EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Kingsley Adjei-Bannor	**v**	**Booker Limited**

Heard at: Watford **On**: 27-30 March 2017

Before: Employment Judge Manley
Mrs S Low
Mr C Surrey

Appearances

For the Claimant: Mr P Linstead, Counsel
For the Respondent: Mr L Ashwood, Solicitor

RESERVED JUDGMENT

1. The claimant was a disabled person at the material time.

2. The claimant was not treated less favourably than others because of his disability.

3. The claimant was unfavourably treated because of something arising in consequence of his disability and the respondent cannot show that the treatment was a proportionate means of achieving a legitimate aim.

4. The respondent failed to make the reasonable adjustments set out below.

5. This matter is already listed by agreement for remedy on **Friday 21 July 2017**. Orders are made at the end of this judgment to ensure the parties are adequately prepared for that hearing.

REASONS

Introduction and Issues

1. The claimant presented a claim in the employment tribunal on 25 February 2016 which contained complaints of unfair and wrongful dismissal and disability discrimination. At a preliminary hearing on 31 August 2016, the

unfair and wrongful dismissal complaints were struck out for jurisdictional reasons. The claimant's disability discrimination complaint was allowed to proceed and was listed for these four days.

2. It appeared that no list of issues had been drawn up before the hearing but, at the commencement of the hearing an agreed list of issues was handed to the tribunal, which reads as follows: -

(i) <u>Disability: reasonable adjustments</u>

1. It is agreed that C suffered from a disability as defined by s.6 EqA 2010 between 2010 and 22 December 2015 as a result of a back condition?

1.1. Did R1 apply a provision, criterion or practice ("PCP") which placed C at a substantial disadvantage in relation to the employment in comparison with persons who are not disabled? C contends that R applied some or all of the following PCPs to him within the meaning of s.20 EqA. The adjustments under para 1.2 below which relate to each PCP are set out in parentheses

(a) the requirement to be free of recurring back pain as a condition of performing work; the particular disadvantages to which this subjected C are (i) that from 21 September 2015 onwards, he was not permitted to work for R in any capacity, despite making it clear that he wished to do so and was capable of doing; (ii) he was dismissed on 23 October 2015, apparently on grounds of capability; (iii) he was paid at sick pay rate from 21 to 29 September 2015; all the adjustments below relate to this disadvantage;

(b) the requirement to do work involving heavy lifting; insofar as C had a difficulty with heavy lifting or R perceived that he did, this PCP subjected him to a particular disadvantage in that (i) from 21 September 2015 onwards, he was not permitted to work for R in any capacity, despite making it clear that he wished to do so and was capable of doing; (ii) he was dismissed on 23 October 2015, apparently on grounds of capability; (iii) he was paid at sick pay rate from 21 to 29 September 2015; all the adjustments below relate to this disadvantage;

(c)the requirement to perform work which combined operating machines and trucks with small amounts of heavy lifting; the disadvantages and the relevant adjustments are the same as for PCP (b);

(d) the refusal to allow employees to perform light duties. The particular disadvantage to which this subjected him is that the failure to make available to him light duties on 21 September 2015 meant that he was not permitted to return to work for R despite

making it clear that he wished to do so; the relevant adjustment is adjustment (b) below: to allow him to return as a picker, and (c) giving him a phased return if necessary, which could include a period of light duties whilst he got up to speed.

1.2. C contends that R failed to:

(a) obtain a medical assessment to fill gaps in their knowledge about C's medical condition, such as the correct diagnosis of the condition and possible treatment for it; such an assessment could have been obtained from a consultant orthopaedic surgeon;

(b) allow C to return to work as a picker, as he requested;

(c) consider whether a phased return was appropriate, if necessary with the assistance of medical advice;

(d) allow C to work as a reach truck driver;

(e) reassess C for work as a reach truck driver;

(f) relax any requirement that if C has suffered from back pain, he was not permitted to work on a reach truck;

(g) provide training to C such that he was able to perform other roles, such as training in typing and administrative functions;

(h) redeploy C to another role in the warehouse which is less physically demanding than picking and/or offer him the opportunity to apply for such a role; the roles in that category include:

(i) Reach Truck;
(ii) Hygiene Operative;
(iii) Recoup;
(iv) Stock Integrity;
(v) Warehouse Loading;
(vi) Goods in
(vii) On line picking
(viii) Tobacco

(i) carry out a work station assessment in relation to C's picking role in order to ensure that he was performing it in the best possible way, having regard to his back condition;

(j) allow C to carry out any of the jobs referred to above but with the elements they considered he could not do removed; C contends that R's letter dated 22 December 2015 inaccurately states the amount of heavy lifting work involved in those jobs;

(k) pay C his full salary between 21 September and 29 September 2015;

(l) delay the date of C's dismissal for a reasonable period of time in order to allow him to apply for suitable vacancies for alternative employment when they arose.

1.3. Did R by one or more of these actions discriminate by failing in its duty to make reasonable adjustments pursuant to ss.20 and 21 EqA?

(ii) <u>Discriminatory dismissal</u>

2. The Claimant relies on a hypothetical comparator.

3. Was C's dismissal on 24 October 2015 an act of direct disability discrimination contrary to s.15 and s.39(2)(c) EqA 2010? C contends that it was because:

(i) the decision to dismiss was based on various assumptions about his ability to carry out the job in the future and its impact on his health which were not based on adequate understanding or medical evidence;

(ii) further or alternatively, when he was dismissed R had failed in its duty to make reasonable adjustments.

4. By dismissing C, did R treat C unfavourably because of something arising in consequence of his disability, contrary to s.15 EqA?

5. If so, can R show that the treatment was a proportionate means of achieving a legitimate aim?

(iii) Remedy

6. If there was a failure to make reasonable adjustments, and /or a discriminatory dismissal, what if any damages or other remedy is C entitled to?

3. The list of issues which was handed in did not have the item which appears above at 1.2 (l) but it was included in the list emailed later to the employment judge. This was discussed during closing submissions and is determined later.

4. In summary, the respondent having conceded that the claimant was disabled at the material time and that the dismissal was for a reason arising from the claimant's disability, the tribunal was concerned with whether there was direct discrimination, whether there was justification for the unfavourable treatment and whether there were any reasonable adjustments that the respondent had failed to make.

The Hearing

5. At the hearing, we heard evidence from four witnesses. We heard from the claimant and from his witness, Mr Chance, who is a former work colleague. We also heard from Mr Tabois, who was the dismissing officer, and from Mr MacCallum, who was the appeal officer.

6. We had before us a relatively substantial bundle of documents and, as is normal, we took the first part of the hearing to read the witness statements and the most relevant documents. The witnesses were then cross examined and we heard oral submissions along with detailed written submissions in the middle of the third day. Because of the complexity of the matter, the tribunal decided it was necessary to reserve judgment and we therefore agreed a date for remedy, should that be appropriate.

Facts

7. The following are the facts which the tribunal have determined and which it considers to be most relevant to the issues before us.

    7.1 The claimant commenced work for the respondent on 14 January 2008. His contract of employment stated that he was a warehouse operative. Between 2010 and the claimant's dismissal in October 2015, he worked in the capacity of "picker" in the respondent's substantial warehouse in Hatfield.

    7.2 The respondent has an agreement with the recognised trade union, USDAW, that those pickers who meet the relevant minimum targets and who have passed a health assessment for reach truck duties, can also undertake that work from time to time. The claimant was one of these people. He was therefore carrying out picking work which is, on any account, hard physical work, where there are relatively challenging targets to meet involving a significant amount of lifting heavy boxes and moving them with the aid of a low level operating platform ('LLOP') When asked to do so, the claimant and others would take turns carrying out reach truck duties which, it is generally agreed, is not as hard physically in that there is not as much heavy lifting as there is when picking.

    7.3 We set out below the facts that we have found in relation to the different warehouse roles mentioned in the tribunal hearing. Before we do that, we describe the sort of environment that the claimant was working in.

    7.4 The respondent is a relatively substantial organisation with several warehouses. The Hatfield warehouse is very large. There are around 370 employees with an additional 100 agency workers. A high volume of stock moves in and out of the warehouse each week. The warehouse was described to us as being the size of eight football pitches with 68 aisles containing about 20,000 spaces for pallets with the aisles ranging from 47-75 metres long and which can go up as high

as 10 metres. Goods are received and then are sent out either to the respondent's cash and carry branches or to other retail customers.

7.5 The respondent has an absence management policy, parts of which are relevant to the issues. It appears between pages 51 to 81 of the bundle. The tribunal believes that the following extracts are relevant:

"Returning to work

The meeting should explore the reason for the absence and the following points should be covered;

- *Is the colleague fit to resume normal duties*
- *If unfit for normal duties, what are they able to do*
- *Whether the absence is for personal reasons or work-related reasons*
- *What preventative measures they have taken to ensure that it does not occur again*
- *What arrangements may be needed to facilitate their return to work*

Long term sickness and disability related absences
Amended duties

As a general rule, the site has no light duties, however the HR department with the aid of our Occupational Health Services will consider what temporary arrangements can be made where possible.

Terminating Employment on Grounds of ill-health

Any decision to terminate employment on the grounds of ill health should only be taken either:

- *Where the colleague will be permanently incapable of performing the work for which they are employed*

  OR
- *Where the colleague will be incapable of returning to their normal duties in the reasonably foreseeable future. Generally, the company will look at the option of ill-health termination once the colleague has been absent for approximately nine months due to prolonged ill health.*

5.3 Long term Absence

Long term absence is defined as any absence lasting longer than 4 continuous weeks. In such cases the company will investigate with the colleague (and with the aid of medical evidence), to establish how to help them to return to work as soon as possible. This will include actions such as:

- *Making reasonable adjustments to their role/hours/workplace etc*
- *Obtaining a medical report from their doctor*
- *Looking for alternative roles*
- *Returning on a phased basis".*

7.6 The pickers' job is to drive the LLOP with two wooden pallets, to travel to a location to pick a case, the weight of which varies but which can be up to 25kg. This needs to be put on the pallet and taken to the next location. The minimum picking rate is 178 cases per hour which requires fast working. Bonuses are given for those who achieve a higher picking rate than this.

7.7 We heard about other roles within the warehouse. As indicated, pickers are sometimes asked to drive one of the reach trucks and they must undergo a medical assessment every three years to show that they are fit for that work. The reach trucks are relatively heavy and lift heavy pallets as high as the top of the stacks. It was agreed that the vast majority of reach truck work involved driving. There were some other aspects to it which Mr McCallum, at the appeal stage, considered and the claimant appears to accept. One of these is doing "*replens*" work which does involve some moving and lifting. As indicated, none of the reach truck drivers are in permanent positions in that role. Mr Tabois was quite clear that somebody working in that role alone might cause problems, particularly in relation to the agreement with USDAW. He said that putting the claimant in that role "*would not have been something we could do*", and that it was a policy and practice agreed by the respondent with USDAW and explained in a letter to warehouse staff. Mr Tabois was concerned how other staff would react and that it would encourage employees to complain of bad backs so that they could be put on reach truck duties.

7.8 One of the other roles that we heard about was that of a hygiene operative. In the meeting with Mr Tabois before the claimant was dismissed, that was referred to by Mr Tabois as "*lighter work*". When it was considered in some detail by Mr MacCallum, he took the view that the role, which had staff dedicated to it, involved some heavy work. In particular, in the letter containing the outcome of the appeal, he referred to the fact that hygiene operatives have to push or pull rubbish bins which may weigh up to 187kg. He also said that hygiene operatives restack pallets and carry out some battery charging of the mechanical handling equipment which is said to be relatively heavy work. The claimant and his witness, Mr Chance, deny that there is any

heavy work involved in that job. The tribunal accepts that that role included some pushing and pulling of (sometimes heavy) rubbish bins which was mostly outside the warehouse, of which the claimant might not have been aware. Although the claimant's view was that he might be able to do that role, he may not have understood every aspect of it. It would seem to have some lifting elements too as it involved placing cases or other rubbish in the cart.

7.9 Another role which has been mentioned is that of "Recoup". This is a role which concentrates on repairing damaged cases. There are no people who are in a dedicated position simply doing that work but it is one of the roles that a general warehouse operative/picker might be asked to do. It still required some lifting of damaged boxes, although not at the rate which would be expected for picking. Although the level of intensity of working was not as challenging as picking, the tribunal accepts that there was still some occasional heavy lifting in that role.

7.10 There was also a role for a stock integrity operative. This was a somewhat more administrative role but it did also include dealing with something called "*branch returns*" where cases (or pallets) had to be broken up because they contained different goods. It included a lot of counting and checking on goods but also included something called "*levelling*" which was making the stacks level to assist with counting of stock. Again, when Mr MacCallum looked at this at the appeal stage he commented on the amount of walking that was necessary but he also said that "*heavy lifting is required*". He stated in the outcome letter that hand pallet pump trucks were mainly used but his primary concern was the heavy lifting. This did appear to be a dedicated role and it appears that, at least by the time of the claimant's appeal, there was a vacancy.

7.11 The stock integrity role was a post which the claimant did have an initial assessment for after his appeal hearing. He applied for this post and the job of transport clerk on or around 4 December but failed the initial assessment. When the HR advisor informed Mr MacCallum of the result of the assessment he said "*Unfortunately, his performance on both tests was poor, scoring 5/20 for the typing test and just 1/8 for the observation/cross checking test. I can give some leeway on the tying test as he may not do a lot of it and it can get better with practice and more use, but for the second test it was simply a cross referencing exercise with a couple of adding up questions and he did really poorly on this".*

7.12 We were also asked to look at warehouse loading. This seemed to include some dedicated employees who worked only in this role. They had been there since sometime before 2009/10 and numbered about five or six people. That was then supplemented by pickers as and when required. It could be between 10 and 20 employees taking it in turns to do the loading alongside the dedicated employees. It appears to be accepted by the respondent that the loading was a little less

onerous but that it still included some "*hard physical work*". The claimant's witness, Mr Chance, took the view that loaders did not manually lift boxes but usually used a powered pallet truck ('PPT'). There was some disagreement about how much lifting of pallets would be necessary. The claimant stated that it was the picker's job to leave the pallets where they should be but it is clear this did not always happen. There was a fair amount of something that is called "*consolidation*" which involved lifting cases off a pallet and placing on another pallet which could be head height. The tribunal accepts that would involve some heavy lifting.

7.13 We were asked to consider a "goods in" role. This role is similar to warehouse loading in that the employees were responsible for moving goods when they had been delivered to the warehouse. It was not entirely clear to the tribunal whether there were any people in dedicated roles or whether the warehouse loaders also did some 'goods in' work. Again, Mr MacCallum looked at this at the point of the appeal and took the view that there would be some heavy lifting because it would require "*split downs*". He also stated and the tribunal accepts that the '*tipping*' part of the job would involve sitting on a counterbalance truck for a relatively long period. It was suggested this might hurt the claimant's back. The claimant did not agree that there was any lifting of heavy objects. He believed it to be light work but the tribunal accepts that it would involve some heavy lifting.

7.14 We were also asked to look at something called "online picking". This was still picking but did not have similar stringent targets as for the main work of picking. This role was to fill an order where someone had placed an order online. Although it still involved lifting cases, there were fewer to lift as the orders were more to do with single cases. The claimant said that it would be likely to be single cases rather than dealing with pallets. The respondent's policy with respect to online picking was that it was something that they asked the general pickers to do and there was no dedicated online picking. Mr MacCallum, in the appeal outcome letter, stated that this still involved lifting boxes up to 25kg from the ground floor, using a LLOP or walking around the warehouse. He was also concerned that there was not always sufficient on line picking to keep one person occupied. Mr Chance agreed with the claimant that the volume was much lighter and that seems to be generally agreed.

7.15 Finally, we were asked to look at tobacco packing roles. That activity took place in a separate part of the warehouse. Mr Tabois, in the meeting before he terminated the claimant's contract, referred to this as lighter work (as he also did for hygiene). It does appear that there are some dedicated operatives carrying out this work and that, from time to time, other pickers do this work. Some years ago, the claimant was in the tobacco section and made a complaint about racist comments. As a result, he stated that he had a letter from HR which said he should not be asked to work in tobacco. He referred to that

letter in the termination meeting with Mr Tabois. The claimant says that the work is considerably lighter in tobacco. We have not been told the weight of any tobacco cases. Mr MacCallum, when he considered it, said that the pallets weighed 27kg and when full, a pallet could weigh up to 370kg and the hand pallet truck would need to be pulled. The claimant disagrees that an operative would be likely to put that much on a tobacco pallet.

7.16 These then are the various roles or parts of roles that we considered. Our findings, as stated above, are based on what was said during various meetings at the time, as well as what has been said in evidence during the course of this tribunal and contained in documents.

7.17 The claimant attended manual handling training including refresher courses on several occasions. From around 2009, or early 2010, the claimant began to suffer with back pain. This led to him being away from work with back pain on a few occasions between 2010 and 2015 as follows:

7.17.1 He was away for short periods of time in 2010 and 2011 of a few days and a week;
7.17.2 In 2013 he had a week away from work with back pain;
7.17.3 In 2014 he had a month away from work, another week and a day again with back pain.

7.18 On 19 March 2015, the claimant attended for his medical assessment for reach truck (also known as fork lift truck). The occupational health nurse recorded what happened and, when she was asked to put it in a note by an HR advisor, she wrote this:

> *"He ticked yes to muscular skeletal issues on his health questionnaire so I asked him about this and he informed me that he has experienced back pain since commencing working for Booker and that he has been to see his GP who just give pain relief. He has tried physiotherapy but did not seem to be beneficial.*
> *As part of the fork lift truck medical I performed a range of movement assessment to ensure that he is able to move freely in all areas of his body.*
> *He was extremely slow and guarded in his movements particularly with the back.*
> *I explained to Kingsley that I had concerns regarding his back and his range of movement assessment and at this stage I was unable to give him clearance for the fork lift truck.*
> *I gave him a letter to take to his GP as I felt he would benefit from further investigations into his now long term back pain and as he is only 26 this needed to be rectified."*

7.19 That nurse then went on to say how the claimant's attitude changed because he said he was concerned that she was "*trying to get him the sack*". There were subsequent difficulties with that discussion which

led to a later suspension for the claimant and he was given a final written warning. In any event, he did not pass that medical which was said to be unsatisfactory so the claimant was not allowed to do any fork lift/reach truck driving at that point.

7.20 The letter of referral was given to his GP and the respondent subsequently received a report dated 14 April from a Dr Thornley, an independent occupational health doctor, which reads as follows:

> *"I saw this warehouse operative at your site on 13 April.*
> *Our meeting was interrupted by a prolonged period of standing outside in the cold during a fire alarm.*
> *He attended an appointment with the nurse for a fork lift truck medical two weeks previously but he failed this because of a restricted range of back movement.*
> *He told me that at the time of that appointment he was not having any problems with his back although he has had back pain before. This is not quite consistent with your referral which said he told the nurse he was still suffering from back pain.*
> *He was advised to see his GP which he did and the GP has referred him for physiotherapy, even though he says he does not have a problem with his back at the moment.*
> *His work consists of mainly reach truck driving and some picking. He manages to hit his targets and in fact has been getting bonuses.*
> *When I examined his back he had a very full range of movement, well developed musculature in his back and shoulder and appeared to be free of pain.*
> *A general examination was otherwise normal.*
>
> *<u>Conclusions</u>*
> *I consider him fit to operate fork lift trucks.*
> *It seems that he has had a muscular type of pain in his back which he says is not currently present.*
> *He is fit to do his normal duties."*

7.21 The claimant, having received the final written warning with respect to the incident with the occupational health nurse, then returned to work, including reach truck duties, on 28 April 2015.

7.22 However, by the end of June 2015, he was certified sick again with muscular back pain; that period of absence being from 29 June through to mid September.

7.23 On that basis, the respondent decided to get further information from the occupational health doctor and a referral form was completed by HR. That referral refers to the 33 day back related absence in 2014, as well as ones in the past. Several specific questions were then asked. The doctor was asked for his opinion of the claimant's "*current state of health*", whether he had an "*underlying back related issue*"; whether the condition could fall under the 2010 Equality Act; whether he was having

treatment; whether he was taking any form of pain relief and when he might be able to return to work. He was asked:

> *"If he is able to return to work, in your opinion would he be able to perform his full range of duties without restriction to enable him to enable him to meet the company pick rate of 85%"*

7.24 The doctor was asked about ill health termination and "*any action we can take to help prevent further issues*" and whether there was anything else to add.

7.25 In the meantime, and throughout his ill-health absence, the claimant was sent details of vacancies for the respondent at their various warehouses.

7.26 By letter of 17 September, Dr Thornley sent his report. This is relatively short and it is probably worth quoting it in full as it is an important document as far as the respondent's decision to terminate the claimant's employment is concerned.

7.27 It reads as follows:

> *"I saw this warehouse operative at your site on 15 September. He has been off work for about ten weeks with back pain. He told me that the pain gradually worsened over a few days until he "couldn't cope and had to go sick". He says there was no particular trigger; it was just a job, lifting heavy things.*
>
> *He had five or six weeks off with back pain last summer and has had several previous absences over the last five years. He said he thinks this episode is worse because he has been doing more picking.*
>
> *I pointed out to him that he was needing longer and longer off with each episode of back pain. His first absence in 2010 was for six days and then subsequent absences were for ten days, 16 days, 33 days, and now for ten weeks or more. I asked if he thought that if he did a lot of picking in the future he would get more pain and he said yes. I asked whether he thought the increasing length of the absences was because he is reportedly being asked to do an increasing amount of picking and he said "absolutely".*
>
> *He said he is getting better and said he "should be back next week…. if I am feeling the way I am now there's no point in staying off".*
>
> *He takes painkilling tablets, one twice a day, which he has been doing every day since he went off sick although, surprisingly, he was unable to remember the names, despite having swallowed 140 of them in the last ten weeks.*

Conclusions

- *He has had a prolonged absence with back pain which came on for no specific reason.*

- *He has had numerous previous absences and each absence is becoming longer and longer.*

- *I consider that picking is having a detrimental effect on his health and if he continues picking he will almost certainly have further prolonged absences.*

- *It would be in his best interests not to pick and given the fact that he would certainly have further prolonged absences caused by caused by picking there is a good case for saying that he is not capable of carrying out his duties as a warehouse operative.*

- *I cannot say whether his inability to remember the name of his tablets is because of an inadequate memory or because he has not in fact been taking them as he states.*

- *You asked whether he is a disabled person within the meaning of the Equality Act. The assessment as to whether his condition has a substantial adverse effect on day to day life has to be done hypothetically as if he were not taking any painkillers. I cannot say how much of the adverse effect his back pain would have if he were not taking painkillers and therefore I cannot say whether he is a disabled person. I am no sure why you need to know this but I would be happy to discuss it on the phone if you wish to consider this question further.*

- *He considers that as he is feeling at the moment "there is no point in staying off". In other words, he considers himself to be fit to be at work. He should therefore return to work immediately.*

- *You ask if ill health retirement would be appropriate. I presume you are asking whether he should be considered permanently unfit to do his job and as stated above, given the fact that continued picking is likely to harm him and lead to further prolonged absences it could be said that he is incapable of doing his job.*

- *You asked what action could be taken to help further issues. You could take him off picking."*

7.28 The claimant attempted to return to work on 21 September 2015. He was met there by a line manager, Mr Carpenter, and a return to work interview was carried out. We have seen a note of that interview which is on a standard document. Mr Carpenter wrote that the claimant was "*better not 100%".* He also recorded the claimant saying "*can they give*

me light duties" and *"just to give me light duties*". The claimant signed that form, although he told the tribunal that he signed to say that he had been there rather than confirming its accuracy. Although the claimant appears to suggest before us that he did not ask for light work we see no reason why Mr Carpenter would have written that down if the claimant had not made reference to it and we believe that the claimant did ask about light duties at that meeting. Mr Carpenter took the view that the claimant could not work if he was not fully fit and he was sent home.

7.29 The claimant was not paid between 21 September and when full pay began to be paid on 29 September. In the meantime, the claimant was invited to a meeting on 29 September, with a manager Mr Coombes. Although there are no notes of that meeting, the HR advisor who was present that day, sent the claimant a letter on 8 October which purports to set out what was said in that meeting. No significant dispute arises about what was said except for how long the claimant thought he needed to adjust. The letter appears at page 299-230 of the bundle and the relevant section reads as follows:

> *"Mr Coombes asked you to explain why you were sent home again. You explained that when you returned you had a meeting with your manager who asked you if you were 100% fit. You replied and said no-one is 100% but you can do the job. The manager said that if you were saying that you were not 100% fit you would not be allowed back to work until you were. You explained that as you had been off for three months you would not be fully fit straight away and may need a day or two to adjust, but that you could meet your picking rate but the manager would not allow this and you were sent home."*

7.30 That letter records that there was then a discussion about the length of the absence and the OH report from Dr Thornley who had said that picking was an issue. The claimant said that he was fit to do the role and could meet the picking rate and Mr Coombes said, on behalf of the respondent, that they had a duty of care towards the claimant and could not put him in a position where he could injure his back and that is why he was sent home. He said then that the matter would be passed up to management to look into.

7.31 The claimant was therefore invited to a meeting with Mr Tabois which took place on 19 October. The tribunal has seen the notes of that meeting which appear at pages 235 – 240 of the bundle. This meeting would appear to have been relatively short. The claimant said in that meeting that it was the whole job which was causing him problems. By implication, that would seem to suggest that he was including the work he did on the reach truck. However, he also went on to say "*I do both picking and truck work*" and that he was better and able to do this work. He did refer to the fact that he had been taken off the reach truck after his assessment. The claimant said that he was fit to do his work. He

also said that he had discussed the possibility of other work with his doctor and that he had said he would get office work if he could but that he had no qualifications.

7.32 As stated above, Mr Tabois said this:

> *"I am concerned about your back – you have told me you have taken steps to help yourself. Have you considered lighter work - have you considered hygiene/tobacco?"*

7.33 It was at this point that the claimant referred to the letter from HR about not working in tobacco. He also asked about "*retraining"*. He suggested that a trainer "*could watch me to see if I am doing picking right*." At the end of that meeting the claimant asked Mr Tabois if he wanted to see the "*physio report*" and Mr Tabois took it from him.

7.34 This report is a document which is dated 30 September and is said to be a discharge report. It indicates that the claimant was given some exercises at three sessions and some advice and that the outcome which is ticked is "*symptom free*". A handwritten note reads as follows:

> *"Thank you for referring this 27 year old man who works as a warehouse assistant and who was on sick leave when you referred him in August. Kingsley has had intermittent problems over the past six years and this episode started six to seven weeks previously. On examination his ES on his (R) was much more hypertrophied as he is R hand dominant. His flexion was only to upper third of tibia and reproduced his pain on extension (illegible) at LS. He was treated as outlined above and he responded very positively and quickly. By 3 treatments he had full ROM and had not had any pain for 1-2 weeks. I left him on 'SOS', and he phoned today to say he was still fine and I could discharge him."*

7.35 Mr Tabois' evidence was that he considered all matters and took the decision to dismiss the claimant. By a letter of 23 October, he set out his reasons for this decision. He referred to the medical report and to conversations with the claimant and stated:

> *"All possible options in other departments have been explored and in the absence of an acceptable alternative position the company has made the decision to terminate your employment with effect from 24 October 2015."*

7.36 The claimant was paid seven weeks pay in lieu of notice and he was told of his right to appeal. Mr Tabois said that he had taken into account 'mitigation' and set out what he said were the reasons to support his decision. Under 11 bullet points Mr Tabois referred to the doctor's report of 17 September, recording that the claimant had back issues for several years and that the absences were getting longer and adding "*I was duty bound to act upon the professional opinion and*

concerns raised within the report." He referred again to the duty of care of the respondent and to the fact that the OH doctor had said that "*If you were to continue picking it would have a detrimental effect on your health*." Mr Tabois confirmed that the claimant said that he had told the doctor the back pain was caused by the job and that he said he had discussed other jobs with his own doctor, but that he had little or no qualifications. He then listed the absences in 2015 as well as those in previous years. He said that the claimant had been "*sent home due to requesting restricted/light duties of which there were none available in the warehouse.*" He said this in conclusion:

> *"The company has a responsibility under the Equalities Act to consider making 'reasonable' adjustments to a role but not such that it would need to 'create' a new role. With your on-going back condition this would involve having to create a totally new role with limited/reduced picking levels and weight restrictions being imposed. To make such an adjustment would not be considered as 'reasonable' as it would have detrimental effects on the role of a warehouse operative as picking is a fundamental requirement of the role for which you have been employed to do."*

7.37 The claimant sent an appeal letter on 30 October. In that he referred to a number of different roles which he believed he could carry out. He referred to the following: -

> *"hygiene, tobacco, goods in, recoup, full pallets function only, put away functions only and also reduce my hours temporary to monitor my health."*

7.38 He said that he had taken measures to make sure his back problem did not come back and that he had handed over the physiotherapy report "*stating I have got better*". He referred to the fact that he had never underperformed when he was picking and that he could do other shifts as well as the night shift, which he was currently working. He asked the respondent to reconsider the decision to dismiss.

7.39 An appeal hearing was set up with Mr MacCallum for 9 December. The notes from that hearing are somewhat lengthier than that for the hearing in early October. They go from pages 251-271 of the bundle and the meeting appeared to last something close to two hours, rather than the one hour meeting with Mr Tabois.

7.40 A number of options were considered in some length at that meeting. The claimant stated that he would be able to do any of the roles which were discussed such as tobacco, hygiene and so on. Mr MacCallum asked questions about whether the claimant thought he would be capable of lifting these weights and pushing or pulling pallets etc, and the claimant said that he would be. Mr MacCallum told the tribunal that he encouraged the claimant to consider applying for the clerical jobs

and the claimant did fill out an application forms for the stock integrity operative and the transport clerk as stated above.

7.41 On that basis Mr MacCallum gave further thought to the matter and decided that he needed to get further information from the doctor. He asked Dr Thornley to contact the claimant's GP and Dr Thornley did a further report which was sent on or around 8 December. Although Dr Thornley had asked the GP for some very specific information, that was not necessarily forthcoming. The GP letter appears at page 331 but was not before the respondent at the point of the appeal.

7.42 The letter from Dr Thornley is his summary of what the GP said. He writes:

> *"His GP was apparently sufficiently concerned about his back to refer him to a consultant orthopaedic spinal surgeon and to a physiotherapist. He understands that the physiotherapy referral was at the beginning of August but I do not know when he referred him to the specialist. The appointment with the specialist was arranged for 22 September so quite possibly he was referred to the specialist at the same time as the physiotherapist.*
> *This would mean that it was around the beginning of August when the GP was particularly concerned about him. He did not attend the appointment with the specialist on 22 September. He claims it was because he did not receive the appointment.*
> *He did attend his appointments at the physiotherapist and apparently the back pain resolved with treatment.*
> *The GP says he returned to work on 29 September and does not have any back pain now.*
> *I did ask the GP for his thoughts about the future and whether he was likely to have further prolonged absences with exacerbations of back pain if he returns to the same sort of work. The GP said that because of the nature of his work with the lifting he does not feel able to predict how things might develop in the future. He evidently does not feel confident to say that he is not going have any more problems."*

7.43 The claimant commented on that report to repeat that he did not receive the appointment with the specialist and commenting that the GP was clearly saying that he was fit to return to work. He stated that the "*Booker doctor is misinterpreting things*".

7.44 In the light of this Mr MacCallum made his determination. He sent a very detailed letter and it is not possible to quote all of it. It appears between pages 293-304. It set out the background which is not significantly in dispute; it dealt with who the claimant saw when, the discussions which were had, the various reports, the grounds for his appeal, and several things that the claimant said on appeal. It then set out what Mr MacCallum did after the appeal meeting quoting large sections from the documents.

7.45 Mr MacCallum then set out in detail his findings for each of the roles mentioned. He went through the various roles in the warehouse which had been mentioned as follows: - picking; on-line picking; tobacco; hygiene; recoup; stock integrity; warehouse loading; reach truck working (full pallet, put away and replens) and goods in working. He said he also considered reduction of hours temporarily, working something other than on night shift, light duties, length of service, etc. He went into the details of the jobs which had been advertised and the claimant unfortunately being unsuccessful at the assessment. In conclusion, he recorded the number of ill health absences and quoted Dr Thornley's report of 17 September. He said this:

> *"You say you can't pinpoint what causes your back problem, therefore there is a high risk that it could happen again. Despite all your absences due to back problems, when I discussed all the various warehouse roles with you, whilst considering reasonable adjustments, you made it clear that none of the roles would affect your back and that you did not need light duties or reasonable adjustments. I did not feel you were taking your medical condition and the risk of it being further worsened as a result of doing a job with heavy lifting, seriously enough. Ultimately I have to decide based on your previous absence history and various medical reports, whether it would be safe for you to continue in a working environment which requires heavy lifting. I cannot create a role for you which requires no heavy lifting whatsoever if it does not exist. In summary your medical condition understandably prevents you from doing hard physical work. This means that you should avoid strain and exertion and leaves you fit for lighter duties only. In general this is in stark contrast to the requirements of the different roles that are carried out in the warehouse which stocks heavy boxes that are required to be moved and at 420,000 square feet requires a lot of walking to get around it."*

7.46 Mr MacCallum upheld the decision to dismiss.

7.47 The claimant made his application to the employment tribunal on 25 February 2016. He prepared an impact statement in relation to the question of whether he had a disability in a document served on 12 October 2016. Various references were made to this in the witness statement evidence of the respondent and in evidence at this hearing.

7.48 The relevant parts refer to the job that the claimant now does as a bus driver and other activities from paragraphs 19-26 and it may be worth quoting those in full at this point. They read as follows:

> *"19. From September 2015 I was out of work although my appeal ran until December 2015. I obtained a new job as a trainee bus driver on 4 January 2016. I finished my training on 4 February 2016 and started work bus driving. I left that*

company on 4 April 2016 and started working for a new bus company which paid better money on 23 April 2016. I work five days a week on a 38 hour shift. I do have some back pain when driving towards the end of the shift but it is manageable for the time being. My route takes only 66 minutes after which I will always have at least 15 minutes break.

20. *Since around 2010 when the problems began various activities have caused me pain and I can no longer do them.*

21. *Sleeping is more difficult as I can no longer sleep on my back for more that 20 minutes without pain. I have to lie on my front and side and sometimes my sleep is disturbed.*

22. *I always used to wash all my white clothes by hand every three weeks also which is part of the tradition in Ghana where I come from. This involves standing at a sink and bending over slightly with my hands in the sink. I can no longer do this without pain so the clothes have to be done in the washing machine. I never had to do anything like this (standing in one position for a long time) when I was at work.*

23. *I used to like to clean my flat including mopping the wooden floor and vacuuming as I thought I could it better than anyone else. Now this is uncomfortable for my back and my partner has to do it. Again, this is not something I had to do at work.*

24. *I love playing with children. I have a number of god-children who live near me. I also have my own two children who were born on 7/1/15 and 24/8/16. I used to like picking them up and running and playing with them. If I pick them up now it often causes pain to my lower back. I used to be able to carry a baby for the whole church service but now I cannot do this for more than five or ten minutes before I get some pain. I cannot run and play with children as I used to. This has been the situation since 2010. I always want to play with my children but I struggle to carry them and it hurts me a lot. Playing with children involves a lot of bending and twisting quickly and it is not the same as lifting items whilst working at Booker.*

25. *I go to church every Sunday and I used to dance in church every week. I still go to church but I have not danced since 2010 because of pain and because I am afraid of injuring my back.*

26. *I cannot now carry a bag of shopping of moderate weight with one hand as I used to. To carry something heavy like a six-pack of water I would now need to lift it with both hands and carry it in the centre of my body. The same applies to luggage."*

7.49 When the claimant was cross examined, he said that the problem around playing with children was when they were running. He also did say that the reach truck role caused him pain.

The Law

8. This is now solely a disability discrimination complaint. The relevant sections of the Equality Act 2010 are as follows:-

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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty

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

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) -

(5) -

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

9. The burden of proof provisions as set out in s136 EQA above apply to all discrimination complaints. That requires the claimant to prove the primary facts from which the tribunal could conclude there has been discrimination. If there are such facts, the burden shifts to the respondent to explain any such treatment is without discrimination. Those sections of EQA which provide for the respondent to justify any otherwise discriminatory treatment require the tribunal to consider proportionality and, in particular, to balance the discriminatory effect with business needs. The more serious the adverse impact the more cogent the business reasons should be.

10. The claimant also relies on direct discrimination under s13EQA. For such a complaint, a comparator is necessary and should be one whose circumstances are not materially different (s23EQA). There is no provision in EQA which would allow a respondent to justify direct discrimination.

11. The complaint of a failure to make reasonable adjustments was central to this claim. The relevant sections are as set out above. The tribunal's task is to first consider the proposed provisions, criteria or practices (PCPs) and determine whether there was a PCP that placed the claimant, as a disabled person, at a substantial disadvantage. The question of whether there was substantial disadvantage requires identification of a non-disabled comparator (usually in these cases, a hypothetical comparator) who would not suffer the disadvantage. If there are one or more such PCPs and the employer has knowledge of the disability and its effects, the tribunal will

move to consider whether the respondent can show it has taken such steps as were reasonable to avoid that disadvantage. This requires careful analysis of the evidence and finding of the relevant facts to which the legal tests should then be applied. In considering what steps would have been reasonable, with the burden of proof resting on the employer, the tribunal looks at all the relevant circumstances and determining that question objectively, may well consider practicability, cost, service delivery and/or business efficiency.

12. The complaint of discrimination arising from a disability needs no comparator but the tribunal needs to consider what facts, if any, show unfavourable treatment linked to the disability. If that is shown, the employer can seek to show with evidence, that it had a legitimate aim which it used proportionate means to achieve. The tests for each section under EQA are as set out in the issues and will therefore be clear from our conclusions.

13. Both parties made detailed written submissions which were helpful to us in our deliberations. The claimant's representative also added to his written submissions orally and, again in some detail. There is little dispute between the representatives on the legal tests as set out above.

14. For the claimant, it was submitted that the evidence was such as to mean he should succeed in all aspects of his complaints. His representative referred us to Aylott v Stockton on Tees [2010] IRLR 994, particularly because the Court of Appeal were there considering direct discrimination and the identification of a hypothetical comparator. That case makes it clear that the question of an appropriate comparator and whether treatment was on a prohibited ground are intertwined. In Lord Justice Mummery's words – "*There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?"*. This is especially so in cases where stereotypical views have been formed. For the respondent, on the question of whether there was direct discrimination, it was submitted that the dismissal was not on the ground of his disability (his bad back) but because he was unable to work and had had time away on health grounds.

15. On the issue of justification for disability related unfavourable treatment, we were referred to Hardy and Hansons v Lax [2005] ICR 562 which emphasises the need for an objective assessment of balance as mentioned above.

16. Several cases were also referred to in the submissions on the important issue of whether there were any failures to make reasonable adjustments. We will not set them out here, because, as has been stated, there was little dispute on the legal tests to be applied. Those which were particularly useful to us when we were deliberating were HM Prison Services v Johnson [2007] IRLR 951; Smith v Churchills Stairlifts plc [2005] EXCA Civ 1220; Croft Vets & Others v Butcher UKEAT 430/12; Noor v FCO UKEAT 470/10 and Griffiths v Sec of State for Work and Pensions [2015] EWCA Civ 1265.

Conclusions

Failure to make reasonable adjustments

17. We therefore make our conclusions by reference to the list of issues referred to earlier. We start with the complaint of failure to make reasonable adjustments.

18. The first question for us under (i) 1.1 is whether the respondent applied a provision, criterion or practice (PCP) which placed the claimant at a substantial disadvantage in relation to employment in comparison with persons who are not disabled. There are four PCPs relied upon by the claimant. Two of those at (b) and (c) are accepted by the respondent. These are *"the requirement to do work involving heavy lifting*" and "*the requirement to perform work which combined operating machines and trucks with small amount of heavy lifting*". The tribunal also accepts that those are PCPs. They placed the claimant with his bad back at a substantial disadvantage as compared to people who did not suffer from a bad back which condition had caused them to have time away from work.

19. There are then two other PCPs which are not accepted by the respondent. At 1.1 (a) it is alleged that the *"requirement to be free of recurring back pain as a condition of performing work*" is a PCP. The tribunal does not accept that the respondent did apply such a requirement. If an employee had recurring back pain and did not mention it to the respondent, nothing would have been done about it. The requirement was that an employee did not have substantial periods of absence because of back pain, rather than a requirement to be free of any such pain. The employment tribunal does not accept that is a PCP.

20. Turning to the fourth one at (d) "*the refusal to allow employees to perform light duties"*, the respondent disputes that this is a PCP. The respondent says that there was no such refusal but accepts that its own policy says that the site has no such light duties (see extract at paragraph 7.5 above). The respondent also says that there was sufficient evidence before the tribunal that there were some circumstances in which light duties could be given. However, most of the evidence before us was that no light duties were available although the claimant had raised light duties and they had been mentioned by Mr Tabois but taken no further. The tribunal finds that this was a PCP which was applied, that it caused substantial disadvantage to the claimant with respect to the difficulties for him carrying out heavy lifting as compared to other employees who had not had a lengthy absence because of a bad back.

21. We have found therefore that the respondent applied three PCPs. We therefore turn our attention to whether, those PCPs having been found, there was a failure to make any reasonable adjustments. We answer these under (i) 1.2 of the List of Issues between (a) and (l). We have not always answered the issues in the order is which they are listed because it

sometimes has made sense for us to consider some items together. However, it is hoped that our findings are clear.

22. At 1.2 (a) the alleged failure is to obtain a medical assessment to fill in gaps in the respondent's knowledge including a diagnosis and possible treatment. It is true that the respondent did obtain a medical assessment from Dr Thornley. It also had a short physiotherapy report which indicated that the claimant's back was better. The claimant accepts that this cannot be a reasonable adjustment on its own but that it "*would have facilitated other reasonable adjustments*". The respondent's representative submitted that there were no such gaps in the respondent's knowledge. We agree that this cannot, without more, amount to a failure to make reasonable adjustments but the information the respondent did have was, the tribunal finds, insufficient to give it a clear view of the claimant's capabilities and prospects of returning to work. We deal with this aspect later in the judgment.

23. We cannot find that there was a failure to make a reasonable adjustment when the respondent did not allow the claimant to return to work as a picker (b). There was certainly enough information before the respondent, when it took the decision that he could not return to work as a picker, that that would be detrimental to his health. That much is clear from Dr Thornley's report. Whatever else we say about Dr Thornley's report, which we will come to later, there is clear advice that the claimant should not be working as a picker and we cannot find that would have been a reasonable adjustment. Indeed, it is not an adjustment at all as that was his job.

24. We will consider questions as to a phased return (c) at the same time as we consider redeployment later under (h).

25. We then considered purported reasonable adjustments (d), (e) and (f) which all relate to reach truck driving. Again, we have formed the view that this would not have been a reasonable adjustment. On the evidence of the claimant himself during discussions, he clearly thought there was some risk to his back of being a reach truck driver. We accept, on the evidence before us, that that role also included some heavy lifting and that was at a significant enough level that he should not have been allowed to return to it. As we say later, there might have been a question about reassessment of that at some later point but at the point the claimant's dismissal was decided upon, he could not have returned to that role.

26. At (g) there is proposed adjustment of providing training. In particular, it was submitted that the claimant should have been trained in typing so that the respondent could have then allowed him to undertake administrative work. We have insufficient evidence to find that the claimant would have been able to reach the level expected for the administrative functions which were available. Unfortunately, it was clear that the claimant was not able to reach the standard required. The work he had been doing for the past few years was of a manual nature and it is clear to the tribunal, as it was to the claimant, that that was where his skills lay. The tribunal does not accept that it would have been a reasonable adjustment to provide training,

particularly as it is unclear how much training or for how long that might have taken.

27. We therefore turn to matters raised under (h) and take that with the question of a phased return. This is the very important question of whether the claimant might have been redeployed to another role. We have considered the list of possible roles between (h) (i) - (viii). We have already dealt with the question of the reach truck. As far as hygiene operative, recoup, warehouse loading and goods-in roles are concerned, we are of the view that the respondent has provided sufficient evidence that this work all included sufficient heavy lifting which would almost certainly have meant it was not a reasonable adjustment for the claimant.

28. However, there remains the issue of whether on-line picking (vii) and/or tobacco (viii) might have been work which the claimant could have carried out either on a phased return basis or possibly on a permanent basis. We take into account here the lack of medical information the respondent had on the claimant's condition. Save for having been told that he had a bad back and that picking would be detrimental, there was very little information on how his condition affected his walking, twisting or driving. These roles did not involve the amount of heavy lifting of the other roles. The tribunal therefore finds, on the balance of the evidence before us, that a reasonable adjustment would have been to place the claimant in one or both of those roles, possibly on a temporary basis while his work was assessed. The tribunal believes that that would have gone far enough to alleviate the disadvantage.

29. We turn then to reasonable adjustment (i) which is the suggestion that a workstation assessment in relation to his picking role would have been a reasonable adjustment. We cannot find that this would be a reasonable adjustment because, as the respondent points out, there was no suggestion that he was carrying out that role in any way incorrectly. In fact, he was performing well but for the fact that the work might have contributed to his back condition.

30. As for (j) which is allowing him to carry out roles with some aspects removed, we cannot agree that was a reasonable adjustment and remain unclear as to what aspects could have been removed from which roles. We do not find that there has been an exaggeration of the heavy lifting involved in most roles, except perhaps for on-line picking and tobacco.

31. As for (k) we find that it would have been a reasonable adjustment to pay the claimant his full salary from the time he made himself available to work. The claimant said he was able to come back to work, the doctor had signed him as fit to return and payment of full salary would have alleviated the disadvantage of him being unable to return while matters were being considered by the respondent.

32. As far as (l) is concerned, this is the claim that delaying the date of dismissal would have been a reasonable adjustment. The tribunal had insufficient

evidence of a delay in dismissal being anything which would alleviate any disadvantage to the claimant. There is little or no evidence that any other vacancies had arisen in that period than might not have been available earlier.

33. In summary, under issue 1.3, we consider whether the respondent failed in its duty to make reasonable adjustments. The short answer to this is that we have found that the respondent did fail in some respects but not all those suggested by the claimant. The respondent's failure was, in part, at least, related to the lack of objective evidence it had before it when the decision to dismiss was taken. Unfortunately, we find the occupational health report was woefully inadequate. Dr Thornley did not examine the claimant physically and he gave no diagnosis, save for saying the claimant had had back pain with no consideration of how physically that was caused. He did not say whether the claimant had an *"underlying back related issue*" and failed to answer specific questions, for instance on "*any action we can take to help prevent further issues*". The letter hints at contradiction in that it said that the claimant should return to work because he said he was able to, but then says that he should refrain from picking without any consideration of what he could and could not do. It is not specific with respect to what work it was that might be difficult for the claimant. Given that a large proportion of the claimant's job was driving, and, on the respondent's account, that would have involved twisting and turning, there is no consideration of that either.

34. Whilst we appreciate that Mr Tabois had good knowledge of the jobs in the warehouse, it is clear that he did not systematically consider each job and analyse, with any level of detail, what tasks needed to be performed, what weights lifted and what other physical aspects were necessary. When Mr MacCallum came to look at it he considered, several times, whether the claimant could walk, push or pull weights. None of this had been considered by either the occupational health doctor or by any other sort of workplace assessment.

35. One of the problems for the tribunal is that it is now being put in a position to try to assess whether the claimant was capable of carrying out these roles when it too has insufficient information before it. However, on the evidence before us, including that information before the respondent at the time, we have taken the view that the respondent failed to make a reasonable adjustment when it failed to redeploy him to on-line picking and/or tobacco whilst assessments were made. What was really needed, before the decision to dismiss was taken, was a further detailed report from an occupational health doctor or a specialist which included, as far as possible, diagnosis, prognosis and consideration of aspects of the various roles rather than concentrating, as Dr Thornley and the respondent did, solely on picking. The respondent might also have found a workplace assessment for the claimant in these roles very useful. Without knowing what caused the claimant's back pain, for instance whether it was muscular or skeletal, the respondent was unable to assess what he could or couldn't do and whether there might be treatment.

36. The tribunal accepts that the respondent owed a duty of care to the claimant. However, it also has a duty not to discriminate on the grounds of disability and to consider reasonable adjustments in the light of information either that it has at the time, or could reasonably get before any final decision is taken, particularly where the decision is whether to dismiss. The respondent's own policy envisages a nine-month period before dismissal and the claimant's absence had only been for two months. Our view is that the claimant had a real chance of undertaking at least some of the roles in the warehouse, either on a temporary or a permanent basis and any hesitation the respondent had about that should have been considered more carefully with follow-up advice. Although Mr MacCallum did attempt to get this further information, Dr Thornley's further letter did not assist at all.

Direct disability discrimination

37. We next consider the direct disability discrimination complaint under issue (ii) 3 under Discriminatory Dismissal. We find the dismissal was not an act of direct disability discrimination. The respondent did not dismiss the claimant because he had a bad back but because it believed that he could not carry out the heavy lifting aspects of a number of roles in the warehouse; that is not direct disability discrimination. A hypothetical comparator without the claimant's bad back but with other issues which prevented heavy lifting would not have received different treatment. This complaint fails.

Disability related discrimination

38. We then consider the disability related complaint under s15 EQA at (ii) 4. First, the respondent accepts that it did treat him unfavourably because of something arising in consequence of his disability when it dismissed him.

39. The respondent seeks to justify the discrimination because it says that the dismissal was a proportionate means of achieving a legitimate aim. That justification is said to be because there was no work which would not hurt the claimant's back and because of its duty of care towards him. The tribunal does not accept that this is a sufficient answer.

40. This employer had before it an employee who said he was fit to return and he had his GP's support and a physiotherapy report which, to some extent, at least, supported that view. The respondent has not shown that it undertook any exercise where it balanced the obvious disadvantage to the claimant in losing his job against taking some steps to find work that he might be able to do. The respondent did not have enough reliable information on the claimant's abilities to decide whether there were other roles he could have undertaken on a temporary or permanent basis. Proportionate means always requires a balancing of the discrimination with the legitimate aim. The respondent does have a legitimate aim to carry out a profitable business. However, given that we have accepted the evidence that there are some jobs which, on the face of it and without further detailed investigation, appear to be somewhat lighter than the picker/reach truck driver job, the respondent has failed to show that dismissal was a

proportionate means of achieving a legitimate aim. If the legitimate aim was to prevent injury to the claimant as a disabled person, considerably more advice was needed before a dismissal took place.

41. The respondent failed in its duty to make reasonable adjustments in two respects. First, it failed to properly consider placing the claimant in two possible alternative roles, either temporarily or permanently. Secondly, it failed when it did not pay him between 21 and 29 September 2015. It did not fail in its duty with respect to the other reasonable adjustments suggested.

42. The respondent also treated the claimant unfavourably when it dismissed him without having received sufficient medical information and without trying or assessing him for those possible alterative roles.

43. The respondent did not treat the claimant less favourably because of his disability.

44. The question of what damages or other remedy to award will be considered at the remedy hearing on **Friday 21 July 2017** unless the parties arrive at an agreement on remedy.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The claimant will serve an updated schedule of loss on the respondent and the tribunal by **19 May 2017**

2. The respondent will serve a counter schedule of loss on the claimant and the tribunal by **9 June 2017**

3. The parties will agree a joint bundle of documents for the remedy hearing by **23 June 2017**

4. Any witness statements on remedy to be exchanged by **7 July 2017**

3. The parties will seek to agree as many aspects as possible, including gross and net weekly pay, any loss of wages and send an agreed list of what remains in dispute to the tribunal by **17 July 2017**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further

consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

_____
Employment Judge Manley

Date: ……20 April 2017……..

Sent to the parties on: .....

.....
For the Tribunal Office