?'*

38. She replied with words to the effect of: -

> *'It was definitely a few times – I lost £700.00,' and also that,' Yes because I was on shift for four days – only once at work in that period.'*

39. I confirmed if she meant she had missed three shifts, and she replied: -

> 'Because often did not have enough meat and sent home after two hours.'

40. I went back to the issue of when this had occurred, and asked as follows: -

'So, what you are saying that on the 15 January 2020 when you were sent home that was one shift that day yes?'

41. The Claimant replied, *'four-day rotation – three-day shift.'*

42. I tried to clarify again and asked if on the 15 January 2020 the Claimant sent home for the whole of the week and last three shifts and I asked her to confirm that was what she was saying, but she replied 'No.'

43. Further discussion took place, and I noted that the reference to the 15th of January 2020 appeared to be £700 lost in that month, and then the Claimant said; -

'I want to say I was at loss in that month - up to £700.00'.

44. I took this as confirmation that she lost £700.00 from three shifts in January 2020, and then asked Counsel what they said about this detail being added to the claim for unfavorable treatment arising from disability – this being she wasn't paid for three shifts in January 2020 and Counsel replied: -

'if that is the totality of the claim for being sent home we don't object to that.'

45. This issue was extremely difficult to clarify with the Claimant due to the language difficulties she was having even with the help of an interpreter.

46. Counsel then objected to the application by the Claimant to add an allegation that she was not treated with respect and Krystoff shouted at her on the 2 August 2021. She said as follows: -

(i) She reminded this Tribunal of Selkent and referred to the nature of the amendment and timing and manner of the application. She said that no reference was made to this incident in the Claimants claim form.

(ii) She invited this Tribunal to treat it as a new allegation and new cause of action but when I pointed out it was not a new cause of action, she conceded it was simply a new allegation not referred to in the claim form.

(iii) She said that this allegation had never been raised as a grievance and that further investigation would need to be undertaken by the Respondent were the allegation permitted by this Tribunal and added to the claim.

(iv) She also submitted that the allegation was not included in the Claimant 's own witness statement. She said she had had ample opportunity to present this amendment earlier than she had done and that it was presented 21 months out of time and that when the Tribunal carried out its balancing exercise it should balance the prejudice to the Respondent were this new allegation added. She invited us to refuse the application.

47. In reply the Claimant stated that she thought she wouldn't be believed if she made this allegation without producing a witness. She said however there was a witness at the time, and he was the deputy manager. I asked if she had asked him to give evidence for her and she said she hadn't because he wouldn't agree to assist her anyway.

48. I pointed out to Counsel that the witness against whom the allegation was made, Mr Krzysztof Murowany, was here to give evidence at the Tribunal in any event and it was a straightforward allegation of asking him if he had shouted at her. It seemed to me that it would be a simple matter for him to be asked supplementary questions about and that he could give evidence to this Tribunal about.

49. I then asked Counsel if there were any other matters that needed resolving prior to us retiring to consider our decision on this issue and the issue of a comparator was discussed. It was agreed that the Claimant would be relying on a hypothetical comparator.

50. There was then a reference made by the Claimant to a co-worker Vasilica who she said was treated better than her. She said she was not disabled but did then refer to her having a stent in her heart. It was not clear to this Tribunal whether this comparator was disabled or not. Counsel then referred to this comparator not having materially similar circumstances. No further information was given about this alleged comparator by the Claimant, and which claim it related to.

51. Discussion then took place about the Claimant's cross examination, and I gave her advice about preparing questions for her cross examination, and that it would probably take place the next day. I explained to her that if she didn't ask a question about something that she said had happened then any failure to ask questions could mean we couldn't make findings on an issue in her favour and that she had to make her allegations against the other side in the form of questions to them.

52. We retired to consider the application by the Claimant to add the allegation in relation to Krystoff Murowany shouting at her on the 2 August 2021. We considered the relevant law in relation to amendments and in particular where the balance of prejudice and hardship lay.

53. We had regard to the case of **Vaughan v Modality Partnership UKEAT/0147/20/BA,** and whilst it was undoubtedly true that the Respondent would suffer some prejudice and hardship if we allowed the amendment, in that the Respondent, would have to answer another allegation which was against Mr Murowany personally, if we did not allow the amendment the Claimant then lost her opportunity to pursue an allegation in her claim. We decided the balance of hardship and prejudice lay in the Claimants favour and so we allowed her to add the allegation that on the morning of the 2 August 2021 Mr Krystoff Murowany shouted at her for being at work when he alleged she was off sick and should not be at work, in that this was a specific example of what she said in the claim form which was that;-

'The Respondent didn't treat her with respect and made her feel she had done something wrong for needing adjustments and/or time off.'

54. We then adjourned at 12.20 am and agreed the hearing would start again at 2.00 pm. This gave the Tribunal time to take a lunch break and to read into the papers.

55. When we reconvened at 2.00 pm, and after the Claimant took the oath, I asked the Claimant some supplementary questions about her claim prior to her cross examination, as her witness statement only amounted to one page, and didn't touch on the detail of her claim to any great extent.

56. During those questions the issue of the date on which she was sent home unpaid arose again. I referred to her being sent home without pay in January 2020 and asked her to tell us about that. She replied, *'In January 2020 still paid.'*

57. This was not a clear answer and seemed to contradict her claim form. I therefore asked her to go to page 18 of her Claim Form and repeated to her what it said which was as follows: -

    '15/01/2020 -Nurse (Occupational Health report has Manager Krzysztof Murowany), work on Line 19 and 30 – recommended by nurse. I was only given the option of working at Line 19 or staying at home. When I stay at home it was not paid, I was struggling financially.'

58. I reminded her that we had discussed this earlier and she replied as follows: -

    'How can I explain that – so I was paid from January 2020 to April 2021 same people still working HR – I don't understand that – I wasn't paid from this date.'

59. I asked again what date she was referring to and she said, 'from 6 April 2021,' and also added, 'he told me at meeting was not going to be paid anymore.'

60. It is now clear that the issue of the date on the ET1 form had been a misunderstanding on both this Tribunals part, and Counsels part, and that the reference in her claim form to the date of the 15 January 2020 was the date when she saw the nurse, and that the reference in the next sentence to, *'I was only given the option of working at Line 19 or staying at home,'* was a reference to a different time period, which the Claimant asserted at this point in the hearing was from 6 April 2021.

61. It became clear that the Respondents reading of this paragraph, and also this Tribunals reading of it, had involved an assumption that the date which referred to when she saw the nurse on the 15 January 2020 also encompassed the period she was sent home unpaid, but which turned out to be an incorrect assumption and the date for the two sentences in bold below had now been clarified by the Claimant to be from the 6 April 2021 onwards [page 18 of Bundle]:

    "15/01/2020 – Nurse (Occupational Health report has Manager Krzstof Murowany), work on Line 19 and 30 – recommended by nurse. ***I was only***

given the option of working at Line 19 or staying at home. When I stay at home it was not paid, I struggling financially."

62. As the Claimant had now for the first time referred to a specific date i.e. from the 6 April 2021, and a meeting when she was told she would not be paid anymore, I remarked to Counsel that she appeared to have simply got confused about what she was being asked about the date, but that it didn't change the issue in relation to the amount she was claiming she had lost, and I then went on to ask Counsel if she was objecting to the date being changed to the period of April 2021, and asked if she had any instructions on this.

63. Counsel replied it was around August 2021 when all adjustments were exhausted and that if she couldn't work on Line 19 then on those occasions she would be given authorised unpaid leave. She then corrected that date to October 2021, and then clarified that the Claimant commenced sick leave in November 2021 until she returned in January 2022.

64. I clarified once more with the Claimant that she was now saying she lost £700.00 when she was sent home, and this was the issue in her claim form of being sent home unpaid, which she was telling us was from April 2021.

65. The Claimant replied: -

'definitely after April 2021'.

At this point Counsel stated: -

'okay Judge we will deal with it in cross-examination.'

No challenge was raised by Counsel that the Claimants reply of *'definitely after April 2021'* could not stand. The Claimant also confirmed it was Mr Krystoff Murowany who sent her home on those occasions when Line 19 was not working.

66. No discussion took place as to whether it was limited to the week of the 6 April 2021 or not, or some wider period.

67. I continued to ask some further questions of the Claimant and about the alleged shouting incident and she gave a detailed account of this incident.

68. In relation to her allegation that her request for holiday at Xmas had been refused she then identified another comparator Yvonne Kudela.

69. We took a short break from 2.40 pm to 2.50 pm. When we did so I warned her about her duty to not discuss her evidence while under oath.

70. After the break cross-examination of the Claimant then commenced. At times it was difficult as the Claimant struggled with the way questions were put to her by Counsel. I intervened on various occasions and rephrased questions in a simpler format. This was not objected to by Counsel. I asked Counsel not to ask hypothetical questions on one occasion as it was confusing the Claimant.

Day 2 of the Hearing

71. Prior to the hearing commencing on the second day, we discussed Counsels opening note and the documents referred to in that note. We noted that Counsels opening note referred, at paragraph 14 (e), to a document at p.138 which was an email from Krzysztof Murowany to Mr Retesh Dosa in Human Resources and dated the 5 April 2021, and in relation to that document she invited us to make the following findings of fact: -

    e) For a reasonable period, where C was unable to carry out other duties due to Line 19 not being operational, R paid C for those days, despite C not carrying out any work, [P138].

72. Upon looking at this document at p.138, and the subsequent page at p.139, it became apparent that in the 5 April 2021 meeting the Claimant was told that she was being allowed to book holiday to ensure she would be paid for the days she was being sent home unpaid. This was confirmed in the letter on the following page at page 139 which confirmed the discussion the day before and in particular said that: -

    'We cannot create a position for you that isn't required within the business. In the meantime, when work is not available for you, you may request annual leave, failing that you will sent home unpaid."

73. It was clear to this Tribunal that the finding of fact Counsel was inviting us to make, which was that for a reasonable period, where the Claimant was unable to carry out other duties due to Line 19 not being operational, the Respondent paid the Claimant for those days [P.4, Para.14(e) of her opening note] was not made out on the facts for the period of time for the document

she referred us to at page 138, which was the 5 April 2021, and which clearly stated that:-

'Line 19 is not running tomorrow so I booked her holiday as she requested.'

We found, that when the Claimant booked a day's annual leave to ensure she was paid, when sent home unpaid, that she had still lost the value of that day's pay and had used up one day's annual leave to compensate for it. We found that this was the same issue in effect and amounted to being sent home unpaid. We found that this meant the opposite of what Counsel was inviting us to find.

74. This issue of being sent home unpaid was clearly set out in the Moore CMO, and it was not defined as only occurring in a certain period, and it was never in dispute that this had occurred. The fact that the Claimant booked annual leave to ensure she got paid for the days she was sent home unpaid was part of the factual matrix of this case.

75. As a result, at the outset of Day 2 I raised this point with Counsel and suggested that where it said in the List of Issues, for the definition of unfavourable treatment, as discussed earlier in the hearing as follows,

On some occasions R sent her home without pay when Line 19 was not working because she was unable to work on certain meat lines.

that the words needed to be added, '***and she took holiday when no work on Line 19.'***

76. I said in my view this was a simple further result for the s.15 claim of what occurred when the Claimant was being sent home. This Tribunal considered this to be an important point of detail to be added to the List of Issues. I said it was an issue that sprang out from the document she had referred us to at p.138 of the Bundle. I also referred to p.139, where the Claimant was advised on the 6 April 2019 that she would no longer be paid when sent home, but that she could request annual leave, failing which she would be unpaid.

77. Counsel objected to this in the strongest terms and she submitted as follows: -

(i) Counsel said this claim was originally about January 2020, but the Claimant had now changed the date to April 2021.

(ii) She said that she had thought we were looking at the three days unpaid leave in April 2021 and now this was being altered significantly to what was suggested by me.

(iii) She said the R was entitled to know the case they must meet, and this was further shifting of the C's case.

(iv) She said her opening note was all premised on this issue being related to 2020.

(v) She said she was concerned about the Tribunal treating not being paid and booking annual leave to compensate that as one and the same thing.

78. I pointed out that her opening note was not premised on this issue being related to 2020 as [page 4 para 14 (e)] and her note had in fact taken us to this document dated the 5 April 2021 (page 138) where she had asserted in her opening note that the Claimant was still being paid. In fact, the document stated that she had had annual leave booked due to the Line not working, which meant the Claimant was being forced to use annual leave to ensure she was paid.

79. It was never defined in the List of Issues that only three shifts had been lost by the Claimant in January 2021. Instead it said in the original issues set out in the Moore CMO that: -

"*On some occasions R sent her home without pay because she was unable to work on certain meat lines."*

80. The suggestion that it only occurred in January 2020 was simply suggested by Counsel at the outset of the hearing on her reading of the ET1 form which I had attempted to clarify with the Claimant, but which was later clarified by the Claimant to have occurred *'from April 2021'.*

81. I suggested the Respondents produce annual leave records for the period of the 6 April 2021 onwards, but Counsel asserted that they would not show why the annual leave had been booked by her, and whether it was due to being sent home that day.

82. At this point in the hearing at 10.45 am, on day 2, we took a break to consider whether the List of Issues should be further amended to add the words '***and she took holiday when no work on Line 19,'*** to the paragraph detailing the unfavourable treatment.

83. I reminded myself of the law on amendments. However we regarded this further amendment as a refinement of the List of Issues and not to the claim form itself, as the issue of being sent home unpaid had been set out in the ET1 form, and in the Moore CMO where it referred to the Claimant being sent home unpaid ***'on some occasions'***.

84. Under my case management powers further to Rule 29 I could clearly revisit and refine a List of Issues even on day 2 of a 3-day hearing such as this. If a party decides to leave an allegation against them as vague and unparticularised where they are professionally represented, then they can hardly complain when the Tribunal is forced to define the issue.

85. Counsel had taken us to the very document in her opening note [page 138 of the bundle] where the practice of sending the Claimant home unpaid and allowing her to book annual leave had commenced, and that document Counsel referred to was dated the 5 April 2021, and the next document at page 139, confirming the Claimant may book annual leave if Line 19 was not working, was dated the 6 April 2021.

86. It was clear from these documents this was to be the practice going forward from the 5 April 2021 so they were not taken by surprise by this issue, they were very well aware of it and must always have known this was the case they had to meet.

87. At this juncture we note that despite knowing this was the issue referred to in the Moore CMO, and they themselves instigated this arrangement in April 2021, they had also adduced evidence on this issue in any event as Mr Murowany referred to it in his witness statement [Para.41] where he specifically referred to:-

'When Line 19 was not working it was agreed that the Claimant could book holiday as an alternative for example I refer to an e-mail dated 5 April 2021.'

88. In considering whether to add the words *'and she took holiday when no work on Line 19,'* to the unfavourable treatment alleged by the Claimant as referred to in Counsels draft List of Issues, we reminded ourselves of the case of

Parekh v London Borough of Brent [2012] EWCA Civ 1630, and in particular the following paragraphs from that Judgment as follows:-

> *[31] A list of issues is a useful case management tool developed by the Tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list* ***[our emphasis added]:*** *see Land Rover v Short Appeal No UKEAT/0496/10/RN (6 October 2011) at 30 to 33. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented,* **it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence [our emphasis added]:** *see Price v Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at 23. As was recognised in Hart v English Heritage [2005] EWHC 2644 (Admin), [2006] ICR 555– 35 case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays* ***[our emphasis added].***

89. We regarded the addition of the words **'and took holiday when no work on Line 19,'** as a necessary refinement of the List of Issues and it did not amount to a shifting of the case against the Respondent. Firstly, this was not even a final agreed List of Issues. The Respondents knew the Claimant was a litigant in person with language difficulties but made no attempt in accordance with the overriding objective to finalise it and request details of any missing information prior to the hearing. We did not regard the reference to this document as a reference to 'background' in the case as asserted by Counsel, and instead it clearly linked to a core issue set out clearly in the Moore CMO of being sent home *'on some occasions'* when there was no work for her.

90. After adjourning to consider this issue, under my case management powers pursuant to Rule 29, we further refined the paragraph in the List of Issues as drafted by Counsel to include the words in bold below, in addition to what we added at the outset of the hearing (as underlined), as follows: -

*On some occasions <u>when Line 19 was not working</u> R sent her home without pay, because she was unable to work on certain meat lines, **<u>and she took holiday when no work on Line 19.'</u>***

91. After taking a second break on the morning of day 2 we returned at 11.50 am to sit until 1.00 pm and for the Claimants cross-examination to conclude.

92. After some cross-examination Counsel took the Claimant to page 142 of the Bundle and once again the issue of when the Claimant took annual leave when sent home unpaid arose again. Counsel suggested that, as set out in the minutes at page 142, that this was the period of time, <u>and the 14 May 2021 onwards</u> was shortly after the time she was told if work was not sourced for her she would need to take unpaid or annual leave, and asked her to confirm that this was correct. The Claimant said she "couldn't remember about the holiday."

93. At this point it became clear to me that we needed clarity from the Respondent on information they had in their power, possession and control. I reminded Counsel that I had asked her already for the records about how many times the Claimant had taken a day's holiday in the period up to when she had then taken extended sick leave, which was from October 2021, and the period for which we wished to see annual leave records was from April 2021 to October 2021. Counsel replied that when an individual made a request for a holiday, they wouldn't state the reason necessarily. I repeated that this Tribunal wanted to know, and that I was sure it was not difficult for the Respondent to produce such information.

94. Counsel once again asserted that she had thought we were talking <u>about April 2021 and asked if it was now not limited to April 2021?</u> I said that nowhere in my oral decision when refining the list of issues about taking annual leave when unpaid due to no work on Line 19 had I said it was being limited to April 2021.

95. I said I was making an order that the Respondent produce documents to this Tribunal about all one-off days of annual leave taken by the Claimant in the period April 2021 to October 2021.

96. Counsel repeated her argument that she did not appreciate that we were seeking information for a wider period. She referred us to page 259 in the bundle which was the Claimants absence profile. I repeated I had not limited our amendment to the list of issues about taking annual leave when sent

home unpaid to April 2021. I said if she wished to cross examine the Claimant further on this she could do so.

97. Counsel referred us to the table at page 269 onwards and I told her that my members and I struggled to understand the table as it was a series of codes as set out on this page by reference to colour and on some occasions it was slightly differing shades of orange. She asked me to clarify if we wished to see information about half days taken by the Claimant as well and I confirmed that we did. After this debate concluded she then continued with her cross examination of the Claimant which finished at the end of the second day.

98. Prior to the end of the Claimants cross examination on day 2 we had a short break, and the Claimant left the witness box.

99. When the parties returned to court Counsel for the Respondent stated that the Claimant had been overheard outside in conversation with her witness Ms Katarzyna Bodzak, and that it was believed she had been discussing her evidence as the words 'HR' were overheard being used by the Claimant.

100. I asked the Claimant if she had been discussing her evidence with the witness and she replied she had not and that her witness had been discussing the fact she needed to get some time off and needed the permission of her HR department to attend the next day.

101. I therefore accepted the Claimants explanation on this and recorded I thought there was no cause for concern and that the Claimants explanation satisfied me. At this point after a further few questions by Counsel in cross examination the Claimants evidence finished, and she was released from the witness box.

102. After some discussion we agreed that the witness for the Claimant would start in the morning as my members could not sit past 4 pm.

103. Counsel then asked me to recall the Claimant to the witness box and to tell her she was held on oath overnight and could not discuss her evidence with anyone as she had 'a few more questions to ask her in the morning.' We granted counsels request.

Day 3 of Hearing

104. In the event the next morning on day 3 of the hearing the Claimant was only asked a few more questions by Counsel and then we released her from her evidence.

105. The records of annual leave were produced by the Respondent as ordered by this Tribunal. The clocking in and out times were clearly set out and showed the days when the Claimant left only a few hours or so after her shift commenced thereby indicating the days when she left work unpaid due to the Line 19 ceasing. This evidence is dealt with in our findings of fact below.

106. Following cross-examination of the Claimants witness, Ms Bodzak, by Counsel, and when the Claimant was about commence her cross-examination on day 3 of the hearing at around 12.30, the Claimant told us she only had one question for the Respondents witness. I reminded her of our discussions about cross-examination and she replied everything had been asked or said already about her case. It was clear to me she hadn't understood the importance of putting her case in questions. I said if she didn't ask all her questions, it had could have serious consequences for her case. I proposed the Claimant be given some more time to prepare her cross-examination of the Respondent's witnesses.

107. Counsel objected to the Tribunal wanting to give the Claimant more time to prepare her cross examination. After further discussion, we adjourned until 2.00 pm and allowed the Claimant an extended lunch break of an hour and a half to prepare her cross-examination.

108. At 2 pm that day, when the Claimants cross examination was due to commence, I raised with Counsel the dates the Claimant had taken annual leave, and after their disclosure that morning of the clocking on cards, and that this needed to be dealt with by the Claimant in evidence and before she was cross-examined. The dates were clarified and agreed with Counsel.

109. I said I intended to recall her to ask a few questions about this. Counsel objected. However, she had done the very same thing herself the day before and only moments after the Claimant was released following her cross-examination, and had asked us to hold the Claimant on oath overnight. I could clearly exercise my case management powers under Rule 29, and this Tribunal was entitled to regulate its own procedure in this hearing in this manner, in accordance with the overriding objective, pursuant to Rule 2, and pursuant also to Rule 41 where it is stated that:-

'The Tribunal may regulate its own procedure and shall conduct the hearing in a manner it considers fair, having regard to the principles contained in the overriding objective.'

110. In addition, Rule 41 sets out that an Employment Tribunal may ask any questions of the Claimant that it wishes to. I therefore told Counsel if she wished to cross-examine further after I had asked further supplementary questions of the Claimant she may do so.

111. I recalled the Claimant. The dates had been disclosed on the clocking on cards and had been agreed with myself and Counsel that morning. I therefore reminded her of these dates on which the issue of annual leave related to. She replied, *'I can't remember that.'*

112. If disclosure had been given prior to the hearing by the Respondent on this issue the Claimant would have had an opportunity to refresh her memory prior to the hearing.

113. I asked her about why she took holiday in April 2021, and she said she could not remember. I took her to page 138 of the bundle where the email of the 5 April 2021 confirmed she had been allowed to book holiday when Line 19 was not running. I said that now I had referred her to that document I was asking her again if that document at page 138 was connected to the holiday she took in April 2021. The document spoke for itself in any event, and it was not in dispute she was sent home unpaid in April 2021 when Line 19 was not in operation.

114. Despite this obvious fact that it was an undisputed document Counsel said I was *'leading' the witness.'* I reminded Counsel of the Equal Treatment Bench Book and said if she needed me to take her to the relevant provisions I would do so.

115. In particular paragraph 12 of the Equal Treatment Bench Book when dealing with Litigants In person states Judges may do as follows: -

"It may be possible for a judge to test understanding by asking a supplementary question or summarising what he or she understands the position to be and asking if the party or witness agrees. It is usually most reliable to ask the party or witness to repeat back their understanding of what has been said to them."

116. The provisions of the Equal Treatment Bench book, i.e. in suggesting that to test understanding you may summarise what you the Judge understand the Claimants case to be, must include asking a Judge asking a Claimant to confirm whether a document related to a claim they were making.

117. Paragraph 73 of the Equal Treatment Bench Book also states as follows: -

> *"Following cross-examination, a represented witness has the opportunity to clear up misunderstandings and draw out extra points on re-examination. LIPs do not have a representative to re-examine them."*

118. This Tribunal was entitled to apply the principles of the Equal Treatment Bench Book and to ensure a litigant in person, and whose first language was Polish, had equal access to justice, and was not disadvantaged by the fact English was not her first language and she was a litigant in person.

119. Following this intervention the Claimant, upon me referring again to the document at page 138 and upon me asking if that document was connected with the holiday she took in April 2021 or not, replied: -

"It is possible I can't remember now if the Xmas period or outside the Xmas period."

120. It was clear from this reply to the Claimant hadn't understood the question which I concluded was due to the language difficulties, and she appeared to be confusing the question with another issue which was the refusal of the request for her annual leave over the Xmas period. I therefore tried again and said: -

"There was some other holiday taken in 2021 do you remember anything about that or not about why?"

This information was contained in any event in a document in the bundle which we had been referred to by Counsel [pages 257 onwards].

121. She replied as follows: -

"it happened sometimes came early in the morning found no work so I had to take the holiday.'

122. I replied, 'thank you,' and she then added, *"the holidays am certain because we finished earlier."*

123. I asked a question about a two-week block of leave in September and it was established that was 'normal holiday.'

124. I asked Counsel if she wished to cross-examine the Claimant again further to my supplementary questions and she confirmed that she did not.

125. The Claimants cross examination of Mr Kryzsztof Murowany then commenced and finished at around 4.00 pm that day. Due to the lack of time to hear submissions I then relisted the hearing for oral submissions as a hybrid hearing to take place on the 20 November 2023.

The Issues

126. The Moore CMO set out the claims and issues, but as stated the matter was complicated by the fact that there was no agreed List of Issues prepared by the Respondent for that Preliminary Hearing, and due to the fact that Counsel arrived at the final hearing with a draft List of Issues which did not follow the exact wording of the Moore CMO, and which had not been agreed with the Claimant. However, Counsels draft did reflect the issues in dispute, subject to some refinement as set out above, and so we adopted Counsels List of Issues in this Judgment. The wording set out below reflects that wording, and also reflects the amendments of this Tribunal to the wording and such amendments are underlined. Some parts were stated to be clarified by the Respondent and are shown in bold: -

The Issues

Disability Status (s.6 EqA 2010)

1) *The impairment relied upon by the Claimant is De Quervain's Tenosynovitis.*

2) *Did the Respondent know, or ought reasonably to have been expected to know that the Claimant was disabled at the relevant time? The Respondent denies that it had knowledge of the Claimants condition prior to September/ October 2019.*

Reasonable Adjustments

3) *Did the Respondent apply the following PCP:*

   Require the Claimant to come to work and carry out full duties.

4) *Did the PCP put the Claimant at a substantial disadvantage compared to someone without the disability? The Claimant relies on:*

   a) *The weight of the meat and/or the height and/or speed of the meat lines.*

5) *If so, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?*

6) *What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant relies on the following substantial disadvantages:*

   a) [C to confirm] Whilst this was not defined by the Claimant it was clear to this Tribunal that the disadvantage to the Claimant was working on lines that were too high. too fast and with products that were too heavy.

7) *Was it reasonable for the Respondent to have to take those steps and when?*

Discrimination Arising from Disability

8) *Did the following arise as a consequence of the Claimants disability?*

   a) *Put on lines she says were too high, too heavy and too fast.*

9) *Did the Respondents treat the Claimant unfavourably? The Claimant relies on the following acts:*

(i) On some occasions when Line 19 was not working the Respondent sent her home without pay, because she was unable to work on certain meat lines and she took holiday when no work on Line 19.

(ii) The Respondents didn't treat her with respect and made her feel she had done something wrong for needing adjustments and or time off, and in particular that Mr Krystoff shouted at her when she attended at work for a shift.

This raises the following issues:

10) Was the unfavourable treatment because of any of the things which are said to have arisen from the Claimants disability?

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

(i) Aim is to ensure that the work is completed in accordance with the operational demands of the business to ensure that the contractual commitments to the Respondents clients are met. The means of action taken IE sending the Claimant home was proportionate as a means of action in recognition of the fact that the Respondent had exhausted other alternatives of recourse;

(ii) to allow the Claimant to remain on the premises with no function would have represented an unnecessary health and safety risk in what is an industrial environment;

(iii) aim is to ensure that the employees are flexible in their duties so as to meet the operational needs and requirements of the business. Where all avenues of recourse are exhausted it is proportionate for the Respondent to exercise its contractual discretion regarding company sick pay and/or payment for services, in the context of those services not being rendered.

(iv) R to provide further clarity once it understands C's claim.

12) If so, can the Respondents show that the treatment in question was a proportionate means of achieving a legitimate but aim? ***NB: No proportionate aim has been identified.***

Direct Discrimination

13) Did the Respondent subject the Claimant to the following treatment:

(i) Not granting the Claimants holiday request in December 2021:

(ii) Mr Murowany, the Claimants line manager, refused to speak in Polish in a meeting on the 6th of April 2022;

(iii) Requiring the Claimant to do menial tasks such as clean shelves;

(iv) From October 2021 onwards not being told there was no work for her by text message so that she was required to come into work only to find out she had no work.

14) So, did that treatment amount to less favourable treatment than would have been afforded to a hypothetical comparator in materially the same circumstances? Claimant relies on a hypothetical comparator and/or Yvonne Kudela. **[Note: The issue of Yvonne Kudela being a comparator only related to the issue of refusing to grant the Claimant's holiday request.]**

15) If so, was the less favourable treatment because of the Claimants disability?

16) ***Time Limits – (s. 123 EqA 2010)*** *Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date, (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction. Early Conciliation commenced on the 7th of December 2021, the Early Conciliation Certificate was issued on the 17th of January 2022 and the Claimant did not submit her claim until the 25th of January 2022.*

17) Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

a) Was the claim made to the tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

b) If not, was their conduct extending over a period?
c) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

18) The Tribunal will decide:

a) why were the complaints not made to the Tribunal in time?
b) In any event, is it just and equitable in all the circumstances to extend time?

Findings of Fact

127. From the information and evidence before us, we made the following findings of fact. We made our findings of fact on the balance of probabilities, taking into account all of the evidence, both documentary and oral, which was admitted at the Hearing. We do not set out in this Judgment all the evidence which we heard, but only our principal findings of fact and those necessary to enable us to reach conclusions on the issues to be decided.

128. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgement about the credibility or otherwise of the witnesses we heard, based upon their overall consistency and the consistency of the accounts given on separate occasions and set against any contemporaneous documents. We have not referred to every document we read or were directed to or taken to in the findings below, however, that does not mean they were not considered.

129. On the 24 March 2014, the Claimant's commenced her employment as a Production Operative for the Respondent (pages 53-58).

130. On the 4 August 2014, following a probationary period, the Claimant's employment became permanent, and she was appointed to the role of General Operative (pages 64-69). On the 31 December 2015, the Claimant signed her Job Description for a General Operative, (page 58).

131. On the 1 July 2016 [P.72-73] the local hospital advised that the Claimant needed to wear a thumb splint due to pain and intermittent swelling of her left thumb/wrist. There was not suggestion she was not fit to perform her

duties. The Claimant was permitted to wear a thumb splint by the Respondent [WS of Mr Murowany – para.19].

132. Due to her absence record the Claimant was then called to a disciplinary meeting to discuss her absence on the 23 March 2017 [P.86-P.88]. A variety of health issues were discussed including neck pain, high blood pressure for which she took medication, and pain in her thumb and wrist while separating meat on the production line.

133. In 2018 the Claimant's problems with her left hand [p12 – ET1 Form] continued which caused pain and swelling in her wrist.

134. From around July 2018 the Claimant asked to move to a different line and she provided a fit note from her GP requesting a change of duties [P.12]. The Claimant provided a fit note dated the 13 July 2018 stating "elbow pain" with a recommendation by her GP of amended duties for 8 weeks [P.12, P.18 and P. 91]. The Claimant asserted in her ET1 form this was ignored by the Respondents. We found no action was taken by the Respondents in July 2018 in relation to this fit note.

135. We found, as set out in her ET1, that she requested that she be moved to different lines or 'to reduce speed of the lines' from 2018 onwards. [p.12 – claim form]. It was not put to the Claimant in the hearing that she did not request a move to other lines from 2018 onwards and so we found that from 2018 onwards the Claimant was asking for assistance in the workplace in performing her duties.

136. The Claimants role involved working on production lines in the Respondents factory. The Respondent was a producer of meat of a variety of types and cuts. The Claimants role involved moving items off a production line and checking items. These items would often be on hooks that she would need to reach up to and remove and could be heavy. The Claimant struggled with the quick moves she had to do with her left hand, as the lines were difficult particularly because the lines were very high and she struggled to reach the items and then had to use a stool [p.18 of ET1]. The difficulties the Claimant had in conducting her role was not in dispute.

137. On the 9 October 2018 she then fell off her bike [p.92] and suffered an intra-articular fracture of the head of the radius in her left arm and elbow. On the 11 October 2018, the Claimant provided a fit note confirming that she was not fit for work, (page 93). This was repeated on the 6 December

2018, (page 94) and then again on the 20 December 2018, which recommended she be placed on light duties and avoid heavy lifting with her left arm (page 100).

138. On the 8 January 2019 there was a return to work meeting with the Claimant and the Respondent agreed for the first time to refer the Claimant to Occupational Health, (pages 96-97), and she was then sent home by a manager after showing her a note from the orthopaedic department that she was waiting for an appointment with the nurse.

139. On the 29 January 2019, the Respondent obtained an Occupational Health Report, which stated that the Claimant was not fit for work (pages 101-102).

140. On the 1 February 2019, the Claimant's GP recommended the Claimant be given a break every 20 minutes for 5 minutes. [p.103]. During cross-examination, the Claimant stated that 'Helen' from HR told her that this was not possible. This was not disputed by the Respondent and so we found that the recommended 5-minute breaks every 20 minutes did not occur.

141. It was put to the Claimant that a break every 20 minutes would result in 36 breaks in a 12 hour shift and the Claimant accepted this was correct, and she also accepted that it would have been difficult from a production point of view for her to be given this frequency of breaks by the Respondent.

142. On the 21 February 2019, a further Occupational Health Report was obtained by the Respondent. The report stated that the Claimant was fit to return to work on a phased return basis (pages 104-105). It stipulated that she should not lift weights above 2kg for the first month. No reference was made to taking frequent breaks.

143. From the 5th of March to the 6 April 2019 the Claimant gradually increased her hours starting with a six-hour shift, then an 8 hour shift in the second week, then a ten hour shift in the third week and then returning to a normal 12 hour shift in the 4th week [P.104].

144. We found that from this point onwards upon her return to work some breaks were given to the Claimant when requested by her and this was the practice up until she went off sick on the 11 November 2021. At this point the Claimant was still working on Line 16. However, it was never clear to

this Tribunal how many breaks she was given in each 12-hour shift. When asked about this by me she stated that she got breaks when a line was down or labels were missing, and at the discretion of her Team Leader.

Date of Knowledge of Disability

145. On the 26 September 2019, the Claimant was assessed by the NHS [p.109] and in a report of the 27 September 2019 there was a reference to a cycling accident almost one year ago, and that the x-ray showed degenerative changes in the elbow. It referred to the Claimants high pain levels and that she had been advised to speak to occupational health at work to discuss any adjustments, such as amended duties or reduced hours. It was also stated that she should wear a wrist splint for work if possible. It was not however clear to this Tribunal on what date the Respondents saw this report.

146. In a report dated the 24 October 2019 [P.108] from the Respondents occupational health advisors the Claimants problems with her left arm and the elbow in particular were detailed, and we found they were on notice of the Claimants long term health problem with her left arm, and that it was likely to reoccur, and that they would have been aware from this date that the condition had already lasted nearly one year and was clearly going to last more than a year looking forward from this point in time. We therefore found the Respondents knowledge of her disability giving rise to a duty to consider reasonable adjustments arose on the 24 October 2019.

147. In this report a reference was made to the Claimant being moved to Line 19. It also recommended micro-breaks in order to rest her arm [p.109] and to restrict the lifting of weights if they were above 500g. It concluded by stating that she was not fit to work on Line 19, Unit D. The Claimant confirmed, and we found, that when she asked for breaks from her line supervisor, she was given them. We found that microbreaks were not provided on a systematic basis.

148. Following the phased return to work, the Respondent, in or around October 2019, moved her to Line 19 which was a slower line because it was manual and not automated [WS of Mr Murowany – Para. 32]. However Line 19 was not always in operation and so for the rest of the time she would be assigned other duties.

149. A further assessment was carried out on the 5 December 2019 by Occupational Health (pages 112-113) and reference was made to Mr Murowany the Claimants manager who had advised that Line 19 was not running daily on her shifts and that she needed reallocating on those days. Reference was made to relocating the Claimant to Line 33 as a packer on the furthest section of the line, as this section of the line required the operator to place a clear small separator into the small cut meat as it was placed into the small clear tray and this was a role she could perform with one hand or both hands as necessary.

150. The report concluded by saying either Line 19 or Line 33 was suitable for the Claimant to work on.

151. On the 6 January 2020, Mr Murowany emailed Occupational Health, (page 114), seeking advice on whether she was able to work on Line 33 and in particular it was now suggested by the Claimant that Line 33 was too fast for her, and that she wished to work on Line 19, but Mr Murowany said that Line 19 was not working every day.

152. On the 15 January 2020 an Occupational Health Report, (pages 115-117), set out that the Claimant had informed them that she had worked her entire four day shifts on line 30 unit E and she found the nature of this work ideally suited to her condition and it didn't cause her any pain or discomfort as on this Line there were smaller trays and weights of meat of no more than 450 gram which were easier for to hold and place in the tray. In particular (page 117) it was said that when Line 19 was not in operation that the company could try and accommodate a redeployment.

153. On the 19 February 2020 a further Occupational Health Report was provided, (pages 118-119) which, as well as repeating that Line 30 was suitable for the Claimant it requested that the Respondent allow her to take two-to-three-minute breaks every 30 minutes to help minimise her symptoms. These were referred to during the hearing as ‘microbreaks.’

154. We found that microbreaks, which the Claimant confirmed were needed on Line 30 as it was automated and fast, were not given to the Claimant at this time in February 2020. The Claimant stated that the only time she got a break on Line 30 was when it temporarily stopped. It was not in dispute that Line 19 was a much slower than Line 30 and so this Line 19 was preferred by the Claimant (page 118-119).

155. The Claimant also accepted during cross-examination, and we found that when Line 19 was not running, that the Respondent needed to find other work for her.

156. As set out in the witness statement of Mr Murowany [Para 36] it was agreed that when Line 19 was not working and there were no other duties for her to carry out she would be sent home and the absences would be recorded as 'authorised payable absences,' and she was to be paid for these absences, and this arrangement commenced in January 2020.

157. On the 10 March 2020, a further Occupational Health Report, (pages 120-121) was provided. It stated that Line 19 was suitable for her to work on. In relation to Line 30 three positions on that line were identified as being suitable for her which were the 1st spotter position where the Claimant needed to check empty packages, the 2nd spotter position where the Claimant needed to observe the package of the meat and that it was level, and the 3rd spotter position where the Claimant needed to check the reject packages with incorrect weights and ensure the weight was adjusted accordingly. It was suggested that she be rotated between Line 19 and Line 30.

158. During cross-examination Counsel put it to the Claimant that in her statement of case she said she was never sent to Line 30. The Claimant in reply stated that she was sent to Line 30 but only worked there for four days due to the need for high rotation, which we found to mean the workers on the line were rotated very frequently because of its speed and so they were swapped in their positions frequently to give them a break from the same repetitive movements.

159. In fact the Claimants statement of case in relation to being sent to Line 30 simply made a generalised statement [p.12] that: -

'I was asking to move to different line or to reduce speed of the lines, I provided a fit note from GP requesting change of duties. This was ignored.'

And,

'Nurse (Occupational Health Report has Manager Krzysztof) work on Line 19 and 30 – recommended by nurse. I was only given the option of working at Line 19 or staying at home.'

160. The Claimant resisted the suggestion that she was changing her evidence and stated she only worked four times on Line 30. Counsel put it to her that the Respondent did comply with the recommendations of Occupational Health in sending her to work on Line 30. The Claimant said they did not implement every recommended adjustment. We found that for some time, and for a brief period of time that the Respondent did send the Claimant to Line 30 but that it was only for four shifts.

161. We accepted the Respondents evidence, and in particular Mr Murowany's evidence, and found that after trying the Claimant on Line 30, and because she could only do a few positions on that line, and due to the need to rotate the Claimant with other workers positions, together with the need to give her frequent breaks, meant that operationally it was not possible for the Respondents to keep her on Line 30.

162. He gave evidence, and we found that Line 30 was one of the highest speed lines and was entirely automated, with weights of up to 8 kilos, well over the recommended weight of 5 kilos for the Claimant, and that every hour they needed to rotate positions. In effect the Claimant working on the line disrupted the rotation method. It was never suggested by the Claimant at any point that they should have been able to source another member of staff to provide cover for her when the positions she could work in had been exhausted while she took her break. We found this system was necessary for the health and safety of all the employees of the Respondent, and so that they could ensure none of its employees developed repetitive strain injury.

163. We found that Line 30 was not a suitable Line for the Claimant to work on, and that the only suitable line the Respondent had for the Claimant to work on was Line 19, and it was not in dispute that Line 19 was not in operation every day.

164. In relation to other light duties the Claimant made a generalised suggestion the Respondent should have provided 'light duties' for her. However, she did not identify in her evidence what those light duties could be apart from a reference to locker checking and pocket checking, the purpose of which was to check employees were not stealing meat.

165. Her case on being provided with light duties was never clear to this Tribunal i.e., what other light duties she asserted she should have been offered.

166. In May 2020, the Claimant was diagnosed with De Quervain's Tenosynovitis. On the 27 July 2020, a further Occupational Health Report, was obtained by the Respondent (pages 123-125). Once again it recommended that Line 19 was suitable but only three positions on Line 30 were suitable, this being the line where all workers were frequently rotated.

167. On the 1 September 2020 in a letter from Dr Modha, (page 126), it was said that the lighter duties provided by the Respondent had helped the Claimant with her condition and that he had not arranged to see her again in clinic.

168. On the 17 September 2020 there was a further meeting between the Claimant and Mr Murowany to consider the Claimant's health condition, (pages 127-129). A discussion took place about the cleaning duties provided to the Claimant after Line 19 had finished running and it was recorded that she found the cleaning duties in Unit F too heavy for her to carry out (p.127). Discussion took place about other duties such as checking lockers (p.128) and then cleaning in Unit C. She confirmed cleaning duties caused pain in her wrists. She stated that only locker checks, and pocket checks were suitable duties which did not cause her pain (p.129).

169. We found that up to, and as of September 2020 the Respondent had complied with some of the recommendations of its occupational health advisors in relation to moving her from one Line to another to try and find a suitable line for her, and that they actively tried to find the Claimant light duties when Line 19 was not running.

170. We did not find micro-breaks, or longer breaks at set intervals were ever implemented however and these only occurred when a Line was down or labels were missing as set out at paragraph 144 above, and at the discretion of her Team Leader.

171. On the 9 October 2020, a further Occupational Health Report, (pages 131-135) was obtained by the Respondent. The discussions between Mr

Murowany and the Claimant were set out and in particular the fact that she could not undertake cleaning work as it was too heavy for her. No further adjustments were recommended at this time. It stated she was only able to work on Line 19 and could only manage one aspect of the facilities role which was checking lockers and that she reported all other lines were too fast for her.

Events following the 6 April 2021

172. On the 5 April 2021, an email confirming Line 19 was 'not running tomorrow' and that the Claimant had taken annual leave, (page 138) was sent by Mr Murowany to Mr Retesh Dosa in Human Resources.

173. The letter on the following page of 6th April at p139 drew a line in setting out how the Respondent intended to deal with the Claimant. In the letter of the 6th of April 2021 it confirmed the meeting that had taken place on the 5th of April 2021 between Mr Murowany and the Claimant [p.139]. It recorded that the meeting had been arranged to discuss the amended duties she'd been placed on since 'at least 2019.'

174. It recorded that there had been no improvement in her condition and that she had been rotating between working on Line 19 and helping out in facilities. It recorded that she had verified there had only been two hours work available for her in facilities when Line 19 was not operating, that due to her amended duty requirements relating to her condition she was only able to empty the bins and conduct locker searches and that the remaining 10 hours of her shift was spent doing spot cheques for face mask wearing for COVID-19 purposes. It also recorded that this was not a designated task, nor did it take 10 hours and that therefore for most of the 10 hours she had no work. It recorded that a discussion had taken place about whether there were any other tasks within facilities she could perform but she had not been able to think of any. It was also recorded that she would be referred to occupational health for an updated assessment as the last one had taken place over a year ago. It then went on to say: -

'we cannot create a position for you that isn't required within the business. In the meantime, when work is not available for you, you may request annual leave, failing that, you will be sent home unpaid.

175. ’It was not in dispute that up until the 5th of April 2021, when the Claimant was sent home due to Line 19 not working, and there being no other duties for her, that she was paid in full for that shift. However we found that at this point in time, on the 5 April 2021, the Respondents decided they would no longer pay her for days when she went in to work on Line 19 and after a short period of time it stopped operating, and she was either sent home after arriving for her shift or on some days she was told in advance Line 19 was not working and so she did not come into work.

176. After the Claimant had been cross examined by Counsel, I asked the Claimant a few supplementary questions about this issue. In particular the following exchange took place: -

So, on the issue of taking holiday when there's no work on Line 19 who's idea was it that you take holiday pay was that yours? I think you said it was your situation that you took holiday annual leave to cover days there was no work?

Yes, so that I had money on my account

To be clear if they said go home there's no work you yourself thought well if I take holiday then I'll get paid, is that right?

Yes

So, the Respondent didn't say to you take it as holiday you thought of this yourself?

Sometimes they would say themselves the line is about to finish so whoever wants to can take it as holiday.

To everyone ?

Yes.

177. We found that the Respondent introduced a system of allowing the Claimant and others, if sent home, from around the 5 April 2021 onwards, to book holiday if Line 19 was not operational to ensure they were paid. We did not find, as pleaded at paragraph 4 of the amended response of the Respondent [p.31] that it did not send her home without pay. We found they did send the Claimant home without pay and that the only way she

could be paid was to use up annual leave. This was referred to at paragraph 41 of the witness statement of Mr Murowany.

178. At paragraph 5 of the Claimants contract of employment it was provided that [p.54]:-

Hours of work

You will work a four-on-four-off shift pattern from 6:00 AM to 6:00 PM with two unpaid breaks of 30 minutes per shift, which equates to an average of 38.5 hours per week over the eight week pattern.... On occasions you may be required to extend your working hours subject to the volume of work and the urgency of business. In the case of any major breakdown or unforeseen circumstances all persons employed will be requested to work the necessary overtime without notice. ***Please note that working time arrangements will vary from time to time and flexibility is required.***

179. The paragraph in the Claimants contract of employment about working time varying, and flexibility being required, followed the preceding sentence about working overtime. We did not find that this sentence stating working time arrangements would vary from time to time was referring to there being no work available in the case of an employee being too unwell to work on all the lines and then being sent home unpaid. We found that the purpose of this clause related to the preceding sentence which talked about working overtime and was simply a general statement about flexibility being required for the needs of the business and working overtime where required.

Ceasing to Pay the Claimant when Line 19 not operational

180. The Respondent, on this issue of ceasing to pay the Claimant when she was sent home due to there not being any duties for her to carry out, simply said the following when asked a question by one of the members [Ms Goding]:

'At what point did you decide to stop paying and ask her to take holiday instead – who did you make that decision with and when did it happen?'

'That meeting with Retesh myself and HR – I think in term of payments Jan 2020 to April 21 – she was paid.'

'So how did the decision come about you would stop that?'

'I think as a business we need to make the decision if supporting them for sixteen months the full wage when line not running and try to allocate for any line in the business – the production line and she was refused to work that production – at that stage we need to make that decision.'

You and Retesh and HR discussed this and said what? Can't do it anymore? – don't want to put words in your mouth.'

'Supporting for that period of time did everything possible for her need to stop at that point.'

181. We found that the evidence given on this issue was entirely inadequate and we did not find that the Respondent carried out a detailed evaluation of how much longer the Claimant could be paid when Line 19 was not working. On the balance of probabilities, we found no formal evaluation of the impact on the business was carried out, and in terms of its defence that deciding to stop paying the Claimant when there was no work on Line 19 was a proportionate means of achieving a legitimate aim, we found no evidence was given on this issue by the Respondents.

182. Mr Retesh Dosa, from Human Resources, was present throughout the hearing and he could have answered in detail how this decision was reached but for reasons not known to this Tribunal he was not called to give evidence. We drew inferences on the failure of the Respondent to call evidence from employees who could give detailed evidence on this matter, i.e., Mr Dosa.

183. On the issue of justifying its decision to stop paying the Claimant from 6 April 2021 onwards more questions were asked by the member Mr Davie of Mr Murowany in order to ascertain the size of the business and what resources it had available to it: -

How many people employed there?

I don't know.

What sort of support from HR and finance

I have a lot of support in terms of person want to check payslip – anything re payments.

We see that.

HR door always open.

Your unit how many production operatives and butchers?

If all line running – 86 people in term of butcher position – it is 14 there is 7-line leaders and 7 machine operators

And packers

12 or 15 something like that

Facilities – hygiene team on unit

There is 2

Okay

That's fine

184. In essence we heard no evidence from the Respondent that sending home the Claimant unpaid was a proportionate means of achieving a legitimate aim as no evidence was given about what this legitimate aim was from any witness, apart from Mr Murowany saying they simply had to stop paying her when asked a question about this by the member Ms Gooding.

Alleged Unfavorable Treatment Arising From Disability - Being Sent Home Unpaid from 6 April 2021 onwards

185. We looked at the clocking in cards provided by the Respondent on the third day of the Tribunal hearing.

186. On the 6 April 2021 one full day's holiday was booked. This accorded with the email at p.138, dated the 5 April 2021, that we had been taken to by

Counsel in her opening note, and which confirmed the Claimant was told Line 19 was not running the next day and so she had been allowed to book holiday.

187. We also noted that there were three other half days booked in April and that she arrived each day and was then sent home with half a day's holiday booked. By way of example on the 22 April 2021 it recorded she clocked in at 5.44 am and clocked out 9:31 and we concluded she was sent home due to the line not working.

188. The same thing occurred on the 29 and 30 April 2021. We therefore concluded and found that she lost 2.5 days of shifts in April and to compensate then booked holiday.

189. In May 2021 it was recorded she took four full days holiday. However, we could not conclude from the documents that this was not simply normal booked holiday as she didn't arrive at work and then go home again after a few hours, as she did for the three half shifts in April 2021, and there was no other supporting evidence she was told not to come in on those days in May 2021.

190. On the 27 July 2021 the clocking in cards showed that the Claimant clocked in at 05.41 am and then clocked out 11.20 am and we concluded and found that this was another occasion on which the Claimant was sent home early due to Line 19 not working and that she booked half a day's holiday to compensate.

191. We therefore found that in April, and July 2021 that the Claimant was forced to book a total of three days holiday to compensate for Line 19 not working and to ensure she was paid.

192. We found her annual leave of two weeks in September 2021 was normal pre-booked annual leave as she confirmed when asked about this by this Tribunal.

Working on Line 30

193. On the 8 April 2021, a further occupational health report was received from Latus Health (pages 140 – 141). A suggestion was made that the Claimant would be able to work on Line 30 so long as she did not pull push or lift loads over 5 kilogrammes on a repetitive basis as a long-term adjustment and that this would be suitable for her.

194. On the 14 of May 2021 (p.142) a meeting then took place between Mr Murowany and the Claimant where this was discussed. She confirmed that she would be able to work on Line 30 for three hours but that after that it was too high for her and that it was in her words,*' really cold on unit E'*. The Claimant expressed that she was no longer able to work on Line 30.

195. We found in any event that this was an adjustment that the Respondents could not make for the Claimant to work on Line 30 due to the necessity to rotate workers on that line.

Reasonable Adjustments

196. It was not in dispute that prior to 2019 the Claimant had not been referred to occupational health by the Respondent. We found that considering the problems started with the Claimants health from at least July 2018 [P.91], when there was a fit note from the Claimants doctor recommending 'amended duties' and to not to use her left arm for repetitive movements, due to her 'tennis elbow', that there was an initial delay of around six months before she was referred to Occupational Health by the Respondent, and considering she was carrying out a manual role, this was a lengthy delay.

197. However, we did not find there was enough evidence prior to the 24 October 2019, that would have put them on notice that she was suffering from a long-term condition that amounted to a disability. Our findings on the date of knowledge of her disability are dealt with above [Para 146] where we found the date of knowledge would have been 24 October 2019 onwards.

198. It is not in dispute that she was referred many times to occupational health, throughout the period of time from the 29 January 2019 [P.101], and including the dates of 21 February 2019 [P.104], 24 October 2019 [P.108], 5 December 2019 [P.112], 15 January 2020 [P.115], 19 February 2020 [P.118], 10 March 2020 [P.120], 27 July 2020 [P.123], 9 October

2020 [P.131], and to the 8 April 2021 [P.140] which was ten assessments in the 14 month period for the purposes of assessing what reasonable adjustments needed to be made.

199. We also found that during the period from January 2019 until around the 6 April 2021 that the Respondent tried to find the Claimant other light duties, and adjusted the duties of the Claimant which included several adjustments, ranging from slower lines [Line 19 and 30] to packaging products with reduced weights (i.e., Line 19 and Line 30, alternative duties such as facilities/cleaning and checking lockers), [P109, P112, P115, P128-9, P137].

200. On the 20 May 2021 – 25 June 2021 fit notes confirmed the Claimant's absence from work (page 143-144). On the 26 July 2021 a letter was sent to the Claimant inviting the Claimant to a meeting to discuss 5 periods of absence in a rolling 12-month period, (page 146) and this was arranged for the 2 August 2021.

Shouting Incident

201. On the 2 of August 2021 the Claimant gave evidence that she attended at work for a shift at 6.00 am in the morning. She gave evidence that Mr Murowvany then came to her and shouted at her telling she should not be at work and to go home. However, as the disciplinary meeting was taking place that day she then waited in the canteen until 2.00 pm when it was to take place. She stated that she was distressed in the canteen and cried.

202. Mr Murowany gave evidence he did not shout at her. He said if she had been crying in the canteen someone would have reported it. He gave evidence that she could not be in the production hall, prior to the disciplinary meeting, if she was not working that day, for health and safety reasons.

203. We found Mr Murowany to be a calm and measured witness and we preferred his evidence on this issue to that of the Claimant. We did not doubt that the Claimant felt threatened in some way by him but that was not on account of his manner of speaking to her. We found it was due to the fact she was facing a disciplinary that afternoon to discuss her absence levels and this coloured her perception of what was said to her and that possibly due to language difficulties she simply assumed he was angry with her but we found he was not, and that he did not shout at her.

We found that Mr Murowany had an understandable concern that she was in the production hall when she was not supposed to be working and that was his reason for asking her to go home.

204. On the 2 August 2021, following the meeting, a disciplinary outcome letter was sent to the Claimant (page 150). In that meeting a discussion took place between Mr Murowany, Retesh Dosa and the Claimant [P.148]. Previous absences due to Line 19 not working were discussed and the fact that she had been paid for them. There was a reference by Mr Murowany to:

'We had meeting before. If you have no work available, not be paid. But you still got paid.'

Retesh Dosa then said:

'will only be paid for work done. Understand.'

205. It was clear to this Tribunal the issue of her being paid in the past when Line 19 was not working was being revisited but it was not entirely clear why as she had already had a letter about this on the 6 April 2019 [P.139]. Her absence level generally was discussed at the meeting, and she was told she was being given a verbal warning and that any further absence in six months could result in further disciplinary action. This was confirmed in a letter from the Respondents to the Claimant dated the 3 August 2021 (p.150).

206. It was never part of the Claimants case that she should not have been subjected to disciplinary procedures for disability related absences and so we make no findings of fact on this, but it is not in dispute these events took place.

207. On the 4 of August 202,1 the Respondents wrote to the Claimant confirming the possible further areas of work the Claimant had provided in addition to working on Line 19 which were label sticking, separating net and fat, adding pad on meat, sprinkling spices and weighing meat. It was stated that these were not duties for one particular line but were spread across various lines across multiple business units and it would not be possible for them to allocate work to these areas at short notice, and furthermore for health and safety reasons they needed to rotate employees on all positions to avoid injury. The Claimant never put to the

Respondent in cross-examination that they could have given her duties across different lines. [p.151] We have however noted that the new working arrangements of the Claimant, which do not form part of this claim, do involve carrying out duties across different lines.

208. On the 9th of September 2021, the Claimant sent a letter of claim to the Respondents in relation to a notification of a personal injury claim. In short, she stated that she had been forced to work on fast lines whilst not having recovered from her broken elbow [p.152].

209. Following the notification of her personal injury claim and these proceedings the Claimant has not been subjected to any further notification of absence management procedures by the Respondent.

210. The Claimant was assessed by the department for work and pensions and by the health assessment advisory service on the 15 September 2021. It was recorded that she felt tearful and depressed and had considered taking an overdose of medication. It was said thoughts of her family had stopped her from attempting suicide [p.155].

211. From the 17th of September 2021 the Claimant was awarded industrial injuries disablement benefit [p.158].

212. On the 11th of October 2021 a statement of fitness for work was issued and it stated that the Claimants working hours be reduced to 2 days on 12 hour shifts and not to lift any heavy items [p.160], and she was signed off work from the 11 October 2021 – 7 November 2021, and the Claimant was then absent from work due to painful hands and was awaiting further specialist review (page 160).

213. On the 28 October 2021 there was a further Occupational Health Report obtained by the Respondent (page 161). This stated that the Claimant should only work 2 x 12-hour shifts with two days off in between working on Line 19, line 30, 11, and line 12 weighing and dealing with label applications. It said rotation remained important to reduce likelihood of increasing her symptoms.

214. From the 12 November 2021 – 5 January 2022 the Claimant was absent from work due to tendonitis in her left hand, (pages 165, 167 and 175).

215. On the 24th of November 2022, the Respondents invited the Claimant to attend a meeting to discuss a reduction to her working week [p.166].

216. On the 2 December 2021 a meeting took place between the Claimant and the Respondent to discuss the Occupational Health Report received on 28 October 2021 (page 166). On the 8 December 2021, the Respondent wrote to the Claimant setting out a reduced and revised working pattern (page 171).

217. The new working pattern was that the Claimant would now work two days a week and would work the first and last day of her shift rotation. She would be assigned to Line 19 and could work all positions on the line. When Line 19 was not operational she would be reassigned to Line 10, 11 and 30. It was confirmed whilst on those three lines excluding Line 19, she could work on any of the following positions which were weighing, rework or checking. It went on to say that if any of the above 4 lines were not operational then she would be sent home authorised unpaid, and that although required to adhere by the company's attendance policy in light of her medical condition she had been attributed an extra absence trigger of 4 instead of 3.

218. The Claimant never put her case on the basis that if the Respondents were able to offer light duties on line 10,11,19 and 30 upon reducing her shifts to two days a week from her return to work in January 2022 that they should have also been able to do the same for her when she was working full time. In cross examination the Claimant simply put to Mr Murowany that she should have been given more light duties on Line 30 when Line 19 was not working.

219. Since the Claimant did not put this case to the Respondents we were unable to make findings of fact on whether these new adjustments to her duties from the date of her return in January 2022 could have been made earlier when she was working full time in 2020 and 2021. We therefore preferred the Respondents evidence on this issue that prior to the shifts reducing to 2 shifts per week that they were unable to find her alternative light duties on other lines when Line 19 was not working.

220. On the 10 December 2021, the Claimant accepted the Respondent's proposals to amend her working pattern, (page 172), save that she asked for reassurance that if she was absent again on authorised unpaid absence she would not be subjected to a threat of disciplinary action. This

Judgment therefore only deals with events up to the date she agreed to the new shift patterns and working arrangements which commenced in January 2022 as the Claimant never suggested her case had anything to do with the agreed working arrangements from that date onwards.

221. On the 15 December 2021 in a letter from the Respondent to the Claimant they agreed the permanent change to the Claimant's working pattern from 17 December 2021, (page 174), and stated that upon her agreeing the changes they would send to her an amended contract.

222. On the 22 December 2021 in a further letter from the Respondent they invited the Claimant to confirm her agreement to the changes following receipt of the Claimant's fit note, (pages 175-176). On the 29 December 2021 in an email from the Claimant she confirmed her agreement to the revised working pattern from January, (page 180).

223. On the 8 January 2022, the Claimant commenced the agreed reduced working pattern averaging 19.25 hours per week, (pages 66-69).

Cleaning Duties

224. The Claimant alleged she had been given menial cleaning duties. We refer to paragraph one of her contract for employment which stated as follows: -

1. Position

Your position within the company will be as production operative reporting to the production manager or designate. In order to meet its commitments, the company requires you to be flexible in this position and to undertake any duty as may be reasonably be assigned to you or for which you are deemed competent or can be trained.

225. We found that the Claimant was required to be flexible in relation to her duties and that asking her to carry out cleaning duties was not asking her to carry out menial duties but it was simply the operation of the clause in her contract about carrying out of any duties as may be reasonably assigned to her.

Claimant obtaining Legal Advice

226. In relation to the letter of claim sent by the Claimant in relation to her personal injury claim the Claimant was cross examined about this letter and gave evidence that the letter had been written with the assistance of a Polish speaking advisor at the Citizens Advice Bureau in Peterborough. We found she was given that advice remotely and possibly over the telephone due to the Covid restrictions in place.

227. When the Claimant was cross-examined about when she contacted the Citizens Advice Bureau, she said it was the 13 or 15 December but she couldn't remember. When asked which year and Counsel suggested it was 2021, she said she couldn't remember.

228. The reference by the Claimant to contacting the Citizens Advice Bureau on the 13 or the 15 December, which we took to mean 2021 was confusing as this postdated her letter of claim for her personal injury claim. We therefore found that on the balance of probabilities she contacted the Citizens Advice Bureau prior to the 9 September 2021.

229. She gave evidence, and we found that having sought advice from a polish speaking advisor at the Citizens Advice Bureau in Peterborough, she was made aware of how to contact ACAS for the purposes of bringing an employment tribunal claim. We also found, that due to the lockdown due to Covid that it was more likely than not that the evidence was given remotely over the telephone and that she would have been assisted by a friend interpreting for her.

230. We found on the balance of probabilities that she did not know specifically about time limits in relation to her claim and the need to contact ACAS within three months less one day from the last act complained of. This was a situation where the problems at work were ongoing, and we did not find on the balance of probabilities that she was told anything more than to contact ACAS to start her claim. We found it was unlikely that the advisor would have specifically explained when limitation had started to run on her claim as this was a complex issue to advise on.

231. We also found that the Claimant, during the primary limitation period, (i.e., from the last act of non-payment when she was sent home and she booked annual leave to compensate on the 27 July 2021, and which

expired on the 26 October 2021) was under severe pressure and was struggling generally with her mental and physical health.

232. On the 17 September 2022 [P.158] she was advised that she had been given Industrial Injuries Disablement Benefit.

233. We found she was still feeling suicidal on the 20 October 2021 [P.156] where it was recorded by Dynamic Health that:

'Of concern she reports some fleeting suicidal ideation purely because the pain can sometimes be so bad.'

234. On the 28 October 2021, the Claimant was assessed again [P.161] by the Respondents Occupational Health Advisors. It was recommended that her duties be restricted to Line 19, Line 30, 11 and 12 for weighing and any label application.

235. In addition we found that up to the 12 November 2021 when she commenced sick leave, the Claimant was still in pain of such severity she felt suicidal [P.156]. It was recorded in a letter dated the 3 November 2021 [P.164] that:

'She continues to work 12 hour shifts but following a recent occupational health assessment her days have been reduced to 3 and she is allowed to have periodic 15 minute breaks.'

236. We noted that in the period from the 12 November 2021 to early January 2022 that she was off sick and we found would still have been mentally distressed, as evidenced by her referrals to the Health Assessment Advisory Service [P.155] where it noted she had considered taking an overdose due to the pain she was in from her condition. We noted that on the 29 November 2022 the Claimant had to attend Accident and Emergency because her wrist was so swollen [P.168].

237. The Claimant then attended a meeting with Mr Murowany [P.166] to discuss her request to reduce her working week. He asked her to attend on the 2 December 2022. Thereafter as set out above on the 10 December 2021 [P.172] the Claimant confirmed her agreement to her new reduced working hours.

238. On the 7 December 2021 ACAS conciliation then commenced. We did not find that at any time up to contacting ACAS that the Claimant knew about the limitation period of three months less 1 day for any act of discrimination she thought had occurred in the workplace.

Direct Discrimination - Allegation 1: Not granting the Claimant's holiday request in December 2021

239. We heard very little evidence on this issue. Simply put the Claimant asserted that Yvonna Kudela was granted her holiday request around Christmas 2021 whereas she was not. When I asked the Claimant a supplementary question about this prior to cross-examination she replied as follows: -

The day before I felt pain and wanted to go to doctor but because didn't have any money and was on holiday – I knew that Line 19 not operating as no meat – Krzystof asked me to call in sick – he knew if I called in sick they can fire me by taking sick leave that's what they do. I saw – day before – 6 November 2021 say Yvonna - Line 17.

240. We concluded from this that the Claimant was saying she was sick and needed to see the doctor but didn't want to be recorded as taking sick leave in case she was disciplined for this by the Respondent. She therefore asked for a day's holiday, but she asserts this was refused by Mr Murowany whereas he allowed Yvanna to take holiday. There was a undated text about this exchange in the bundle [P.215] which was a translation it said of p.208. However, page 208 was not a text but a letter to the Claimant.

241. The Claimant did not put it to Mr Murowany that he refused this holiday request because she was a disabled person. In any event she was already on sick leave in December 2021 [P.259] and so we struggled to understand this allegation.

242. Counsel asserted in closing submissions that, save for a bare assertion, the Claimant had provided no evidence such 'as a holiday request forms/emails and/or dates which she had allegedly requested as leave, but was refused.' In the bundle [P.215] was an English translation of texts in polish between the Claimant and Mr Murowany. It in fact appeared from the page in the bundle that this may in fact have occurred in December

2020 and not December 2021. However, there was no clarity on this date of it occurring and the cross reference to page 208 was an incorrect cross reference. In any event, the Claimant accepted that she was aware of the policy about taking annual leave during the Christmas period. Therefore, whilst employees may request leave during this period it was not disputed that this was on a 'first come first served' basis, [Para 58 KM WS].

243. I reminded the Claimant she needed to cross-examine on this issue at the end of her cross-examination, but she simply replied she 'could not remember now'.

244. In the absence of the Claimant cross-examining Mr Murowany, and the lack of any evidence of a request made in the Christmas period in 2021 we did not find on the balance of probabilities that there was a refusal of a holiday request in December 2021 by Mr Murowany because of her disability.

Direct Discrimination - Allegation 2: Mr Murowany, the Claimant's line manager, refused to speak in Polish in a meeting on 6 April 2022

245. The Claimant confirmed during the hearing that she was no longer pursuing this allegation against the Respondent and so no findings of fact were made on this allegation.

Direct Discrimination - Allegation 3: Requiring the Claimant to do menial tasks such as to clean shelves.

246. As set out in our findings of fact above the Claimant's contract of employment, at that time, stated "it should be noted that you may be required to undertake work anywhere in the Company according to the needs of the business" [P59]. We did not find this was requesting the Claimant to carry out menial tasks, and we found that they were trying to find her alternative duties that did not cause her pain when working.

247. We found this part of the Claimants case difficult to follow as in relation to the checking of lockers/cleaning locker shelves, the Claimant was happy to carry out these tasks and these tasks did not appear to be less menial to us than cleaning shelves, and she never raised any objection to this task. To the contrary she asserted that she could complete these tasks, [P128-9].

Direct Discrimination - Allegation 4: From October 2021 onwards not being told there was no work for her by text message so that she was required to come into work only to find out she had no work

248. A table was in the bundle detailing the days the Claimant worked in this period [P259]. In addition, we were supplied with clock in sheets for the days the Claimant came to work for the period from April to October 2021. In relation to the period of October 2021 we found no conclusive evidence to suggest that the Claimant came into work and was sent home without any pay/any work for that day. On the 29 October 2021 there was one day's holiday recorded for which she was paid. The Claimant never cross-examined on this issue and so we did not find that from October 2021 onwards the Respondent deliberately failed to tell the Claimant until she arrived at work there was no work for her to do.

249. Further, from 12 November 2021 the Claimant was absent from work until 5 January 2022, and at this point she returned to her new reduced hours of 2 shifts a week. [P160, P165, P167, P175].

250. In any event the Claimant accepted that she had a smartphone, and on the balance of probabilities we accepted that the Respondents MYHUB app, which would have shown the Claimant's working patterns, including details of the shift for the next day, that the Claimant would have been able to ascertain if Line 19 was running the next day.

251. In any event I asked the Claimant if she had any cross examination on this issue and she simply replied, 'I don't know how.' In the absence of any cross-examination on this issue we did not find this allegation was made out.

Submissions

252. We fully considered the submissions of both parties but don't repeat them here. They were fully taken into account in reaching this Judgment.

The Law and Conclusions

253. The List of Issues on the issue of knowledge of the Claimant disability set out as follows: -

Disability Status (s.6 EqA 2010)

19) *The impairment relied upon by the Claimant is De Quervain's Tenosynovitis.*

20) *Did the Respondent know, or ought reasonably to have been expected to know that the Claimant was disabled at the relevant time? The Respondent denies that it had knowledge of the Claimants condition prior to September/ October 2019.*

254. We repeat our findings of fact at para 146 above. We find that the Respondent knew or ought reasonably to have known that the Claimant was disabled from the 24 October 2019 onwards.

Direct Discrimination Claim – s.13 of the EqA 2010

255. Section 13 of the Equality Act 2010 provides,

13. Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

256. In cases of alleged direct discrimination, the Tribunal is focused upon the 'reasons why' the Respondent acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR877.

257. In order to succeed in his claims under the Equality Act the Claimant must do more than simply establish that she has a protected characteristic and was treated unfavourably: Madarassy v Nomura International Plc [2007] IRLR246. There must be facts from which we could conclude, in the

absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR931. It has been said that a Claimant must establish something "more", even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ.1279**.** A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

258. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is irrelevant, her subjective perception of her treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

259. The grounds of any treatment often must be deduced, or inferred, from the surrounding circumstances and to justify an inference one must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generallydone by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337.

260. 'Comparators', provide evidential material, but ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case disability. The usefulness of any comparator will, in any case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

261. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, as in this case, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that can support the requisite inference of discrimination. This may include a relevant statutory code of practice or adverse and discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice.

262. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

263. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ.33.

264. In reaching our conclusions in relation to the Claimant's direct discrimination complaints we had regard to the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL11, [2003] ICR337 where it was stated that:

> "110. ... the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

265. We also had regard to the case of MacDonald v MoD [2003] ICR937, HL**,** where it was stated that:

> "All the characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator."

266. For each of the alleged acts of discrimination we constructed a hypothetical comparator of another employee who worked on a production line and who did not have a disability and was able to conduct their tasks without difficulty. We also compared the Claimant where she had named an actual comparator to the named comparator.

267. We then asked ourselves if there were facts from which the Tribunal could conclude that such treatment complained of, was because of the Claimant's disability?

List of Issues

Direct Discrimination

21) Did the Respondent subject the Claimant to the following treatment:

(v) Not granting the Claimants holiday request in December 2021:

(vi) Mr Murowany, the Claimants line manager, refused to speak in Polish in a meeting on the 6th of April 2022;

(vii) Requiring the Claimant to do menial tasks such as clean shelves;

(viii) From October 2021 onwards not being told there was no work for her by text message so that she was required to come into work only to find out she had no work.

22) So, did that treatment amount to less favourable treatment than would have been afforded to a hypothetical comparator in materially the same circumstances? Claimant relies on a hypothetical comparator and/or Yvonne Kudela.

23) If so, was the less favourable treatment because of the Claimants disability?

Direct Discrimination - Allegation 1: Not granting the Claimant's holiday request in December 2021

268. As set out above we heard very little evidence on this issue. The Claimant asserted Yvonna Kudela, her chosen comparator on this issue, was granted her holiday request around Christmas 2021 whereas she was not. In summary the Claimant was saying she was sick and needed to see the doctor but didn't want to be recorded as taking sick leave in case she was disciplined for this by the Respondent. She therefore asserted that she asked for a day's holiday in December 2021, but she asserts this was refused by Mr Murowany whereas he allowed Yvonna to take holiday. There was a reference to a text about this exchange in the bundle [P.215] but this was undated and did not refer to 2021.

269. The Claimant did not put it to Mr Murowany that he refused this holiday request because she was a disabled person. In any event if a request was made she was already on sick leave in December 2021 [P.259] and so we did not find that the allegation was made out, as if she was on sick leave

there would be no need to request annual leave to see the doctor in order to avoid being disciplined for it.

270. The Claimant also accepted that she was aware of the policy about taking annual leave during the Christmas period. Therefore, whilst employees may request leave during this period it was not disputed that this was on a 'first come first served' basis, [Para 58 KM WS].

271. We did not find on the balance of probabilities, despite our finding there may have been a page referencing and date error on this [see para 242 above], that there was any request made for holiday in December 2021 by the Claimant. We found that the burden of proof did not even pass to the Respondent on this allegation in accordance with Madarassy v Nomura [2007] EWCA Civ.33 as no prima-facie case was established on this claim by the Claimant and which meant that the Respondent did not have to prove a non-discriminatory reason for the treatment.

272. The question of whether the Respondent granting Yvonna's request in December 2021 was proof of less favourable treatment of the Claimant falls away and this claim must therefore fail.

Direct Discrimination - Allegation 2: Mr Murowany, the Claimant's line manager, refused to speak in Polish in a meeting on 6 April 2022

273. The Claimant confirmed during the hearing that she was no longer pursuing this allegation against the Respondent and so no findings of fact were made on this allegation.

Direct Discrimination - Allegation 3: Requiring the Claimant to do menial tasks such as to clean shelves

274. As set out in our findings of fact above the Claimant's contract of employment, at that time, stated *"it should be noted that you may be required to undertake work anywhere in the Company according to the needs of the business" [P59].* We found that asking the Claimant to carry

out the cleaning of shelves, was not asking her to carry out menial tasks, but was the Respondent operating this clause in her contract.

275. We asked ourselves how a hypothetical comparator may have been treated who for some reason may not have been able to carry out their usual duties, and we found that they also would have been asked to carry out cleaning duties to occupy them while they could not carry out their usual tasks.

276. We found that the burden of proof did not even pass to the Respondent on this allegation in accordance with Madarassy v Nomura [2007] EWCA Civ.33 as no prima-facie case was established on this claim by the Claimant and which meant that the Respondent did not have to prove a non-discriminatory reason for the treatment.

Direct Discrimination - Allegation 4: From October 2021 onwards not being told there was no work for her by text message so that she was required to come into work only to find out she had no work

277. A table was in the bundle detailing the days the Claimant worked in this period [P259]. In addition, we studied the clock in sheets for the days the Claimant came to work for the period from April to October 2021. In relation to the period of October 2021 we found no conclusive evidence to suggest that the Claimant came into work and was sent home without any pay/any work for that day. On the 29 October 2021 there was one day's holiday recorded for which she was paid. The Claimant never cross-examined on this issue and so we did not find that from October 2021 onwards the Respondent deliberately failed to tell the Claimant until she arrived at work there was no work for her to do.

278. Further, from 12 November 2021 the Claimant was absent from work until 5 January 2022, and at this point she returned to her new reduced hours of 2 shifts a week. [P160, P165, P167, P175].

279. In any event the Claimant accepted that she had a smartphone, and on the balance of probabilities we accepted that the Respondents MYHUB app, which would have shown the Claimant's working patterns, including details of the shift for the next day, that the Claimant would have been able to ascertain if Line 19 was running the next day.

280. We found that the burden of proof did not even pass to the Respondent on this allegation in accordance with **Madarassy v Nomura** [2007] EWCA Civ.33 as no prima-facie case was established on this claim by the Claimant and which meant that the Respondent did not have to prove a non-discriminatory reason for the treatment.

281. Accordingly, the claims for direct discrimination under s.13 are not well-founded and fail.

Failure to Make Reasonable Adjustments – s.20/21 of the EqA 2010

282. Section 20 of the Equality Act 2010 defines the duty to make adjustments as follows,

> 20 Duty to make adjustments:
>
> (1) …
> (2) …
> (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.

283. The reasonable adjustments duty is contained in Section 20 of the EqA 2010 and is further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments.

284. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

285. The approach that a Tribunal should take was set out in the judgment of **HHJ Serota QC in Environment Agency v Rowan** [2008] IRLR 20. We are required to identify:

(a) the relevant arrangements (PCP) made by the employer,
(b) the identity of non-disabled comparators (where appropriate), and

(c) the nature and extent of the substantial disadvantage suffered by the Claimant (as a result of the arrangements).

After determining the above, we then must consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

286. A substantial disadvantage is one that is more than minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. It is the PCP that must place the claimant at the disadvantage **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12, and the 2011 Code paragraph 16. Using a comparator may help with this exercise as the purpose of the comparator is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question, as set out in paragraph 6.16 of the 2011 Code of Practice on Employment.

287. The substantial disadvantage should be identified by considering what it is about the disability which gives rise to the problems and effects which put the claimant at the substantial disadvantage identified, **Chief Constable of West Midlands Police v Gardner** UKEAT/0174/11. In **Griffiths v Secretary of State for Work and Pensions** [2014] UKEAT/0372/13, a case concerning the management of sickness absence, it was also explained that the fact that the disabled and non-disabled were treated equally and may both be subject to the same disadvantage when absent in the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled or category of them than it does on the able-bodied.

List of Issues

24) **Did the Respondent apply the following PCP:**

Require the Claimant to come to work and carry out full duties.

288. We find that in the period from the Respondents date of knowledge of the Claimants disability, as set out in paragraph 146 above, from the 24 October 2019 to the date her duties were reduced in January 2022, that the Respondent did apply this PCP to the Claimant.

25) Did the PCP put the Claimant at a substantial disadvantage compared to someone without the disability? The Claimant relies on:

b) The weight of the meat and/or the height and/or speed of the meat lines.

289. We find that this did put the Claimant at a substantial disadvantage compared to someone without the disability. It caused the Claimant pain and suffering in carrying out her normal range of duties.

26) If so, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

290. We find that the Respondent did know that it placed the Claimant at the disadvantage. They were well aware of the disadvantage caused by the speed, and height of the lines to the Claimant, and the weight of some of the products she had to handle.

What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant relies on the following substantial disadvantages [C to confirm]:

291. The Claimant did not define the disadvantage during the hearing, but it was clear to this Tribunal that the disadvantage complained of was the height, speed and weight of the meat lines.

292. However the Claimant never identified with any clarity during the hearing the steps that should have been taken to avoid the disadvantage, save for saying she should have had micro-breaks and breaks on the production lines, and that she should have been given light duties but these light duties were never defined by her.

293. We found that the Respondent did take active steps to identify what support and adjustments could be made for the Claimant. We found that the adjustments were made save for the recommendations about breaks/ micro-breaks which we deal with below. The steps taken are as set out in paragraphs 198-200 above.

294. In particular we found that the Respondent took the following steps to try and assist the Claimant: -

a) When the Claimant was signed off work with a fit note she received full company sick pay during these periods;

b) Prior to April 2021 the Respondent would pay the Claimant for the hours the Claimant could not work when Line 19 was not operational, [P216, P184, P215];

c) For a period of 22 months, the Respondent referred the Claimant to Occupational Health on 10 occasions to assess what reasonable adjustments could be made for the Claimant and they implemented those proposed adjustments (save for the breaks);

d) The Respondent tried to glean a better understanding of the adjustments and support it could offer to the Claimant. Following each report the Respondent actively sought to implement those proposals in order to support the Claimant;

e) Following the reports the Respondent then implemented adjustments to the Claimant's role, including placing the Claimant on new lines, which ran at slower speeds and operated products which weighed less than 1kg, explored duties in other areas such as facilities, conducted workplace assessments and then reduced the Claimant's working hours in line with her request. We accepted the evidence of Mr Murowany that the average steak was 200-300g (i.e., two steaks would range between 400-600g).

f) The Respondent tried out 7 adjustments to the Claimant's role;

g) A variety of Occupational Health Reports together with medical reports from the Claimant's own doctors all reflected that adjustments were being explored [P112-4, P126, P133, P137].

h) Where alternatives proposed by the Claimant were not workable, the Respondent discussed with her why these proposals were unsuitable; [P151]; and

i) In the period up to the 11 November 2021, when the Claimant was signed off sick, the Respondent was actively trying to accommodate the Claimants request for reduced hours and to discuss these options with her, and these adjustments were effective from 8 January 2022 [P161, 164, 206, 166, P171-2, P174, P182].

295. Having found that the Respondent offered the Claimant 10 different roles and positions on the available lines throughout the period from the 24 October 2019 to the 12 November 2021, and that they undertook several occupational health assessments we found that the Claimant failed to establish any further steps that the Respondents could have taken for her in relation to carrying out any further roles or light duties that did not cause her pain when carrying out her duties.

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

296. In relation to finding alternative duties for the Claimant we found that it was reasonable for the Respondent to take those steps it took to try and find alternative and/or light duties for the Claimant, and we find that they did so, and that there were no other steps they could have taken.

297. The Respondent invited us to find, and we found that, and as accepted by the Claimant during cross-examination, due to the nature of the work, breaks every 20 minutes, were not feasible. We also found that the Claimant was able to take breaks when she asked her line supervisor. We also found that there was no evidence at any point about a request for a break by the Claimant being refused.

298. In relation to offering the Claimant more frequent breaks we found, as submitted by the Respondent that it was not reasonable for the Respondent to have given the Claimant a break every twenty minutes.

299. The Claimant did not give us any evidence about how frequently she took breaks. She did not put in cross-examination to the Respondent that she was ever refused a break or that the breaks were not frequent enough. We therefore found on the balance of probabilities that the breaks offered to the Claimant were reasonable and sufficient in the circumstances.

300. In any event it was submitted by the Respondent, and we found, that it would not be possible for the Claimant to leave the production floor for short breaks, as to do so would involve removing PPE and heading to the canteen which would take 20-25 minutes each time.

301. Having found such steps that could be taken were taken, and that more frequent breaks could not be provided, the Claimants claim for a Failure to Make Reasonable Adjustments therefore fails.

Discrimination Arising from Disability – s.15 EqA2010

302. Section 15 of EqA 2010 provides: -

> 15 Discrimination arising from disability.
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

303. In **Secretary of State for Justice and Anor v Dunn** EAT0234/16 the EAT (presided over by Mrs Justice Simler, its then President) set out the elements that must be established in a S.15 claim:

(i) there must be unfavourable treatment.
(ii) there must be something that arises in consequence of the claimant's disability.
(iii) the unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability, and
(iv) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

304. Each of these elements, together with the separate requirement in S.15(2) that the alleged discriminator must (or should) have known of the Claimant's disability, must be proven. We have already found that

the Respondent must (or should) have known of the claimant's disability from the 24 October 2019 onwards.

305. It has been established that what must be shown is that the disability is 'a significant influence … or a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment as established in **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR893, EAT and also in **Pnaiser v NHS England** [2016] IRLR170, EAT**.** 7.

306. In **Pnaiser** Simler P at [31] gives further succinct guidance on the general approach to be taken by a tribunal under s 15, in order to distinguish it from direct discrimination. The steps set out in that judgement can be divided as follows: -

(1) Was there unfavourable treatment?
(2) What caused the unfavourable treatment?
(3) Was the cause 'something' arising in consequence of the claimant's disability?
(4) There can be more than one link in the causation chain, but the more there are the more difficult it may be to establish causation.
(5) The causation test is an objective one.

Did the following arise as a consequence of the Claimants disability?

a. Put on lines she says were too high, too heavy and too fast.

307. We found that the 'something' arising from the Claimants disability was that as a result of her mobility problems and in particular the inability to rotate with her left arm, and weight bear, as she was once able to do, that as a result she no longer had the ability to carry out her duties on lines that had become too high, too heavy (i.e. the weight of the items) and which were too fast for her.

308. As a result of her inability to work on some Lines she was then placed on Line 19, but this line was not always operational.

Did the Respondents treat the Claimant unfavourably? The Claimant relies on the following acts:

(iii) On some occasions when Line 19 was not working the Respondent sent her home without pay, because she was unable to work on certain meat lines and she took holiday when no work on Line 19.

309. We found that sending the Claimant home when Line 19 was not working and then the Claimant having to take holiday to ensure she was paid did amount to unfavourable treatment of the Claimant. As a result of this she lost pay and to in order to be paid, on four occasions in April 2021, and one occasion on the 27 July 2021 she lost three days' pay and had to book three days annual leave to compensate for this.

(iv) The Respondents didn't treat her with respect and made her feel she had done something wrong for needing adjustments and or time off, and in particular that Mr Krystoff Murowany shouted at her when she attended at work for a shift.

310. As set out at paragraph 203 above we did not find that Mr Murowany shouted at the Claimant when she attended at work for a shift on the 2 August 2021.

Was the unfavourable treatment because of any of the things which are said to have arisen from the Claimants disability?

311. Sending the Claimant home unpaid resulting in the Claimant taking it as holiday in order to be paid when Line 19 was not operational was unfavourable treatment because of the things that arose from her disability i.e. she could not work on the faster lines with heavier products on them and was therefore moved to a slower line that was not always operational.

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

312. The Respondents submitted the following in answer to this question in their draft List of Issues but which was not provided in their Response, at the PHR, or reflected in the Moore CMO, or in their amended Response:-

(v) Aim is to ensure that the work is completed in accordance with the operational demands of the business to ensure that the contractual commitments to the Respondents clients are met. The means of action taken IE sending the Claimant home was proportionate as a

means of action in recognition of the fact that the Respondent had exhausted other alternatives of recourse;

313. At this juncture we refer to the fact that Mr Dosa, from Human Resources who met with the Claimant to discuss all matters arising in this claim, was present throughout the hearing but did not give evidence. It was confirmed by Mr Murowany that he and Mr Dosa discussed the issue of paying the Claimant when Line 19 was not working.

314. We had regard to the case of **Habinteg Housing Association Ltd v Holleron UKEAT/0274/14** (20 February 2015, unreported) where the issue of failing to call an available witness, and where it is within the power of a particular party to call a witness on a point of importance to a case, but the party declines to do so, was dealt with. It was said that this is a matter that can be taken into account by the tribunal. Langstaff P, at [29], described it as:-

'a sound principle that a party's case is to be determined not just by the evidence produced but by the evidence which it is within the power of either party to produce to support or refute the allegation'.

315. The court illustrated the point by explaining that if a conversation is critical (for example, a conversation in which it is alleged that a discriminatory comment was made),then if a party has it within its power to call a person who could give evidence of that conversation which is supportive of its case and does not do so, a tribunal is entitled to draw an inference.

316. In this case we therefore drew an inference in our findings from the Respondent failing to call Mr Dosa to assist the Tribunal with the issue of Unfavourable Treatment of the Claimant arising from Disability.

317. We heard no evidence about the operational demands of the business of the Respondent to ensure that the contractual commitments to the Respondents clients were met. In fact, when we asked Mr Murowany about this he was not able to give evidence about any discussions of this nature, as set out in paragraph 181 above. As set out we found that the evidence given on this issue was entirely inadequate and we did not find that the Respondent carried out a detailed evaluation of how much longer the Claimant could be paid when Line 19 was not working. On the balance of probabilities we found no formal evaluation of the impact on the business was carried out, and in terms of its defence that deciding to stop paying the Claimant when there was

no work on Line 19 was a proportionate means of achieving a legitimate aim, we found no evidence was given on this issue by the Respondents.

318. Where the only employee of the Respondent who gave evidence could not tell us how the decision was reached to stop paying the Claimant from the 6 April 2021 onwards then no proportionate means of achieving a legitimate aim was even evidenced by the Respondent for us to make such a finding. The burden of proof is on the Respondent to prove their legitimate aim and in the absence of any evidence on this issue they failed to discharge this burden and accordingly we did not find that this legitimate aim was established.

319. The Respondent also submitted the following in answer to this question in their draft List of Issues but which was not provided in their Response, at the PHR, or reflected in the Moore CMO, or in their amended Response:-

> *(vi) to allow the Claimant to remain on the premises with no function would have represented an unnecessary health and safety risk in what is an industrial environment;*

320. It was never the Claimant's case that she should be allowed to remain on the premises with no function. In any event we heard no evidence about this alleged health and safety risk to the Claimant or others if she was not fully occupied on each shift. We did not therefore find that the Respondents could rely on this issue to show sending her home unpaid was to address a health and safety issue on their premises. The burden of proof is on the Respondent to prove their legitimate aim and in the absence of any evidence on this issue they failed to discharge this burden and accordingly we did not find that this legitimate aim was established.

321. The Respondent also submitted the following in answer to this question in their draft List of Issues but which was not provided in their Response, at the PHR, or reflected in the Moore CMO, or in their amended Response:-

> *(vii) aim is to ensure that the employees are flexible in their duties so as to meet the operational needs and requirements of the business. Where all avenues of recourse are exhausted it is proportionate for the Respondent to exercise its contractual discretion regarding company sick pay and/or payment for services, in the context of those services not being rendered.*

322. Once again, we heard no evidence about this from Mr Murowany. It was never in issue that the Claimant was not being flexible in her duties, it was simply in issue what duties she could carry out due to her disability. Extensive discussions did eventually result in January 2022 in the Respondent allocating the Claimant duties across four different lines on the two shifts it was agreed she would then work in place of her previous four shifts. We did not therefore find that the Respondents could rely on this issue of employee flexibility to show sending her home unpaid was to address the need for employee flexibility. The burden of proof is on the Respondent to prove their legitimate aim and in the absence of any evidence on this issue they failed to discharge this burden and accordingly we did not find that this legitimate aim was established.

323. We did not find that in the period from the 6 April 2021 to the 12 November 2021 that it was a proportionate means of achieving a legitimate aim to send the Claimant home unpaid and so that she was either unpaid or had to use her annual leave to be paid on those days. The burden of proof is on the Respondent to prove their legitimate aim and in the absence of any evidence on this issue they failed to discharge this burden and accordingly we did not find that this legitimate aim was established.

324. Counsel said that in any event the Claimants contract of employment reserved the right to 'amend the hours worked should the workload so require.'[P59, clause 2.2]. We did not find as set out at paragraph 179 above that this was the effect of this clause in her contract of employment in relation to instances of being sent home when not fit to work on other lines.

325. Counsel contended that the Claimant's evidence to the Tribunal supported this position i.e., that she could be sent home unpaid when Line 19 was not in operation. We did not find the Claimant's evidence to the Tribunal supported that position prior to January 2022.

326. Counsel submitted that where an employee cannot or does not work on certain lines then Respondent is not required to pay an employee for those hours in accordance with its contractual provisions, and that the evidence showed that this was discussed and agreed with the Claimant, [P150]. We found that this letter did not show the Clamant had agreed to this proposal and it simply reflected that if she was sent home due to Line 19 not working that it would be classed as 'authorised unpaid leave,' by the Respondent. This only evidenced what the Respondent had decided and did not evidence an 'agreement.'

327. Counsel also submitted that on the 5 April 2021 the evidence showed that when Line 19 was not operating the Claimant had requested annual leave and that this was authorised by the Respondent, [P138] and that this demonstrated that the Claimant taking annual leave was a voluntary process and not an arbitrary process imposed by the Respondent. She submitted that the Claimant conceded that it was her decision to take leave and that she proposed this during cross examination. The Respondents case on this was simply that she chose to use her annual leave.

328. However, we found that the Claimant either didn't get paid for the day she was sent home or she used annual leave to ensure she was paid and they were two sides of the same coin; either way she lost a day's pay. She simply had to choose whether to be unpaid for that day or lose a day's annual leave (or half a day) to be paid – in monetary terms this amounted to the same financial loss to the Claimant, and we found it amounted to unfavourable treatment.

329. The Claimants claim for unfavourable treatment arising from disability in being sent home unpaid and booking holiday to ensure she was paid therefore succeeds.

Jurisdiction and Time Points

330. We had to determine as follows:-

> ***Time Limits – (s. 123 EqA 2010)*** *Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date, (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction. Early Conciliation commenced on the 7th of December 2021, the Early Conciliation Certificate was issued on the 17th of January 2022 and the Claimant did not submit her claim until the 25th of January 2022.*
>
> *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:*

e) Was the claim made to the tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
f) If not, was their conduct extending over a period?
g) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
h) If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

The Tribunal will decide:

c) why were the complaints not made to the Tribunal in time?
d) In any event, is it just and equitable in all the circumstances to extend time?

331. ACAS conciliation commenced on the 7 December 2021 ("Date A") and ended on the 17 January 2022 ("Date B") and proceedings were issued on the 25 January 2022. However, the extension of time conferred by the ACAS regulations did not apply due to the Claimant contacting ACAS outside the primary limitation period. Given that the primary limitation period expired on the 26 October 2021, three months less one day from the last act of non-payment on the 27 July 2021, then as ACAS was not contacted withing the primary limitation period no extension was conferred, and so the claim form when it was presented on the 25 January 2022, was presented three months less one day out of time from the last act of unfavourable treatment, so that the tribunal may not have jurisdiction.

332. As the last act of unfavourable treatment occurred on the 27 July 2022, and prior to that on the 6, 22, 29, and 30 April 2021 then if each act of non-payment when she was sent home was treated as a discrete act then each act was potentially out of time.

333. We therefore had to consider whether the Claimant could prove that there was conduct extending over a period which was to be treated as done at the end of the period ending on the last non-payment on the 27 July 2022 pursuant to s123(3)(a) of the Equality Act 2010? ('EqA').

334. Even if the test above was made out, as the end of that period during which non-payment occurred was up to the 27 July 2022, the claim was still presented out of time, and so we then had to consider whether any complaint

was presented within such other period as the Tribunal consider just and equitable pursuant to s123(3)(b) EqA?

335. Pursuant to s.123 of the EqA 2010 it is provided that: -

> (1) … proceedings on a complaint within section 120 may not be brought after the end of —
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment Tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period.

336. We found the non-payments in April 2022 and on the 27 July 2022, which then resulted in the Claimant booking annual leave and losing that amount of annual leave of three days did amount to conduct extending over the period up to the 27 July 2022.

337. In reaching this conclusion we had regard to the case of **South Western Ambulance Service NHS Foundation Trust v King** [2020] IRLR168 EAT, where the EAT set out that when a Claimant wishes to show that there has been 'conduct extending over a period' — i.e. a continuing act — for the purposes of s.123(3)(a) EqA 2010, he or she will need to set out a series of acts, each of which is connected with the other, to demonstrate that either they are instances of the application of a discriminatory policy, rule or practice, or because they are evidence of a continuing discriminatory state of affairs.

338. We found that each act of non-payment by the Respondent in April 2022 and July 2022 were a series of acts which related to the application of a discriminatory policy by the Respondent to send the Claimant home unpaid when it had no work available for her, and they were evidence of a continuing discriminatory state of affairs.

339. We then considered whether this complaint was presented within such other period that we considered just and equitable pursuant to s.123(3)(a) of the EqA 2010? The claim being presented on the 25

January 2022 meant that it was presented three months less one day out of time from the 26 October 2021.

340. We had regard to the Claimants ill-health during the period of time from the 26 October 2021 up to the date she contacted ACAS on the 10 December 2021, and then issued proceedings on the 25 January 2022. We found that she was unwell with severe pain that impacted her so severely she felt suicidal. Whilst we found she did obtain legal advice sometime prior to or on the 9 September 2021, this being the date of her letter notifying the Respondent of her personal injury claim there was no evidence, as we found above in paragraph 230 above, that she was advised of the actual limitation period that applied to her claim where she continued to be employed by the Respondents, and where the matters she complained of were continuing.

341. We therefore found that the period of three months less one day from the expiry of the primary limitation period on the 26 October 2021, until she issued proceedings on the 25 January 2022, was the issue of the proceedings within a period of time we considered just and equitable, and as such we found that we had jurisdiction to hear this claim.

342. This claim will now be listed for a remedy hearing for one day to take place in person.

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Employment Judge L Brown

Date: 14 January 2024…….
Sent to the parties on:
....18 January 2024.....

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For the Tribunal Office.