THE INDUSTRIAL TRIBUNALS

CASE REF: 22996/19

CLAIMANT: **Robert Harbinson**

RESPONDENT: **Hovis Ltd**

JUDGMENT

The unanimous decision of the tribunal is that the claimant's claims that he was discriminated against

(i) on grounds of his disability (direct discrimination); and

(ii) by reason of the failure by the respondent to make a reasonable adjustment contrary to Section 4A of the Disability Discrimination Act 1995;

are not well founded and are dismissed.

The claimant's claim of unauthorised deduction from wages is dismissed as it was not pursued at the hearing.

Constitution of Tribunal:

Employment Judge: **Employment Judge Gamble**

Members: **Mr S Pyper**
Mr I Foster

Appearances:

The claimant was represented by Mr R Cushley, Barrister-at-Law, instructed by John Boston and Company Solicitors.

The respondent was represented by Mr B Mitchell, Barrister-at-Law, instructed by Steeles Law Solicitors Ltd.

BACKGROUND

1. The claimant presented a claim for disability discrimination and unlawful deduction of wages to the tribunal on 10 October 2019. The claim recounted the events which gave rise to his claim. The claimant was not legally represented when he presented his claim.

2. The respondent presented a response, resisting the claimant's claims on 3 December 2019. The response asserted that it was "*entirely unclear as to the nature of this claim as it is wholly unparticularised."*

3. The respondent admitted in the ET3 response that:

   (i) the claimant's condition of bilateral calcification bursitis of the shoulders amounts to a disability for the purposes of the Disability Discrimination Act 1995 ("the 1995 Act") (see paragraph 6.2.32 of the response); and

   (ii) it was under a duty to make reasonable adjustments to accommodate the claimant's disability (see paragraph 6.2.35 of the response).

4. The respondent denied in the ET3 response that the claimant had been subject to direct discrimination on grounds of the claimant's disability, for a reason related to his disability and that the respondent had failed in its duty to make reasonable adjustments. The respondent also resisted the claimant's claim for unauthorised deduction from wages.

AGREED FACTS

5. The claimant has a shoulder condition for which he had been receiving treatment for two years prior to the period in question. He has been diagnosed with Bilateral Calcific Bursitis. A series of adjustments were put in place in respect of the claimant's substantive role prior to the events which gave rise to this claim.

6. In January 2019, the claimant was referred to an Occupational Health Physician by the Company nurse. This appointment did not take place until 4 July 2019. The claimant was off work when this appointment with the Occupational health Physician, Dr Hamilton, took place, due to a flare up of his condition. There was a delay in the issue of Dr Hamilton's report, which was not received by the respondent until the 22 August 2019, when the claimant's Fit Note and expired and he had returned to his substantive role for a number of weeks. In his report, Dr Hamilton, raised concerns that whenever the claimant was able to return to work that the nature of the duties described in his role, even with restrictions and adjustments in place, was likely to cause aggravation of his shoulder condition and lead to recurrent episodes of sickness absence. Dr Hamilton suggested that the possibility of redeployment of the claimant to a job that did not involve repetitive movement of the shoulders should be explored. The claimant returned to work on 18 July 2019, and continued in work until 22 August 2019, when he was suspended from work on medical grounds by the respondent, following receipt of Dr Hamilton's report by the respondent.

7. There was a series of meetings between the respondent and the claimant, namely on 5 September 2019, 10 September 2019 and 4 October 2019. There was also an exchange of correspondence between the claimant and

respondent. During these meetings and in this correspondence, the issue of the claimant's pay was raised on a number of occasions:

(i) In a letter dated 29 August 2019 which stated "As the OHP report has stated that you are not fit in your current role, with the current amendments, and to date there is (sic) no suitable alternatives, then you will have no option but to report as sick from today's date";

(ii) at a meeting on 5 September 2019 when it was minuted that Mr Declan Lavery (the respondent's Operations Manager at its site at Apollo Road, Belfast) told the claimant that he would *"be paid until Tuesday but you need to get a sick line in."* and L.A. (from the respondent's HR) was unable to confirm if the claimant would "get paid for this";

(iii) in a letter dated 9 September 2019, confirming the outcome of the meeting on 5 September 2019, in which Mr Lavery stated: *"Finally, I advised that until the meeting takes place with occupational health on the task-based assessments, the company would continue to pay your normal pay. I must point out however, should the tasks be assessed by Occupational Health and she does not deem any suitable (not to exacerbate your shoulder injury) and all other avenues of redeployment have been explored, then the business will may (sic) not be able to continue to pay you as normal. In this event, you will be invited, in writing to meet formally with us to discuss the outcome of the task assessment, and will have the opportunity to be supported by Laura. You will then be required to attend your GP practice in order to get a sick line, as you are not fit for the job you were employed to do or any other temporary alternative redeployment";*

(iv) in a letter dated 14 September 2019 from Mrs Fiona McKenzie (the respondent's HR Manager responsible for the Belfast site) which stated *"Finally, at present, your pay will remain unchanged. I must point out however, should we be unable to identify any suitable (not to exacerbate your shoulder injury) roles, then the business will not be able to continue to pay you as normal. You will then be required to attend your GP practice in order to get a sick line, as you are not fit for the job you are required to do or any other temporary alternative employment"; and*

(v) at a meeting dated 4 October 2019, extracts from minutes *"OK salary should have remained unchanged however, and why we are here, as a business we feel we have explored all jobs and unfortunately full pay will stop after today…"*.

It is common case that a number of production roles were considered and assessed for the claimant to be redeployed to. However, no alternative production role which would have been suitable for the claimant was identified initially. During this period, there was ongoing consideration of the issue of the claimant's pay leading up to a meeting on 4 October 2019, when his pay was discussed. The tribunal's finding in respect of this meeting is set out at

paragraph 91 below. Despite the outcome of the meeting on 4 October 2019, the claimant's pay was not stopped and he continued to receive his full pay, without interruption. This was communicated to the claimant by letter dated 15 October 2019, emailed to the claimant on 17 October 2019. This letter set out the conditions on which the claimant would continue to receive full pay.

8. Following a further assessment by the Occupational Health Physician on 31 October 2019, the claimant returned to his substantive role as a Production Operative on the pancake line on 21 November 2019.

CASE MANAGEMENT

9. The proceedings were subject to initial case management on 6 February 2020. The Tribunals' building was closed from 23 March 2020 until 8 July 2020 due to the Covid-19 pandemic. The claim was subject to further case management on 19 August 2020 and 11 December 2020. At the Review Case Management Preliminary Hearing on 19 August 2020, the tribunal was informed by Mr Cushley that the Legal and Factual issues that had been lodged with the tribunal were considered to be too narrow, and the claimant was ordered to serve the proposed revised Legal and Factual issues on the respondent by 26 August 2020, with the final agreed Legal and Factual issues to be lodged with the tribunal by 5 September 2020.

10. An agreed statement of Legal and Factual issues was lodged with the tribunal on 2 October 2020.

11. A Progress Review Case Management Preliminary Hearing took place on 11 December 2020 when the parties confirmed that the hearing and reading time previously allocated remained appropriate and that all steps directed at the previous Review Case Management Preliminary Hearing on 19 August 2020 had been done. No further applications were made to the tribunal.

THE BASIS OF THE CLAIMANT'S CLAIM AS SET OUT IN THE CLAIM FORM AND REPLIES

12. As noted at paragraphs 1 and 2 above, the claimant's claim form was narrative in nature. It was characterised by the respondent as *"wholly unparticularised".* The claimant provided particulars of his claim in Replies dated 16 March 2020, in response to a Notice for Particulars from the respondent's solicitors dated 12 March 2020.

13. These set out the basis of the claimant's claims. The request and the claimant's reply (in bold) are set out below:

"3.1 If the claimant is claiming direct discrimination on the grounds of his disability, please state:

3.1.1 Each and every act or omission which the claimant relies upon as less

favourable treatment to which he asserts he was subjected and to which the respondent would not subject a comparator not having the claimant's disability whose relevant circumstances, including abilities, were the same as or not materially different to those of the claimant.

The decision by the respondent to suspend the claimant from work was taken on the grounds of the claimant's disability. The ongoing decision to prevent the claimant from returning to work is further asserted to be an act of direct discrimination.

3.1.1 The name of each comparator relied upon.

The claimant relies on a hypothetical comparator, who is a person who does not have the same disability as the claimant, employed by the respondent during the relevant period, carrying out the same duties and responsibilities as the claimant during that period.

…

3.3 If the claimant asserts that he has suffered discrimination on the grounds that the respondent has failed to comply with a duty to make reasonable adjustments please state:

3.3.1 With full particulars each provision, criteria or practice applied by or on behalf of the respondent upon which the claimant relies; and/or

3.3.2 Each and every physical feature of premises occupied by the respondent upon which the claimant relies.

3.3.3 Each and every respect in which it is alleged that the claimant is or was placed at a substantial disadvantage by the aforesaid provisions, criteria or practice, and/or feature AND the manner in which it is asserted that the adjustment would have ameliorated or limited the alleged substantial disadvantage to which the claimant asserts he was placed.

3.3.1.1 The decision taken to suspend the claimant on 22 August 2019 without considering the obtaining of up to date medical advice.

3.3.1.1.1 The claimant was unnecessarily suspended from work at the time the claimant had been working without any negative consequence. In taking the decision to suspend the claimant the respondent relied on out of date medical advice. This decision put the claimant at a substantial disadvantage as he was not permitted to work.

3.3.1.1.2 By way of a reasonable adjustment the claimant should have been permitted to remain in work, perhaps on reduced duties as appropriate while an up-to-date medical position was obtained.

3.3.1.2 The decision taken to suspend the claimant on 22 August 2019 without considering whether there was alternative employment available

for the claimant.

3.3.1.2.1 The claimant was placed at a substantial disadvantage by not being able to work for a significant period of time.

3.3.1.2.2 By way of a reasonable adjustment, the respondent should have properly and carefully considered what alternative roles may have been available for the claimant and/or what reasonable adjustments could have been made to his current role to enable him to continue working in the role.

3.3.1.3 Failure to consider the appropriateness of the job roles offered to the claimant as suitable alternative employment.

3.3.1.3.1 The claimant was placed at a substantial disadvantage by not being able to work for a significant period of time.

3.3.1.3.2 By way of a reasonable adjustment, the respondent should have properly and carefully considered what alternative roles may have been available for the claimant and/or what reasonable adjustments could have been made to his current role to enable him to continue working within the role.

3.3.1.4 The decision taken to remove the claimant's pay from 4 October 2019.

3.3.1.4.1 The claimant was placed at a substantial disadvantage by losing his income from 4 October 2019.

3.3.1.4.2 The respondent should have given consideration to making a reasonable adjustment to retain the claimant on full pay given that a. his absence was as a result of his disability and b. his absence was by reason of suspension imposed by the respondent."

LEGAL AND FACTUAL ISSUES FOR DETERMINATION BY THE TRIBUNAL

14. Mr Mitchell informed the tribunal, without contradiction, that the final Legal and Factual Issues had been drafted by the claimant's representative. The final Legal issues confirmed that the claimant's claim was:

    (i) a claim of direct discrimination on grounds of his disability contrary to Section 3A(5) of the 1995 Act by the respondent's decision to suspend the claimant on 22 August 2019

    (ii) a claim of failure to make reasonable adjustments contrary to Section 3A(2) of the 1995 Act by suspending the claimant on 22 August 2019 and/or suspending the claimant's pay on 4 October 2019.

15. The claimant's witness statement included matters which occurred some considerable time after the claim had been lodged. These matters were not

included in the claim form and the Replies and would have required to be subject to an amendment application. At the commencement of the hearing, Mr Cushley confirmed to the tribunal that the claimant was not pursuing any claim in respect of a reduction of his salary from his pay leaving the claimant and his family short coming up to Christmas or in relation to the recalculation of his sickness pay. Mr Cushley also confirmed that the claimant was not pursuing any claim in respect of the claimant's absence from work with work-related stress from February 2020 until July 2020 or in respect of the amount of the claimant's wages in July 2020. There is no dispute that the claimant received his wages in full for the relevant period.

16. In light of this and in light of Mr Cushley confirming that the claimant was not pursuing issues of unauthorised deduction from wages, relating to the calculation of the claimant's sick pay (see paragraph 18(i) below), the claimant's claim in relation to unauthorised deduction from wages is therefore dismissed.

17. At the commencement of the hearing, there was also a dispute between the parties as to what the scope of the claim was. After hearing argument on the parties' respective positions, the claimant was ordered to set out particulars of alleged threats to the claimant's pay and the parties were directed to attempt to seek an agreed position. This argument took up the first day of the hearing.

18. On the morning of the second day listed for the hearing:

    (i) Mr Cushley confirmed that the claimant was not pursuing issues of unauthorised deduction from wages, relating to the calculation of the claimant's sick pay and to restrict the discrimination issue to that of the decision made in respect of the claimant's pay on 4 October 2019;

    (ii) Mr Cushley confirmed that the series of alleged threats to the claimant's pay which had been particularised overnight formed part of the background to the claimant's claim;

    (iii) Mr Cushley and Mr Mitchell confirmed that the decision to suspend the claimant on 22 August 2019 was being proceeded with as both a direct discrimination claim and a claim of failure to make reasonable adjustments;

    (iv) Mr Mitchell accepted that, whilst not reflected in the Issues, the pleadings disclosed a claim of failure to make reasonable adjustments for the claimant's substantive role;

    (v) Mr Mitchell did not accept that either the pleadings or the issues disclosed a claim of failure to make reasonable adjustments in respect of the other roles suggested to the claimant;

    (vi) Mr Cushley asserted that the claim of failure to make reasonable adjustments in respect of the other roles suggested to the claimant was disclosed by the alleged failure of the respondent to properly and

carefully consider alternative roles (see Replies at paragraph 13 above);

(vii) Mr Mitchell did not agree that the alleged failure to consider reasonable adjustments in relation to the decision to stop the claimant's pay on 4 October 2019 could also be pursued as an act of direct discrimination as this was not made out in the pleadings or the issues;

(viii) Mr Cushley asserted that the decision to stop the claimant's pay on 4 October 2019 was both an act of direct discrimination and a failure to make reasonable adjustments; and

(ix) Mr Mitchell asserted that the claim in respect of the decision to stop the claimant's pay on 4 October 2019 above had been advanced as a failure to make reasonable adjustments claim only, and not as a direct discrimination claim.

19. Both parties were legally represented in these proceedings when the Notices were replied to. The Replies define the issues for the hearing and the issues to be determined in the judgment. Through the Replies, the parties know the nature of the claims being pursued, the issues to which they should direct their evidence, plan their challenges to the evidence of the other party and identify the issues to which they should direct their submissions on the law and the evidence. Having considered the position of the parties in so far as it was agreed, the Replies and the Issues (recognising that a tribunal is not required to stick slavishly to the Statement of Issues (per **Knox v Henderson Retail Ltd [2017] NICA 17**, approving **Parekh v The London Borough of Brent [2012] EWCA Civ 1650**), the tribunal offered Mr Cushley the opportunity to make an application to amend the Replies to support the additional claims which had been outlined and which were not agreed as having been disclosed by the Replies. The tribunal rose to afford the claimant and Mr Cushley the opportunity to consult. Having done so, Mr Cushley confirmed that the claimant wished to proceed on the basis of the Replies, as drafted.

20. The tribunal proceeded, with the consent of the parties, on the basis that it would resolve the issue of whether a claim of failure to make reasonable adjustments in respect of the other roles suggested to the claimant was disclosed by/implied in the alleged failure of the respondent to properly and carefully consider alternative roles, once it had concluded the evidence and heard further submission on this point (see paragraph 84 below).

21. The tribunal pauses to reflect that these difficulties, and the consequent loss of hearing time, could and should have been avoided by careful attention being given to the content of Replies and the settling of issues, and, once any potential defect or omission had been identified, by raising it with the tribunal immediately. In particular, the tribunal notes that no issue was identified or raised with the tribunal on behalf of the claimant, either after service of the claimant's witness statement dated 23 October 2020, or when the matter was subject to a final Progress Review Preliminary Hearing on 11 December 2020 and when offered the opportunity to amend the pleading at the hearing, the

claimant declined to do so. Mr Cushley's replying submission, on behalf of the claimant, characterised the objection by Mr Mitchell to the belated attempt on behalf of the claimant to recast the nature of the claim on the first day of the final hearing as "bizarre and ludicrous". The tribunal does not view it as either "bizarre" or "ludicrous" to expect a legally represented party to be constrained by its Replies, or the confines of the agreed issues which are based on those Replies.

SOURCES OF EVIDENCE

22. The claimant gave direct evidence by way of his witness statement, was cross examined and re-examined. The tribunal also received a written statement from Laura Graham, the claimant's trade union official, who was unable to attend the hearing and, in those circumstances, little weight has been given to it.

23. The following witnesses gave direct evidence on behalf of the respondent by way of witness statements and were cross examined:

    (i) Fiona McKenzie, the respondent's HR Manager responsible for the Belfast site, following her appointment on 2 September 2019; and

    (ii) Declan Lavery, the respondent's Operations Manager at its site at Apollo Road, Belfast, at all material times. He left the respondent's employment in October 2020.

    Mrs McKenzie was also re-examined.

24. The tribunal was also provided with an agreed bundle of documents and a supplementary bundle relating to the claimant's grievance.

CREDIBILITY

25. There were issues in respect of credibility in respect of the evidence of both parties.

26. In relation to the claimant's evidence, it was apparent from Mr Mitchell's cross examination of him in relation to his sickness absence record, that the claimant's evidence as set out in paragraph 3 of his witness statement, when he stated:

    > *"Throughout 2019 being the period in question with regard to this claim I would say that the only period when I was unfit due to my shoulders was from 22nd June 2019 until 18th July 2019"*

    was inaccurate The claimant accepted that his evidence in this regard was not accurate. Apart from that inaccuracy, which the claimant accepted, the tribunal found that the claimant was doing his best to provide an account that accorded with his understanding and recollection of the events in question.

27. In relation to the respondent, Mr Lavery stated, under cross examination, that he did not prepare his own statement. He was asked *"Did you draft it yourself?"* and answered *"No."* He then informed the tribunal that it was drafted by the company the respondent uses for legal advice. Mr Mitchell, in the respondent's closing submission stated: *"It is unsurprising (and perfectly normal) for Mr Lavery to have had assistance from the Respondent's legal team in preparing his statement given the time consuming mechanics of drafting a detailed statement."* A witness statement for tribunal proceedings should be prepared by the witness, as it will be adopted as their evidence in chief. The tribunal has therefore accepted Mr Lavery's evidence where it was corroborated by the oral evidence of other witnesses and/or the documentary evidence in the bundle.

RELEVANT LAW

28. **The Disability Discrimination Act 1995**

Section 3A Meaning of "Discrimination":-

"(1) For the purposes of this Part a person discriminates against a disabled person if –

...

(2) For the purpose of this Part a person also discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person.

…

(5) A person directly discriminates against a disabled person if, on the grounds of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances including his abilities are the same as, or not materially different from, those of the disabled person.

(6) If, in a case falling within sub-section (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that cannot be justified under sub-section (3) unless it would have been justified even if he had complied with that duty."

Burden of Proof

4A Employers: duty to make adjustments

"(1) Where –

(a) a provision, criterion or practice applied by or on behalf of an employer, or

(b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.

(2) In subsection (1), "the disabled person concerned" means –

(a) in the case of a provision, criterion or practice for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment;

(b) in any other case, a disabled person who is –

(i) an applicant for the employment concerned, or
(ii) an employee of the employer concerned.

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

(a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the employment; or
(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."

Section 17A (Enforcement, remedies and procedure):-

"…

1(B) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act.

(2) Where an industrial tribunal finds that a complaint presented to it under this section is well-founded, it shall take such of the following steps as it considers just and equitable—

(a) making a declaration as to the rights of the complainant and the respondent in relation to the matters to which the complaint relates;

(b) ordering the respondent to pay compensation to the complainant;

(c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(3) Where a tribunal orders compensation under subsection (2)(b), the amount of the compensation shall be calculated by applying the principles applicable to the calculation of damages in claims in tort for breach of statutory duty.

(4) For the avoidance of doubt it is hereby declared that compensation in respect of discrimination in a way which is unlawful under this Part may include compensation for injury to feelings whether or not it includes compensation under any other head.

…"

18B Reasonable adjustments: supplementary

"(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

…

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments—

(a) …

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

(e) assigning him to a different place of work or training;

…

(l) providing supervision or other support.

..."

18D Interpretation of Part II

"(1) Subject to any duty to make reasonable adjustments, nothing in this Part is to be taken to require a person to treat a disabled person more favourably than he treats or would treat others.

(2) In this Part –

…

"provision, criterion or practice" includes any arrangements."

The Disability Code of Practice

The duty in s. 18B is explored in the Code of Practice, at paragraphs 5.18 and following. The Code of Practice includes the following provisions.

> *"5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its cost and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the employer, or by a physical feature of the premises it occupies, the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so, the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable.*

…

5.26 If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled person in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments, such as those carried out for the purposes of the Management of Health and Safety at Work Regulations (NI) 2000, should be used to help determine whether such risks are likely to arise.

…

5.36 It is more likely to be reasonable for an employer with substantial financial resources to have to make an adjustment with a significant cost, than for an employer with fewer resources. The resources in practice available to the employer as a whole should be taken into account as well as other calls on those resources. For larger employers, it is good practice to have a specific budget for reasonable adjustments - but limitations on the size of any such budget does not mean that an employer does not have duties to its disabled employees. The reasonableness of an adjustment will depend not only on the resources in practice available for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

5.37 It is more likely to be reasonable for an employer with a substantial number of staff to have to make certain adjustments, than for a smaller employer." (Tribunal's emphasis.)

THE CASE LAW RELIED UPON AND SUBMISSIONS ON BEHALF OF THE PARTIES

29. The tribunal is grateful to the representatives for their helpful submissions. The submissions, which were forwarded to the panel after the evidence was completed and which are attached to this judgment, were considered by the panel in their deliberations.

30. Mr Cushley referred the tribunal to the following authorities:

Glasgow City Council v Zafar [1998] IRLR 36
High Quality Lifestyles Ltd v Watts [2006] IRLR 850
Nagarajan v London Regional Transport [1999] IRLR 572
Archibald v Fife Council [2004] IRLR 65
Environment Agency v Rowan [2008] IRLR 20
Smith v Churchills Stairlifts plc [2005] EWCA Civ 1220
Carrera v United First Partners Research UKEAT/0266/15
Lamb v The Business Academy Bexley [2016] All ER (D) 228
Igen v Wong [2005] IRLR 258 (EWCA)
McDonagh & Others v Samuel John Hamilton Thom t/a The Royal Hotel Dungannon [2007] NICA 3
Nelson v Newry & Mourne District Council [2009] NICA
Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8

Chamberlain Solicitors v Emokpae [2004] IRLR 592 EAT
Chief Constable of West Yorkshire v Vento [2001] IRLR 124
HM Prison Service v Johnson [2007] IRLR 951

31. Mr Mitchell referred the tribunal to the following authorities:

McCorry v McKeith [2017] IRLR 253; [2016] NICA 47
Owen v Amec Foster Wheeler Energy Ltd [2019] ICR 1593; [2019] EWCA Civ 822
Environment Agency v Rowan [2008] IRLR 20
Royal Bank of Scotland v Ashton [2011] ICR 632
Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664
General Dynamics Information Technology Ltd v Carranza [2015] ICR 169
Project Management Institute v Latif [2007] IRLR 579
Ishola v TfL [2020] EWCA Civ 112; [2020] IRLR 368
Carphone Warehouse Group plc v Martin UKEAT/0371/12

BURDEN OF PROOF

32. In **McCorry and Others (as the committee of Ardoyne Association v McKeith [2017] NICA IRLR 253** the Northern Ireland Court of Appeal summarised the relevant law regarding the passing of the burden of proof:

> ***"39*** *The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in* ***Igen Ltd v Wong [2005] IRLR 258****. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*
>
> ***40*** *The issue was revisited by the Court of Appeal in England and Wales in* ***Madarassy v Nomura International plc [2007] IRLR 246*** *which set out the position as follows (italics added):*
>
> > *'56. The Court in* ***Igen v Wong*** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

57. "Could conclude" [in the Act] must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.' "

33. In **McDonagh and Others v Thom [2007] NICA 3** Kerr LJ, as he was then, noted that direct evidence of discrimination is unusual and will usually be a matter of inference to be drawn from the primary findings of fact.

"19. For the purposes of the present case the first question that the judge should have articulated was, 'Have the plaintiffs proved on the balance of probabilities facts from which I could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against them?'. In addressing this question, it would be necessary for the judge to bear a number of ancillary issues in mind. First, that it is unusual to find direct evidence of discrimination. Secondly, that the conclusion on the preliminary issue will usually be a matter of inference to be drawn from the primary facts. Thirdly, it must be clearly understood that the plaintiffs do not have to discharge a final burden, merely whether on the facts as found, it is possible to draw the inference of discrimination and finally it must be assumed at this stage that no adequate explanation for the discrimination exists."

34. In relation to a failure to comply with the duty to make reasonable adjustments, in **Project Management Institute v Latif [2007] IRLR 579**, Elias P observed:

> *"45. We observe in passing that we very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice, or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant. These are not issues where the employer has information or beliefs within his own knowledge which the claimant cannot be expected to prove. To talk of the burden shifting in such cases is in our view confusing and inaccurate."*

He stated at paragraph 53 and following of the judgment:

> *" 53 …It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.*
>
> *54…The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*
>
> *55 We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."*

35. In **HM Prison Service v Johnson [2007] IRLR 951** the EAT held

> *"We are not to be taken as saying that it was incumbent on either the claimant, in advancing the case, or the tribunal, in deciding it, to identify a precise alternative posting, with every detail worked out. The degree of specificity required would depend on the nature of the evidence and the issues. In some circumstances a finding that there were "plenty of*

other jobs" which a claimant could have been moved to might be sufficient (at least for liability purposes). But it is necessary that that finding be made. The tribunal never made a clear finding that (in relation to stages 1 and 2) there was another 'non-hostile' prison psychology department or (in relation to stages 3 and 4) another suitable job elsewhere in the prison service or the Home Office to which the claimant could reasonably have been transferred (or academic course to which she could have been seconded)."

DIRECT DISCRIMINATION

36. A claim of direct discrimination, in practice will require a tribunal in its decision to consider, firstly, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue*).* (**Glasgow City Council v Zafar [1998] IRLR 36.**)

37. Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. In doing so, the tribunal is addressing the question of whether the claimant, on the proscribed ground, received less favourable treatment than others.

38. In **Nagarajan v London Regional Transport [1999] IRLR 572**, a case which examined direct discrimination in the context of race relations, Lord Birkenhead set out the "crucial question":

> *"Thus, in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence, which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so?"*

39. In **McCorry v McKeith [2016] NICA 47** the Northern Ireland Court of Appeal considered the question of the reasonable comparator and cited with approval Lord Hoffman in **Watt (Carter) v Ahsan [2008] 1 AC 696:**

> *"…The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in each case should be (or be assumed to be) the same as, or not materially different from, those of the complainant…."*

40. The construction of an appropriate hypothetical comparator was also considered in **High Quality Lifestyles Ltd v Watts [2006] IRLR 850**. The EAT held that:

> *"The comparator may be, but need not be, the same comparator as is envisaged for the purpose of disability-related discrimination. For example, for direct discrimination, the comparator may be a person who does not have the claimant's disability, and may not have a disability at all. The comparator might have a condition which falls short of the kind of impairment required to satisfy s.1 of the Act. This is because s.3A(5) focuses upon a person who does not have 'that particular disability'. The circumstances of the claimant and of the comparator must be the same 'or not materially different'. One of the circumstances is the comparator's 'abilities', but since this is prefaced by 'including', it follows that more circumstances are relevant than simply the comparator's abilities."*

41. Considering the question of the "reason why" the claimant was treated as he was can avoid "arid and confusing disputes" about the identity of the appropriate comparator (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.**)

FAILURE TO MAKE REASONABLE ADJUSTMENTS

42. In **Environment Agency v Rowan [2008] IRLR 20**, the EAT stated:

> *"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:*
>
> *(d) the provision, criterion or practice applied by or on behalf of an employer,*
>
> *…*
>
> *(c) the identity of non-disabled comparators (where appropriate) and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the Claimant. …*
>
> *In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."* (Tribunal's emphasis.)

43. In **Carreras v United First Partners Research UKEAT/0266/15/RN** the Employment Appeals Tribunal held

> *"In approaching the statutory definition, the protective nature of the legislation meant a liberal, rather than an overly technical approach, should be adopted (**Nottingham City Transport Ltd v Harvey UKEAT/0032/12/JOJ** at para 18; EHRC Code of Practice on Employment 2011 at para 6.10"*

44. In **Lamb v The Business Academy Bexley UKEAT/0226/15**, a case brought under the Equality Act 2010, which is not in force in Northern Ireland, Simler J held that:

> ***"**26. The phrase "PCP" is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions…"* (Tribunal's emphasis.)

The statutory Code of Practice ("Equality Act 2010 Statutory Code of Practice: Employment" (2011) issued by the Equality and Human Rights Commission),in respect of the Equality Act 2010 which is in force in GB, but not Northern Ireland, provides as follows:

> *"6.10 The phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, or qualifications including one-off decisions and actions …"*

45. In **Lamb**, Simler J cited with approval the dictum of Langstaff P in **Nottingham City Transport v Harvey** which is set out at paragraph 46 below. The EAT concluded in **Lamb** that:

> *"29. The practice relied on by the Claimant was an asserted practice that was in fact repeated. Just by reference to the investigation in the Claimant's own case, there was repeated delay: first in the process adopted by Ms Haylett that took some four months from complaint to a potential outcome, and then again in relation to the investigation conducted by Mr Atkinson where a similar delay ensued both at the investigation stage and again at the appeal stage. Even if the Claimant had some responsibility for part of that delay, it seems to us that the Respondent was in charge and responsible for the grievance process and for the extent of the delay. The Respondent's practice of delay in delivering a timely grievance outcome was capable of being a PCP for these purposes. The Claimant was not contending that she was physically forced to return to work during September 2012 or in the period that followed. It is apparent, and no doubt an inference as a matter of common sense, that she felt pressure to return, perhaps*

because she was on reduced pay, and in circumstances where her sick pay would come to an end in April 2013.

…

30. … it is apparent that the Tribunal understood the PCP to involve a one-off decision requiring the Claimant to return to work in September 2012. That probably explains the conceptual difficulty the Tribunal had in describing what it interpreted as a one-off decision by the Respondent as not being reasonably capable of being regarded as a PCP. Had the Tribunal been addressing the PCP actually contended for, which involved a relatively long period over which it was said that the grievance investigation was not fairly completed with no outcome provided, the same conceptual difficulty would not have arisen."

46. In **Nottingham City Transport v Harvey UKEAT/0032/12/JOJ,** at paragraph 18 of the decision, Langstaff P stated:

""Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply."

Paragraph 21 of that judgment states:

"it seems plain to us that the Tribunal erred in law by identifying the particular flawed disciplinary process that the Claimant underwent as being something that fell within the heading "provision, criterion or practice", and, as Mr Soor points out, as showing that because of his disability those aspects caused a disadvantage over others who were not disabled, when it may seem obvious that a failure to consider mitigating circumstances and a failure reasonably to investigate is likely to cause misery whoever is the victim. Accordingly, as it seems to us, the appeal must be allowed." (Tribunal's emphasis.)

47. In **Carphone Warehouse Ltd v Martin UKEAT/0371/12/JOJ,** the EAT held that neither incompetence nor failing to take care could properly be construed as amounting to a breach of Section 4A of the 1995 Act. It held:

"First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer. Secondly, the obligation created by s 4A is to take steps, or such steps as are reasonable. However it is phrased, what the Employment Tribunal were saying, in effect, was that The Carphone Warehouse had failed to take proper care in preparing Mr Martin's pay packet in July 2010. Taking

care cannot be properly described, in our view, as taking a step or steps for the purposes of s 4A(1) of the DDA. What the Employment Tribunal is seeking to do, perhaps understandably, is to give the Claimant a remedy for what they regard as rather egregious incompetence by The Carphone Warehouse, but we do not think the facts can be shoehorned into the relevant provisions of the DDA. Therefore, that finding of discrimination, in our view, cannot stand.

…

Again, we consider the upholding of the DDA claim based on those findings as misconceived, for similar reasons as in relation to the pay matter. First, incompetence or a woeful lack of application, or a failure to stick to your own time limits, cannot, in our view, be properly characterised as a "provision, criterion or practice applied" by an employer. Secondly, avoiding delay cannot be characterised as the taking of steps. So, for very similar reasons as we have already explained on the other disability discrimination claim, we consider that the findings of the Employment Tribunal at paragraph 2(d) cannot stand."

48. The Court of Appeal considered the meaning of the phrase "provision, criterion or practice" in **Ishola v TfL [2020] EWCA Civ 112; [2020] IRLR 368.** Whilst this case was brought under the Equality Act 2010, and not the Disability Discrimination Act 1995, the discussion by the Court regarding the meaning of PCP is helpful:

"*35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the statutory code of practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.*

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. … To test whether the

PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

39. In that sense, the one-off decision treated as a PCP in ***Starmer [2005] IRLR863*** *is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J (President) referred to "practice" as having something of the element of repetition about it. In the* ***Nottingham*** *case [2013] Eq LR 4 in contrast to* ***Starmer****, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."* (Tribunal's emphasis.)

49. In **Environment Agency v Rowan**, the EAT noted:

> *"As has been observed in other cases what s.4A and s. 18B(2) envisage is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining what steps should be taken."* (Tribunal's emphasis.)

50. In **Royal Bank of Scotland v Ashton [2011] ICR 632** Langstaff J held

> *"24 Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not—and it is an error—for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."* (Tribunal's emphasis.)

51. In **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664** the EAT explained that the duty is about results (i.e. whether the employer made the required reasonable adjustments), not about the process it followed in considering them (paragraph 71):

> *"The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in **Archibald v Fife Council [2004] IRLR 651**. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough."*

52. In **General Dynamics Information Technology Ltd v Carranza [2015] ICR 169** (a case brought under the Equality Act 2010) the EAT held that**:**

> *"37. The general approach to the duty to make adjustments under s.20(3) is now very well-known. The employment tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the employment tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the 'step'. Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take. …*
> *…*

46. I have therefore concluded that the majority finding of a failure to make reasonable adjustments cannot stand. To my mind, the majority did not identify any 'step' for the purposes of s. 20(3), concentrating instead on the respondent's process of reasoning."

RELEVANT FINDINGS OF FACT, APPLICATION OF THE LAW AND CONCLUSIONS

DIRECT DISCRIMINATION ON GROUNDS OF DISABILITY

Was the decision to suspend the claimant on 22 August 2019 and to keep him suspended thereafter until his return to his substantive role made on grounds of his disability?

53. The tribunal finds that the claimant was not directly discriminated against on grounds of his disability in the decision to suspend the claimant on 22 August 2019 and to keep him suspended thereafter.

54. The tribunal notes that the claimant relies upon a hypothetical comparator. The tribunal agrees with the submission made by Mr Mitchell on behalf of the respondent and finds that, per **Ahsan** as cited with approval in **McKeith** (see paragraph 39 above) that the appropriate comparator is a non-disabled employee in relation to whom Occupational Health ("OH") had advised it would be harmful for him to continue work. The receipt of the occupational health report raising the same or similar concerns is a relevant circumstance in making the comparison required by Section 3A(5) of the 1995 Act.

55. The tribunal finds that such a hypothetical comparator would have been treated in an identical manner to the claimant and medically suspended from the workplace upon receipt of the medical report from the Occupational Health Physician, Dr Hamilton, which recorded his concern that *"whenever Mr Harbinson is able to return to work that the nature of the duties described in his role, even with restrictions and adjustments in place, is likely to continue to cause aggravation of his shoulder condition and lead to ongoing recurrent episodes of sickness absence."* In such circumstances, there is no less favourable treatment between the claimant and the comparator, and therefore no discrimination on grounds of disability. Per **Zafar** (see paragraph 36 above), there is no discrimination as the tribunal is satisfied that such a hypothetical comparator would have been suspended from his duties, and would have likewise remained suspended from his duties whilst redeployment opportunities were investigated.

56. Even if the tribunal has erred in finding that there was no less favourable treatment in this regard, the tribunal finds, having accepted the evidence of both Mrs McKenzie and Mr Lavery that the claimant was suspended because of the employer's duty of care, that the "reason why" (see **Zafar** at paragraph 36 and **Shamoon** at paragraph 41 above) the claimant was treated as he was is that the respondent was acting to protect his health and avoid an aggravation of his shoulder injury, and not on grounds of his disability. The claimant, during cross examination, accepted that the respondent had a duty

of care towards him.

57. In his closing submission, Mr Cushley submitted on behalf of the claimant that:

> *"The less favourable treatment [was] the decision to suspend the Claimant from work and the ongoing decision to keep the Claimant suspended for 12 weeks. It is only in looking at this case in the round do we get a flavour that the act of suspension in its entirety was done on the grounds of the Claimant being a disabled person. Mr Lavery had tired of the Claimant, had grown frustrated with him, and retained an unhealthy degree of scepticism of the Claimant's condition"* and that *"by August 2019 had seized an opportunity to potentially get rid of the Claimant".*

The tribunal is not satisfied on the basis of the evidence before it, that Mr Lavery had tired of the claimant, that he had grown frustrated with him or that he retained an unhealthy degree of scepticism of the claimant's condition. The tribunal notes the content of Mr Lavery's letter of 15 October 2019 when he stated:

> *"You advised me that you felt the business did not want you to return to work. I pointed out to you that this was not the case and that we were short staffed and would be delighted to have you return to work, but emphasised the business has a duty of care to follow the guidance provided by the OHP."*

The tribunal accepts Mr Mitchell's submission that if the Respondent had truly wanted to 'get rid' of the Claimant, it would not have disapplied the Attendance policy, nor continued to pay him in full.

58. The tribunal concludes that the decision to suspend the claimant on 22 August 2019 and keep him suspended thereafter was not made on grounds of his disability and the claimant's claim of direct discrimination on grounds of disability is dismissed.

FAILURE TO MAKE REASONABLE ADJUSTMENTS

59. The tribunal notes that the respondent has admitted that it was under a duty to make reasonable adjustments to accommodate the claimant's disability. Notwithstanding this admission, the tribunal notes that, in assessing whether there has been a breach of the duty to make reasonable adjustments, it must still go through the process of identifying the provision, criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators (where appropriate) and the nature and extent of the substantial disadvantage suffered by the Claimant. As noted in **Environment Agency v Rowan** (see paragraph 42 above) it is for the tribunal to identify the PCP, the identity of the non-disabled comparators and the nature and extent of the substantial disadvantage, and that unless the tribunal has identified these matters, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the

provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

Was there a failure to make a reasonable adjustment by the respondent in suspending the claimant on 22 August 2019?

60. Mr Cushley on the first day of the hearing and at paragraph 56 of the claimant's closing submission stated that the decision to suspend the claimant amounted to a PCP. In his closing submission, Mr Cushley stated that the disadvantage the claimant was placed at was an inability to work. The tribunal is mindful that it is for the tribunal to identify the PCP per **Rowan** (see paragraph 42 above) in assessing whether there has been a breach of the duty. The tribunal is satisfied that the decision to suspend was consequent upon the application of a requirement that employees of the respondent should discharge their usual duties of work in a manner which would not risk causing damage to their health.

61. In light of the respondent's admission that it was under a duty to make reasonable adjustments to accommodate the claimant's disability, the tribunal has proceeded on the assumption that the claimant was placed at a substantial disadvantage and that that disadvantage was the disadvantage identified by Mr Cushley, namely the claimant's inability to work.

Reasonable adjustments contended for by the claimant:

62. In the claimant's replying submission, the claimant relies on **Latif** (see paragraph 34 above) and suggests that potential reasonable adjustments were explored during the hearing. In particular, the claimant suggests that steps which would have prevented the disadvantage were explored during cross examination, namely:

    (a) **Whether the respondent had given any consideration to obtaining up to date medical evidence prior to suspending the claimant;**

    (b) **Whether the respondent could have contacted Dr Hamilton to ascertain whether his advices would still stand given the passage of time from his report; and**

    (c) **Whether the respondent could have conducted an assessment as to whether the claimant could have conducted some of the tasks on each line as opposed to the entirety of the role.**

    The tribunal does not accept that either of the measures at (a) or (b) above would have made it safe for the claimant to continue to work on the day he was suspended and these are not therefore reasonable adjustments which the respondent failed to take. Further, the suggestion at (a) above is, in effect, a suggestion that the respondent ought to have disregarded the opinion of Dr Hamilton. The tribunal finds that this would not have been a reasonable

adjustment, as it would not be reasonable to disregard medical advice, when to do so could place an employee at risk of suffering harm. This would breach paragraph 5.26 of the Code of Practice (see paragraph 28 above.)

In relation to the potential adjustment at (c) above, the tribunal agrees with and accepts, as its reasoning, Mr Mitchell's closing submission at paragraph 59 that:

> *"The only conceivable adjustment that could have been made would be to have found the Claimant alternative work straightaway. That would not have been a reasonable adjustment: the Respondent needed time to assess whether those alternative jobs would be safe for the Claimant and thus consistent with its duty of care, and the Claimant needed time to consider his options and speak to his union; it would not have been fair or reasonable to give him a new post without this."*

63. The tribunal therefore concludes that there has been no breach of the duty to make reasonable adjustments because the tribunal, acting as an industrial jury, finds that there was no adjustment which could reasonably have been made or any other action which could have been taken by the respondent other than to suspend the claimant on full pay on 22 August 2019, in light of their duty of care to the claimant arising on the receipt of Dr Hamilton's report. **Latif** (see paragraph 34 above) establishes that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

64. The tribunal therefore finds that there has been no failure by the respondent to make reasonable adjustments in relation to the decision to suspend the claimant on 22 August 2019 and the claimant's claim in that respect is not well founded and is dismissed.

Was there a failure to make a reasonable adjustment by the respondent in keeping the claimant suspended after 22 August 2019?

65. Mr Cushley on the first day of the hearing and in the closing submissions contended that the decision to keep the claimant suspended after 22 August 2019 amounts to a PCP. The disadvantage that Mr Cushley says the claimant was placed at was an inability to work. The tribunal is satisfied that the continued suspension of the claimant was also consequent upon the application of a requirement that employees of the respondent should discharge their usual duties of work in a manner which would not risk causing damage to their health.

66. In light of the respondent's admission that it was under a duty to make reasonable adjustments to accommodate the claimant's disability, the tribunal has proceeded on the assumption that the claimant was placed at a

substantial disadvantage and that that disadvantage was the disadvantage identified by Mr Cushley, namely the claimant's inability to work, with consequent stress and anxiety arising due to the ongoing background threat to the claimant's pay, as set out at paragraph 5 above.

Reasonable adjustments contended for by the claimant:

67. In the claimant's replying submission, Mr Cushley contended that the following steps, which he submits would have been reasonable adjustments that would have prevented the disadvantage arising on the continuing suspension of the claimant, were explored in cross examination, namely:

> **"b. Whether the respondent could have contacted Dr Hamilton to ascertain whether his advices would still stand given the passage of time from his report;**
>
> **c. Whether the respondent could have conducted an assessment as to whether the claimant could have conducted some of the tasks on each line as opposed to the entirety of the role;**
>
> **d. Whether the despatch and or bread wrapping roles could be done in a way other than a 12-hour shift;**
>
> **e. Whether the respondent could have looked at an alternative role for the claimant that did not require repetitive shoulder movements;**
>
> **f. Whether the respondent could have identified an administrative role suitable for the claimant sooner; and**
>
> **g. Whether the respondent could have kept the claimant on full pay pending the outcome of discussions."**

Findings of Fact in relation to whether there was a failure to make a reasonable adjustment by the respondent in keeping the claimant suspended after 22 August 2019:

68. The tribunal is satisfied that it was reasonable for the respondent to keep the claimant suspended after 22 August 2019 and consequently that there was no failure to make a reasonable adjustment by the respondent in so doing. It was reasonable to keep the claimant suspended, and there was no viable alternative to doing so, whilst the suitability of alternative roles was explored with the claimant and assessed.

69. The tribunal finds that Mr Lavery's letter, following the meeting with Mr Lavery and LA, an HR Officer of the respondent, on 5 September 2019, appears to set out a reasonable initial approach to considering redeployment opportunities and the letter records the claimant agreed that the proposed "hotplate" role would likely be the best area for the claimant, albeit as a

"stepping stone" until he received treatment for his injury.

70. The tribunal finds that the hotplate and speciality breads production roles were considered for the claimant. It is clear that after further consideration, both the claimant and the Occupational Health nurse agreed that these roles were unsuitable for the claimant to be redeployed to. The claimant's ability to carry out production roles within Speciality/Roll specific and Hotplate/Wrapping was assessed by the respondent's in house Occupational Health nurse using the Health and Safety Executive ART tool on 10 September 2019. The claimant, in his evidence to the tribunal, deemed transfer to either of these areas as unsatisfactory, describing the roles that were offered as "more manual than my own job". The Occupational Health Nurse also concluded that both tasks, even with rotation, presented very similar risk factors for the claimant and concluded that both of these roles could aggravate the claimant's condition. However, her assessment also noted that there were no administrative, supervisory or writing tasks observed that would cause issues for the claimant in these areas.

71. The tribunal finds that following the consideration of the hotplate and speciality bread roles, the claimant suggested an exploration of a role within dispatch, which includes decanting, undertaking administrative roles as well as undertaking his shop steward duties during his shifts. A further workplace assessment was conducted by the Occupational Health nurse on 18 September 2019. The Despatch Operative role was one which rotates over various tasks over a twelve hour shift. An analysis of this role showed that the shift was roughly divided between decanting, wheeling up, picking and packing (which included stacking and lifting baskets, pushing and pulling basketeers, as well as labelling and driving the roller truck. The assessment concluded that the requirements in respect of decanting, wheeling up and picking and packing involved risk to the claimant. The assessment noted that the claimant could however undertake driving of roller trucks with training and was capable of the administrative and supervisory tasks.

72. In relation to the suggested amendment at paragraph **67 b.** above, namely **whether the respondent could have contacted Dr Hamilton to ascertain whether his advices would still stand given the passage of time from his report**, the tribunal finds that there was no requirement for the respondent to do so, as Dr Hamilton's opinion expressly acknowledged the possibility that the claimant would be fit to undertake his duties, yet still be at risk of aggravating his condition (see paragraph 55 above). In any event, the respondent did seek updated advice from the Occupational health Physician on 25 October 2019, and the further Occupational Health report ultimately opened the way for the claimant to return to his substantive role. The respondent therefore ultimately took this step, as suggested by Mr Cushley, which ameliorated the disadvantage at which the claimant was placed. The tribunal does not criticise the respondent for the time taken to seek updated advice in the particular circumstances, where redeployment, in line with Occupational Health advice, was being explored actively and the claimant had not disputed the accuracy of Dr Hamilton's report.

73. In relation to the suggested adjustment at paragraph **67 c**. above, namely, **whether the respondent could have conducted an assessment as to whether the Claimant could have conducted some of the tasks on each line as opposed to the entirety of the role**, the tribunal finds that the respondent did assess the constituent requirements of the redeployment roles and did identify those which the claimant was capable of carrying out. The tribunal finds that in relation to the role within despatch, consideration was given to the claimant conducting some of the tasks which he could perform, namely driving and supervisory roles. The tribunal finds that the respondent did not proceed to do so because of the need for rotation of staff, arising from its duty of care to ensure the Health and Safety of all staff. The tribunal finds that in accordance with paragraph 5.26 of the Code of Practice (see paragraph 28 above) that to remove these rotational duties from other staff and give them to the claimant would not have been a reasonable adjustment, as the tribunal accepts the evidence of Mrs McKenzie and Mr Lavery that rotation was needed in the despatch role to give respite to employees in those roles from the more physical tasks during a long shift, in order to protect other employees from injury. To have given these duties to the claimant would have increased the risk of injury to other employees. In addition, the claimant in cross examination accepted that the supervisory roles would have meant undertaking duties above his level of employment. The tribunal finds that the claimant was not fit to undertake all of the requirements in the alternative roles he was assessed for. The tribunal accepts that the approach of the respondent in considering whether the claimant could be redeployed to a different role, in not removing duties from other employees, where these were required for respite, was reasonable and in line with both s.18B of the 1995 Act as explained paragraph 5.26 of the Code of Practice (see paragraph 28 above).

74. In relation to the suggested adjustment at paragraph **67 d**. above, namely, **whether the despatch and or bread wrapping roles could be done in a way other than a 12-hour shift**, there was no evidence adduced to the tribunal that the carrying out of these roles in any other way than on a 12 hour shift would have ameliorated the substantial disadvantage to which the claimant was placed, by allowing him to return to work without risk of exacerbating his condition. The tribunal finds that some of the requirements of these roles, on medical advice, were believed to place the claimant at risk. The tribunal also accepts the evidence of Mr Lavery that it would have been very difficult to engage and retain Agency staff for a two hour section of the shift.

75. In relation to the suggested adjustment at paragraph **67 e**. above, namely, **whether the respondent could have looked at an alternative role for the claimant that did not require repetitive shoulder movements**, it was not unreasonable to consider redeploying the claimant to extant roles first. The tribunal is satisfied that the respondent is in the business of production and that in a production environment, the production roles available to the claimant involved repetitive shoulder movements. The tribunal finds that the respondent's approach in considering whether the claimant could be transferred to another operative role, before considering other steps was reasonable. Although the tribunal has found that approach, namely to look at

existing job roles first, to be reasonable, the tribunal pauses to reflect that once this approach failed it would be reasonable for an employer of the size and with the resources of the respondent to consider whether a "pieced together" role made from blending duties from a number of roles, including administrative roles, could be offered. It is clear that the respondent accepts that such an approach was reasonable, as ultimately it was able to offer the claimant such a "pieced together" administrative role.

76. In relation to the suggested adjustment set out at paragraph **67 f.** above, namely, **whether the respondent could have identified an administrative role suitable for the claimant sooner**, this is in effect a criticism of the process that was followed by the respondent as per **Rowan, Ashton** and **Tarbuck** (see paragraphs 49 to 51 above.) The tribunal is satisfied that the administrative role was identified within a reasonable time, having first considered and explored the availability of other production roles. The tribunal notes that the claimant did suggest being paid to carry out his trade union duties for part of his time. The tribunal finds that it would not have been a reasonable adjustment for the respondent to pay the claimant to carry out duties for the trade union. In any event, administrative duties for 30 hours per week were ultimately offered to the claimant as recorded in a letter dated 15 October 2019 from Mr Lavery, with details of the role provided by Mrs McKenzie, by email dated 21 October 2019. The tribunal is satisfied that this adjustment, which would have addressed the disadvantage at which the claimant was placed, was offered by the respondent. However, the claimant ultimately was not redeployed to that administrative role, following the outcome of a further Occupational Health assessment that was arranged by the respondent. The tribunal notes that the respondent's closing submission, on the table set out at pages 23-24 referred the tribunal to page 230A of the hearing bundle to support the respondent's contention *"Claimant did not accept the temporary administration role".* The tribunal is satisfied that Mr Mitchell's submission in this regard is not consistent with the content of the email dated 23 October 2019, from the claimant's trade union representative, set out at page 230A of the hearing bundle. This email did not communicate that the claimant did not accept the administration role. The email stated the claimant*"…has expressed a concern that he has still not been able to get an appointment with his GP to review the latest proposed job role so he wouldn't be in a position to agree this role on Friday, however wants to reassure the company he wishes to discuss it at a later date after a GP appointment."*

77. In relation to the suggested adjustment at paragraph **67 g.** above, namely, **whether the respondent could have kept the claimant on full pay pending the outcome of discussions**, the tribunal is satisfied that, despite the respondent informing the claimant that his pay would be stopped, the claimant's pay was not in fact stopped. Instead, the claimant was kept on full pay pending the outcome of discussions. The tribunal accepts that there could have been a potential overlap between this point and the consideration of the claimant being told that his pay would stop and this latter point is considered at paragraphs 92 to 97 below.

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78. The tribunal, in light of its findings and analysis above, concludes that

there was no failure to make reasonable adjustments in keeping the claimant suspended from 22 August 2019 until 21 November 2019, when he returned to work following a further Occupational Health assessment on 31 October 2019 and the claimant's claim in that respect is dismissed.

Was there a failure to make reasonable adjustments for the claimant's substantive role?

79. Mr Cushley in his closing submission contended that:

> *"58. The decision by the Respondent not to consider or look into making reasonable adjustments in respect of the Claimant's own role is a PCP. The Claimant as a disabled person is entitled to have the Respondent consider making reasonable adjustments. A total failure to consider making reasonable adjustments placed the Claimant at a substantial disadvantage as he lost the chance to be able to resume his role with additional adjustments."*

80. The tribunal is not satisfied that this decision by the respondent in respect of the claimant is a valid PCP, as it lacks the quality of repetition referred to in **Lamb** and **Nottingham City Transport** (see paragraphs 45 and 46 above) needed to be a practice. The impugned decision relates only to the claimant's role, so that it cannot be considered to have been applied to other workers, to allow for the comparative exercise required by s.4A(1)(b) (see paragraph 28 above.)

81. Even if the tribunal has erred in this finding, there is no dispute between the parties that a significant number of reasonable adjustments already had been put in place by the respondent to support the claimant's employment in his substantive role, prior to his suspension. The claimant during cross examination confirmed that no further adjustment was required to his substantive role, beyond the adjustments already in place, when he returned to that role in November 2019, following the assessment by Dr Curran, Occupational health Physician, dated 31 October 2019.

82. The claimant has not identified any specific further adjustments which could have been made to the claimant's substantive role and which would have prevented the substantial disadvantage, by way of a further reasonable adjustment. As per the finding of the tribunal, at paragraph 62 above, disregarding the opinion and recommendations of Dr Hamilton would not have been a reasonable way to proceed. Although not relied upon by the claimant in the closing submissions, the tribunal is satisfied from the evidence that consideration was given by the respondent to the claimant's suggestion of having a "buddy" accompany the claimant in his substantive role, with the intention that the buddy would undertake those aspects of the role which were problematic for the claimant. The tribunal accepts Mrs McKenzie's unchallenged evidence that the claimant had suggested that the respondent arrange for someone to accompany him on the pancake line and that this suggestion was discounted as not being reasonable because it was considered that this approach would potentially aggravate the claimant's

condition and that the claimant would be left with no reasonable role to perform as the majority of the tasks would be carried out by the buddy. As no further adjustment which would have prevented the substantial disadvantage has been advanced for consideration, the tribunal finds that the claimant has not discharged the onus upon him in, as per **Latif** (see paragraphs 34 and 63 above) and that, accordingly, there has been no failure by the respondent to make a reasonable adjustment in this regard.

83. In light of its findings above, and on the application of the law, the tribunal concludes that there was no failure to make reasonable adjustments for the claimant's substantive role and his claim in that respect is therefore dismissed.

Was there a failure to make reasonable adjustments in respect of the other roles suggested to the claimant?

84. The tribunal finds, notwithstanding the submission to the contrary by Mr Mitchell at the outset of the hearing that this element of the claim is implicitly disclosed in the pleadings, in the alleged failure of the respondent to properly and carefully consider alternative roles and has therefore considered the evidence adduced to it and determined that claim. Proper and careful consideration of other roles would include considering whether they could be undertaken with adjustments.

85. The claimant, in his closing submission asserted:

> *"59. The decision by the Respondent not to consider or look into making reasonable adjustments to any alternative role suggested for him is a PCP. The Respondent's steadfast failure to consider any reasonable adjustments to any alternative role placed the Claimant at a substantial disadvantage as he lost the chance to be able to return to his role with additional adjustments."*

86. The tribunal considers that if the approach taken by the respondent in considering temporary redeployment to other existing roles, had been to discount any adjustments to these roles, such an approach could amount to a PCP. An approach of considering redeployment to existing roles, whilst discounting adjustments, has the necessary qualities of being potentially applicable to both disabled and non-disabled employees and potentially could have greater impact on a disabled employee.

87. The tribunal finds that there was no failure to make a reasonable adjustment as the tribunal does not accept that the approach of the respondent was to discount adjustments to alternative roles. The tribunal finds that the approach of the respondent was not contrary to s.18B and the Code of Practice (see paragraph 15 above). Consideration was given to the claimant undertaking part only of the roles, but, as noted at paragraph 73 above, this was discounted on grounds of potentially causing a risk of injury to other employees, who required rotation of duties too.

88. When this was unsuccessful and the respondent had established that

the claimant would consider redeployment to administrative duties, the respondent did piece together an administrative role, which was offered to, but not ultimately taken up by, the claimant.

89. No further adjustment in respect of any particular role has been advanced for consideration. Accordingly, the tribunal finds that the claimant has not discharged the onus upon him, as per **Latif** (see paragraph 34 above). Whilst the tribunal accepts that as per **Johnson** (see paragraph 35 above), it is not necessary for the claimant or the tribunal to have every detail worked out, there must be a finding that a reasonable adjustment could be made. On the basis of the evidence before it, the tribunal is not satisfied that there was any such an adjustment that could be made.

90. The tribunal therefore concludes that there was no failure to make reasonable adjustments in respect of the other roles suggested to the claimant.

The reasonable adjustment claim in respect of the decision to stop the claimant's pay

Was there a decision to stop the claimant's pay on 4 October 2019?

91. The tribunal is satisfied that there was a decision to stop the claimant's pay and that this was communicated to him on 4 October 2019, as outlined below.

92. Mr Mitchell, in his closing submission stated:

> *"7…In a meeting on 4 October 2019 the Respondent explained to the Claimant that it would not continue to pay his full pay indefinitely. It explained that his full pay would cease. It made clear that it considered he was entitled to sick pay but which could only be paid if the Claimant provided a sick line. The Respondent also arranged to refer the Claimant back to OH….*

93. The tribunal finds that at that meeting the claimant was told in clear and unequivocal terms that he would not be paid at all, whether full pay or sick pay. The claimant's trade union representative, Ms Graham, is recorded in the minutes of that meeting as saying:

> *"…you are now saying that after 7 weeks of permitting full pay that is being stopped, you haven't looked at proper reasonable adjustments with any of the jobs we can see is being offered, also question that due to the fact he [the claimant] won't go and obtain a sick line fraudulently from his GP as he currently is not in enough pain and does not feel sick and is not comfortable signing a document to say he is, will he now trigger the absence policy for being off unauthorised."*

Mrs McKenzie replied: *"absence won't be considered"*

Ms Graham then asked: *"and clear from you that as of today he won't be receiving pay or sick pay"*

Mrs McKenzie replied: *"yes"*

94. During cross examination, Mrs McKenzie was asked about the accuracy of these minutes and answered that she was not disputing what was said. She also admitted in cross examination that Ms Graham had stated "*and clear from you that as of today he won't be receiving pay or sick pay"* and that she had left the claimant with a clear impression that he would receive no pay whatsoever. She then stated *"to get sick pay, you need a sick line."*

95. Mrs McKenzie also stated during cross examination that she understood that the claimant felt fit, but that as Occupational Health said he was causing more damage, she "100%" believed that the claimant ought to have submitted a sick line. A careful reading of Dr Hamilton's report ought to have disclosed that Dr Hamilton was allowing for the possibility that the claimant would be fit to carry out his duties as he opined that whenever the claimant was able to return to work, the nature of the duties described in his role, even with restrictions and adjustments in place, was likely to cause aggravation of his shoulder condition and lead to recurrent episodes of sickness absence. The claimant had returned to work after the flare up had settled and had been fit for work and had worked for a number of weeks, apparently without issue, before the report was received and the claimant medically suspended.

Was there a failure to make reasonable adjustments in respect of the decision to stop paying the Claimant on 4 October 2019?

96. The tribunal finds for the reasons set out below that there was no failure to make reasonable adjustments in respect of the decision to stop paying the claimant on 4 October 2019.

97. Mr Cushley, in his closing submission, submitted:

> *"20. The Claimant was repeatedly and consistently told that the Respondent would stop his pay at numerous points during his suspension. This came to a head on 4th October 2019 when the Claimant was categorically told that he would no longer be paid either his normal wage or sick pay. In short, he would be paid nothing. As the Claimant was ready and willing to work at all times, it was unlawful not to pay the Claimant, and to threaten to stop paying him is an abusive behaviour and will be of a particular effect to a man with a disability, with a family at home. While the Respondent never did stop paying the Claimant, he was left in a position of certainty [sic] where between 4th October 2019 and 17th October 2019 he believed he would not be paid until the Respondent finally confirmed it had changed its position, albeit attaching a number of preconditions that the Claimant would have to do in order to continue being paid. It is the Claimants position that those preconditions themselves were unlawful, but it is accepted that the Respondent never did apply the preconditions.*
>
> *…*
>
> *57. The decision to tell the Claimant that he was no longer going to be*

paid from 4th October 2019 was a PCP. The Claimant was left for two weeks worried – frightened – about being left on no income unnecessarily and unlawfully. It is submitted that this clearly amounts to a substantial disadvantage."

98. The respondent's position on the PCP identified by the claimant, as set out in Mr Mitchell's closing submission (which refers to the claimant being told that he would not be paid as the "statement PCP") was:

> *"93. The Claimant's closing submissions characterise this incident as "abusive behaviour". If that were correct, it would clearly not be a PCP at all. Poorly managed isolated incidents in relation to a single individual is not a PCP, as the Court of Appeal explained in* ***Ishola v TfL [2020] EWCA Civ 112; [2020] IRLR 368***
>
> *…*
>
> *95…At its very highest, this statement PCP is a statement that a (different) PCP would apply: it was an explanation that the Respondent had a PCP that employees have to earn pay ("pay-must-be-earned PCP")."*

99. The tribunal finds that the PCP identified by the claimant is not a valid PCP. The tribunal agrees with the submission of Mr Mitchell that the treatment of the claimant by the respondent in informing the claimant on 4 October 2019 that his pay would be stopped does not amount to a PCP per **Carphone Warehouse** (see paragraph 47 above), as neither a failure to exercise care in paying the correct salary nor "incompetence or woeful lack of application" in respect of disciplinary proceedings could constitute PCPs for which there could be a failure to make reasonable adjustments.

100. The tribunal agrees with Mr Mitchell's submission that poorly managed isolated incidents in relation to a single individual is not a PCP. The tribunal adopts and applies the dicta of Simler LJ in **Ishola** (see paragraph 48 above) that:

> *"… If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

101. Notwithstanding this finding, the tribunal has considerable sympathy for the claimant and recognises the considerable anxiety that he would have felt when he was told that his pay would be stopped. The tribunal views the respondent doing so as premature when the consideration of the redeployment of the claimant to alternative duties was ongoing.

102. Even if the tribunal has erred in finding that the PCP relied upon by the

claimant is not a valid PCP, the tribunal in any event finds that it cannot find in the claimant's favour on this point because the claimant was not placed at a comparative substantial disadvantage as required by section 4A(b) (see paragraph 28 above). As per **Nottingham City Transport** (see paragraph 46 above), anyone, whether disabled or not, who was told that they would not be paid, would be worried or frightened.

103. In light of this, the tribunal cannot consider whether a reasonable adjustment could be made as no duty can arise in respect of this PCP, as cast by the claimant, and the claimant's claim in this respect must fail.

104. The respondent's closing submission suggests analysis using an alternative PCP:

> *"To the extent that pay-must-be-earned PCP was applied to the Claimant, very substantial adjustments were made to his benefit: he was paid in full despite not working, the Respondent disapplied its attendance procedure and the Respondent did not dismiss the Claimant for incapability. These far exceeded what would constitute "reasonable" adjustments. The Respondent was not duty bound to pay the Claimant when he was not in work but it did it anyway in order to maintain his contract and keep him in employment."*

105. The tribunal accepts the respondent's submission in this regard, noting that ultimately the respondent continued to pay the claimant in full in the particular circumstances that pertained, and in so doing, disapplied the PCP Mr Mitchell has identified in respect of the claimant, namely that pay must be earned. Accordingly, there has been no failure to make reasonable adjustments for the claimant in this regard.

106. The tribunal, on the basis of its findings of fact and the application of the law, concludes that there has been no failure by the respondent to make reasonable adjustments.

OUTCOME

107. The claimant's complaints unlawful direct discrimination and of failure to make reasonable adjustments are not well founded and are dismissed.

Employment Judge:

Date and place of hearing: 11 to 13 January 2021, Belfast.

Date decision recorded in register and issued to parties: