Case Numbers: 1801155/2016
1801156/2016

EMPLOYMENT TRIBUNALS

Claimants:	**Mr M R Sabir** **Mr M A Sabir**		
Respondent:	**Schaeffler (UK) Limited**		
Heard at:	**Sheffield**	**On:**	**30 and 31 July, 1-3 August 2018** **17-21 September 2018** **5 and 16 November 2018** **(in chambers)**
Before:	**Employment Judge Brain**		
Members:	**Mr G Harker** **Mrs S Robinson**		

Representation

Claimant:	Mr P Morgan of Counsel
Respondent:	Mr P Sandeman, Solicitor

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The Claimant's application for permission to amend their claims to include one of harassment related to the protected characteristic of disability is refused.

2. The complaint of discrimination arising out of a failure by the respondent to make reasonable adjustments succeeds in part *per* paragraph 346 below.

3. The complaint of discrimination by being treated unfavourably for something arising in consequence of the claimants' disability succeeds *per* paragraph 346 below.

REASONS

1. Following the receipt of each party's helpful written submissions at the close of the case, the Tribunal reserved its Judgment. By consent, promulgation of this Reserved Judgment was deferred pending the outcome of the linked cases

(proceeding with cases numbered *1810014/2018* and *1810015/2018*) heard on 3, 4 and 5 April 2019 and 3, 4 and 5 February 2020. We now set out the reasons for the Judgment that we have reached. *(The findings of fact are those made in November 2018. The Tribunal takes no account of events after 16 November 2018).*

Introduction

2. The claimants are twin brothers. They are employed by the respondent as assembly operatives.

3. The respondent manufactures clutches for the motor industry from its factory in Wales Bar, Sheffield. Clutches for motor vehicles are manufactured in the 'Pascar segment' and for tractors in the 'tractor segment'.

4. The respondent operates seven days a week. It operates upon a shift system. The working arrangements are complex. Between Monday and Friday, a 24-hour rotating three-shift system operates: 06:00 to 13:45; 13:45 to 21:30; and 21:30 to 06:00. The employees rotate between these shifts and do not permanently work upon just one of them. Some employees work on Saturdays. The Saturday employees work on a 'five out of seven' contract. They do not work upon the rotating shift system. The respondent also operates on a Sunday which is filled by overtime work. Part-time employees are also engaged by the respondent and work four-hour shifts: 06:00 -10:00; 08:45 to 13:35; 14:00 to 17:45; and 17:30 to 21:30.

5. The claimants commenced work for the respondent on the same day (that being 17 March 2003). There is no issue that the claimants have at all times been good employees of the respondent carrying out their work diligently and efficiently.

6. Unfortunately, the claimants have been diagnosed with an eye condition known as retina pigmentosa. They were registered as sight impaired in or around 2014. The respondent concedes that at all material times with which we are concerned the claimants are disabled within the meaning of section 6 of the Equality Act 2010.

7. Where convenient, we shall from time-to-time refer to the claimants as 'the brothers'. Also, for convenience we shall refer to the first claimant as 'MRS' and the second claimant as 'MAS' from time-to-time.

8. The Tribunal heard evidence from the claimants. On behalf of the respondent we heard evidence from:

    8.1. Robert Darius. He is employed by the respondent as the Pascar segment leader and production manager.
    8.2. Richard Bowgen. He is employed by the respondent as car clutch value stream leader. He is responsible for the day-to-day running of car clutch production and reports to Mr Darius.
    8.3. Katie Brooksbank. She is employed by the respondent as a HR advisor.

8.4. Jayne Burkin. She is employed by the respondent as HR manager. She has been in post since 15 August 2016 having taken over from Ruth Gilmore who left as the respondent's HR manager in June 2016.
8.5. David Wright. He is employed by the respondent as the environment health and safety co-ordinator.
8.6. Darren Milton. He is employed by the respondent as a KS team leader. (In paragraph 3 of his witness statement Mr Darius tells us that KS is the discs section of the Pascar segment).

9. Upon the first morning of the hearing, the Tribunal was presented with a list of issues prepared by Mr Sandeman. Following an adjournment, Mr Morgan confirmed that he and Mr Sandeman had been able to agree the list of issues as set out in that document subject to several agreed amendments. We shall consider the list of issues in due course. It suffices at this stage to say that the claimants bring the following complaints against the respondent:

9.1. That they were treated unfavourably for something arising in consequence of disability and thus were discriminated against in the workplace. This claim is brought under section 15 and section 39(2) of the 2010 Act.
9.2. That the respondent failed to comply with the duty upon it to make reasonable adjustments, being a requirement upon the respondent by reason of the substantial disadvantage caused to the claimants (because of their disability) by: the application to them of a disadvantaging provision, criterion or practice; the presence of a disadvantaging physical feature of the respondent's premises; the failure to provide an auxiliary aid or service. In each case, the claimants say that they were placed at a substantial disadvantage by reason of the application of these matters. Those claims are brought under section 20 and section 39(5) of the 2010 Act.

10. The list of issues included a complaint of harassment related to the protected characteristic of disability. This was a claim that arose out of matters occurring after the presentation by the claimants of their claim forms. The claimants wished to pursue such a complaint under section 26 and section 40 of the 2010 Act. The Tribunal refused the claimants' application (made on the first morning of the hearing) to amend their claims to include the harassment complaints. We shall set out in due course the basis for that refusal. Reasons for the refusal of the application were given to the parties at the hearing.

Findings of fact

11. The claimants' principal witness statements are both dated 20 October 2017. (Where we refer to passages from the claimants' witness statements we shall do so by reference to these statements unless stated otherwise). As was observed by Mr Sandeman, they are very similar. In seeking to explain the similarity, MRS said that the claimants had had help from their solicitors and "from a few people" when writing the statements. MAS gave similar evidence and said that he and his brother had prepared the statements together. In paragraphs 17 and 18 of MRS' statement and in paragraphs 19 and 20 of MAS' statement this was said:

> "In January 2016, we decided to notify our employer of our visual impairment. We had done a lot of soul searching and were advised by the Sheffield Royal Society for the Blind that our employer would be understanding and would put support in place. We thought this was the right time to inform our employer and ask for help in the workplace as we considered that it had come to this point.
>
> We informed our union shop steward of our health issues and understand that this was passed on to HR manager Ruth Gilmore on or around 8 January 2016."
>
> *[It is unfortunate that MRS and MAS do not identify the person at the Sheffield Royal Society for the Blind with whom they dealt at this stage. We presume that it was Joanne Arden who features later in the history of this case].*

12. The claimants explained that their condition entails retinal changes affecting peripheral vision making it hard to see in dim light or the dark. The claimants said that their condition mainly affects peripheral vision which is impaired. This leads to them finding difficulty with navigating around the factory floor. The claimants' evidence is that they became concerned to the point that they considered that they ought to tell the respondent. They each say that they resolved so to do towards the end of 2015 following difficulties with eye fatigue and the extra concentration needed to work on the nightshift. They were also concerned that the visual impairment may impact upon their ability to produce quality parts and that their condition was deteriorating.

13. The claimants each gave the following evidence:

> "In my substantive post of assembly operative I am on my feet regularly and move around the workplace and machines in order to carry out my role.
>
> In order to commence work, I must first get to my workstation when I attend the workplace. This involves going to the clocking machine and navigating the factory floor. My problem is with my peripheral vision and this makes navigating a problem. I have to safely navigate the workplace before commencing work. During the day I may be required to move around the factory to get to the canteen or attend the toilet. With help/support in place I believe these concerns can be mitigated to a point that would reassure the company that they are no greater than any other employee." (MAS then says, "I just require assistance in navigating and the adjustments that I come on to below").

14. MRS says that the tasks involved at his workstation are set out at pages 480 to 488 (this document being a work log which he and MAS prepared at the request of Access to Work) and in the report prepared by Access to Work at pages 447 to 450. (There is a similar report upon MAS' machine at pages 439 to 446). We shall come to these documents later in the history. In summary MRS says that his job involves a number of elements that require visual inspection. He works on a machine that fits the facing to the retainer plate. This machine upon which MRS worked is known as machine 0539. Mr Darius told us (at paragraph 20 of his witness statement) that this is a facing-assembly machine. It is smaller than

the machine operated by MAS but the operator has to carry out the same tasks. Mr Darius says that, "the machine [0539] is loaded manually, rather than automatically (as in the case with Alyas' machine). Riaz has to walk around the machine also but he does not have to step on to walkways and gangways when doing so. The machine itself is within the main production area which is busy and he would have to negotiate the walkways and gangways when moving around the factory."

15. Mr Darius goes on in paragraph 21 to say that, "This machine is also used for pre-assembly riveting of friction material on to the disc. It involves a similar riveting process but without the automatic loading. Components are manually loaded and the finished parts are manually unloaded at the same place. A robot puts the rivets into the parts before it is pressed." Mr Darius goes on to say that the tooling has to be changed each time there is a changeover of product and containers have to be changed to replenish the material which is collected from a nearby preparation area using a pedestrian truck. The machine is used for about 50 different products and there are one or two changeovers per shift on average. He goes on to explain that the operator also has to carry out visual quality inspections and attend to any stoppages which involves walking around the machine. This involves moving around a tight space.

16. MAS worked on the 0501/0507 machine. Mr Darius told us that this is "an automated facing-assembly cell. It is a large machine used for pre-assembly involving the riveting of friction material on to discs before the main assembly of the discs. It is a fully automatic line which presses and assembles the parts". He goes on to explain the duties of the operator which involves loading segments, segment rivets, retainer plates, facing and facing rivets into the machine and the carrying out of a visual inspection of the parts for any damage. There is also a need to change over the tooling on the line when there is a change of product. There is an average of one change per shift but the machine is used for about 20 different products. The main task of the operator is to attend to any stoppages to the machinery and solve and rectify them. When loading is necessary the operator uses a pedestrian truck to collect containers from the stores preparation area and takes them to the relevant station on the line. The 0501/0507 machine is located in the middle of the KS disc department. The operator is required to move around the machine which can entail a need to cross the conveyer belt on steps, to walk on the main aisle and to walk upon the pedestrian gangway adjacent to the machine.

17. MAS referred us to the Access to Work report concerning his duties at pages 439 to 446 and to the table with the work log attached at pages 480 to 488. MAS' evidence was that his job is more automated and the machine larger than the one operated by MRS. There appears to be little in dispute between the parties about the nature of the work undertaken by the brothers and the machines upon which they were working at the time that they notified the employer of their condition.

18. At pages 138 to 152 is a document entitled 'summary of MAS/MRS case'. Mrs Brooksbank told us that this was a document compiled by the respondent's human resources department. It was a 'living document' in the sense that it was completed and added to as matters went along. We can see from the log that it

is recorded that during week commencing 4 January 2016 Ian Hamilton (shop steward and support worker) informed Ruth Gilmore "that MAS and MRS wished to see HR to talk about a health issue they have." The entry goes on to say that it was explained by Ruth Gilmore that "the first step will need to be that they approach HR directly themselves. Then their permission to access medical records will be sought so that we can write to their GP to get a view of their condition, prognosis, proposed adjustments etc." The log records that there was in fact no direct contact from MAS and MRS during the rest of that week.

19. Ruth Gilmore was unfortunately absent from work between 9 January and 31 January 2016 having suffered a bereavement and an illness. Mrs Brooksbank was on holiday between 1 and 19 January 2016.

20. The log then records that on 25 January 2016 the claimants shared details of their condition with Mrs Brooksbank who issued them with a medical records release authorisation form. We can see the letters that she sent to each claimant the same day at pages 157 to 160. The log (at pages 138 to152) records that the access to medical records forms was returned by the claimants on 27 January 2016. MRS says at paragraph 20 of his witness statement that the claimants handed to Ms Gilmour literature about their condition and about Access to Work. We accept MRS's evidence upon this issue which was unchallenged. In the absence of Ms Gilmour, the respondent was in no position to gainsay MRS's evidence and it is consistent with the tenor of the log and the letters that were sent around this time.

21. The log records that on 26 January 2016 the claimants asked about the possibility of flexible working. They were interested in working daylight hours. The applications for flexible working were returned by the claimants on 29 January 2016.

22. Mrs Brooksbank's witness statement focuses upon grievances presented by the claimants in March 2018. We shall come to the grievances in due course. It is perhaps unfortunate that her witness statement did not deal with the events in January 2016 when, due to Ruth Gilmore's unfortunate absence, she was dealing with the claimants.

23. Ruth Gilmore returned to work on 1 February 2016. The log records "MAS/MRS attended HR office (unscheduled) and asked for a few minutes of RG's time. Both pull up chairs (uninvited) and stay for approximately one hour in RG's office to repeat everything they have already told KB. They are informed again that we will need to have feedback from a medical professional before we can consider any adjustments. They also withdraw their flexible working request despite RG exploring with them whether they really wish to do so".

24. The claimants visited the HR office again on 2 February 2016. Mrs Brooksbank and Ms Gilmore were both unable to see them. They therefore left a note for Katie Brooksbank.

25. On 3 February 2016 they attended the HR office again. The note records that "RG and KB are busy on other matters. RG goes out to see them in the main

office to explain that we are really busy, no one is available to see them at that moment and will make them an appointment so we can meet with them properly. RG also explains that they cannot come into the office every day as we cannot just drop everything to see them every time (today is their seventh visit in eight days and they usually stay for a minimum of 30 minutes)." An appointment was made for them to be seen on 16 February.

26. The claimants' evidence is that they were embarrassed and humiliated by Ruth Gilmore's treatment of them on 3 February 2016. This prompted them to raise a grievance on 4 February 2016 (pages 174 to 177). This was followed up by a letter from them dated 7 February 2016 (180 to 183) complaining of their treatment. They mentioned in the letter that on 3 February 2016 they had gone into the HR office in order to hand in "paper evidence" of their condition and to inform HR that Access to Work had been attempting to make contact with the respondent, had been unable to do so and had closed an application made by the claimants with Access to Work for workplace assistance. The reference to "paper evidence" corroborates our finding that literature about the condition was handed to the respondent's HR department.

27. The claimants were absent from work for the rest of that week. They also gave evidence that a social occasion planned for 5 February 2016 was cancelled so upset were they by what had happened.

28. The claimants take issue with the respondent's assertion that they had turned up without an appointment. The claimants said that no appointment system had ever been instituted by the respondent's HR department. The respondent did not challenge that evidence and we heard nothing to gainsay what the claimants said about the lack of an appointment system.

29. The claimants' upset was rooted in the fact that (as they said in evidence) "it had taken us a lot of courage to open up to Ms Gilmore and tell her about the full extent of our disabilities and our fears about how we would be perceived. We went in looking for the support and reassurance from our employers as we had worked for them for over 14 years."

30. The claimants' grievance was upheld. It was determined that a more compassionate approach should have been adopted by Ms Gilmore. It was recommended that matters should be followed up with her "on a formal level". The grievance outcome letter dated 6 June 2016 is at pages 302 to 305.

31. The claimants appealed against the grievance outcome. That appeal was upheld upon the basis that the respondent should in addition issue an apology to the claimants. The appeal grievance outcome is dated 27 September 2016 (pages 343 to 346).

32. Ms Gilmore wrote to Dr Vasan about each claimant on 4 February 2016 (pages 170 to 173). Information was sought about each claimant's condition, its likely duration and their fitness for role. Mention is made in the letters of the issue of contact with the respondent from Access to Work. Ms Gilmore said in the letter

addressed to the claimants' GP that that matter would not be pursued pending receipt of medical advice.

33. The application made by the claimants on 28 January 2016 for assistance for Access to Work was closed on 9 February 2016 according to the Access to Work log at page 655. *(There is evidence in the log at pages 647 to 657 that Access to Work attempted to contact the respondent on a number of occasions between 28 January 2016 and 2 February 2016. An email was sent on the latter date to the respondent hence Ms Gilmore's reference in the letter of 4 February 2016 to 'Access to Work contact'. On 3 February 2016 the log records the claimants asking Access to Work not to contact the respondent. The log records that the application was closed on 9 February 2016 because there had been no employer contact).*

34. We have within the bundle a copy of the log maintained by Access to Work at pages 645 to 862. This corroborates that the initial contact was on 28 January 2016 and that the application was closed on 9 February 2016 (albeit that it was subsequently re-opened as we shall see).

35. The letter of 7 February 2016 (at pages 180 to 183) to which we have already referred at paragraph 26 confirmed retraction by the claimants of the flexible working application. The basis of the retraction was that "the Equality Act 2010 covers our request for hour of working".

36. The claimants intimated in the letter of 7 February 2016 an intention not to come into work that week. Their sick leave commenced on 8 February 2016. In the event they did not return to work until 18 September 2017. There was no suggestion that the claimants were not satisfactorily performing their duties up to the date of their departure on sick leave and after their return to work.

37. In a further letter of 7 February 2016, the claimants wrote suggesting a number of adjustments (pages 184 to 187). Theses did not include a suggestion of changing job role. The suggested adjustments included part time working during daylight hours and the involvement of Access to Work and other specialist organisations such as Action for Blind People and the RNIB. Mrs Burkin fairly accepted that she knew throughout the entire time of her involvement in the matter that the claimants were keen to return to work.

38. On 10 February 2016 the claimants wrote to the Greg Littlefair, the respondent's managing director (pages 188 to 190). They complained about Ms Gilmore's actions on 3 February 2016 and referred to a timeline of events. Mention was made of the claimants informing Ms Gilmore of their health issues on 8 January 2016, the involvement of Access to Work and their flexible working request. Mention was also made of them receiving a two weeks' sick note for work related stress. It is not part of the claimants' case that this particular period of sickness absence was due to issues around the making of reasonable adjustments. Rather this was occasioned by their reaction to the respondent's handling of their concerns and in particular the events of 3 February 2016.

39. On 10 February 2016 Dr Vasan wrote to Ms Gilmore (page 191). He opined that "the best option would be for you to refer [MRS and MAS] to an occupational health specialist to get a full report, as this may be more beneficial to [the claimants] and to you". We refer to pages 191 and 192.

40. Ms Gilmore wrote to the claimants on 11 February 2016 (pages 195 to 202). She expressed her empathy with them feeling stressed at around this time by reason of (amongst other things) their father's unfortunate serious illness and (at page 195) *"the serious condition you are suffering with your eyesight.".* The expression of empathy was (at least in part) upon the basis that Ms Gilmore had recently sadly lost her mother.

41. The tone of the letter at pages 195 to 202 may be contrasted with that of the log (in particular at pages 138 and 139). The continued reference to the claimants making unscheduled visits to the HR office in late January and early February 2016 conveys annoyance with the claimants' persistent approaches upon the part of Ms Gilmore. The Tribunal has every sympathy for her in view of the loss of her mother and that upon her return to work she would inevitably be very busy. However, that has to be balanced against the need to deal professionally and sympathetically with the serious matter which the claimants brought to the respondent's attention at around that time. That need was recognised by the respondent by dint of the fact of the upholding of the claimants' grievance and grievance appeals.

42. In the letter of 11 February 2016 Ms Gilmore acknowledged the closure of the Access to Work application but noted the possibility of it being reinstated once the respondent had received "feedback from your GP regarding your condition".

43. In accordance with Dr Vasan's advice, Ruth Gilmore referred the matter to the respondent's occupational health service on 16 February 2016. The referrals are at pages 204 to 211. The referral was made to the EEF occupational health service (presumably available to the respondent by virtue of their membership of the EEF). Appointments were made for 14 and 16 March 2016 (as confirmed in letters from Ruth Gilmour dated 8 March 2016 to MRS and MAS respectively: pages 224 to 227. The letters also contemplated risk assessments of the work areas upon receipt of the claimant's written consent).

44. Similar questions were asked of the occupational health physician as had been asked of the GP concerning the condition, the diagnosis, the longevity of the condition and the impact of it upon each of the claimants' ability to perform their duties as assembly operators. This was also said:

> *"[Alyas/Riaz] [is/are]* keen to continue to work for as long as possible, however, he does work in a job where he needs to be able to see adequately well enough to (a) protect his own health and safety and (b) ensure appropriate level of production quality where safety standards are paramount to the end user (car clutch production). I would therefore anticipate that given the degenerative nature of this condition, there may come a time when this becomes a capability issue. We would obviously therefore be keen to ensure that his ongoing ability is carefully monitored for his own safety as well as from the company perspective.

[Alyas'/Riaz's] GP has declined to offer any response to the questions above and suggested that we refer him to an occupational health specialist. We would therefore request that you seek his permission to write to his GP and gain both the GP and any specialist/consultant information available so that we can be properly advised. We enclose a copy of his access to medical records consent form (to us) and a copy of his current job description". *[Underlining added].*

45. This underlined section of this passage was the subject of controversy between the parties. The claimants' position was that Ruth Gilmore had asked occupational health to obtain information from the treating specialists as well as from the claimants' GP. We shall see in due course that that appears to have been the understanding of Dr Oliver, the occupational health physician who dealt with the matter. When asked about this in re-examination, Katie Brooksbank did not reply in the affirmative to the question put to her by Mr Sandeman as to whether occupational health had been asked only for the claimants' GP notes (which will of course contain letters or reports from specialists in the usual way).

46. Ms Gilmore wrote to the claimants on 16 February 2016. The claimants were informed that Dr Vasan had declined to respond to the respondent's enquiries and had suggested a referral to an occupational health specialist (pages 212 and 213).

47. On 29 February 2016 the Royal National Institute of Blind People's Legal Rights Service wrote to Ruth Gilmore (pages 214 to 219). The RNIB recommended that an Access to Work assessment be carried out as a matter of urgency. They referred to the earlier closure of an Access to Work referral and suggested that the matter be reinstated. They also referred to the claimants' severe sight impairment and the possibility of making suitable adjustments.

48. On 3 March 2016 Ruth Gilmore emailed the occupational health service to enquire as to whether or not appointments had been made for the occupational health assessments for the brothers. She asked for an update.

49. On 7 March 2016 the claimants wrote to the respondent (pages 221 to 223). They complained that the respondent's failure to make adjustments was the cause of stress and suggested a number of adjustments that may help them at work:

- Daylight hours working.
- Part time working.
- Help with movement due to peripheral vision loss.
- Lighting.
- Magnifiers.
- Work risk assessment.
- Access to Work assessment.
- Disability discrimination awareness amongst co-workers.

50. MRS was seen by occupational health on 14 March 2016. MAS was seen on 16 March 2016. They both exercised their rights to look through the report before disclosure to the respondent. Letters to this effect addressed to Ms Gilmore by EEF occupational health are at pages 242 to 255.

51. On 17 March 2016 the claimants handed a letter to Mr Darius and Paul Calderbank (team leader). The letter is at pages 232 to 234. The letter disclosed to Mr Darius, for the first time, the brothers' condition. We can see from page 233 that as at 17 March only six people knew of the claimants' health condition; Mr Hamilton, Ms Gilmore, Mrs Brooksbank, Mr Darius, Mr Calderbank and Greg Littlefair (managing director). A meeting had been arranged 17 March 2016 at claimants' request in order that they could explain their continued sickness absence. It was at this meeting that the letter at pages 232 to 234 was handed up.

52. It was suggested to Mr Darius that the claimants made it clear that they wished to continue in their substantive roles. Mr Darius said, "no, there was no real discussion about other roles". It was not quite clear what he meant by this. He was then asked by Mr Morgan as to whether there had been any discussion at the meeting about doing other than their substantive roles. The claimants' letter (at pages 232 to 234) also does not talk about the possibility of the claimants moving from their substantive roles as an adjustment. Mr Darius confirmed his understanding that the claimants' sickness absence was attributable to stress at work caused by the incident of 3 February 2016 and its aftermath rather than the claimants' eye condition.

53. On 18 March 2016 Ruth Gilmore again chased EEF occupational health for the reports. She was told that day that both reports were "with the doctor for review". She was informed that, "the doctor has requested that we contact both gentleman's specialists for a medical report in order to provide more information. The costs of these reports will be passed through to your company." Ms Gilmore authorised the obtaining of specialists reports the same day. We refer to pages 247 and 248.

54. The position of the respondent before the Tribunal (and contrary to Katie Brooksbanks' apparent understanding *per* paragraph 45 above) is that it wished to obtain specialists reports. In evidence under cross-examination MRS fairly said that Dr Oliver had told him that the respondent would normally act upon occupational health advice but in this case wished to obtain specialist reports as well which created delay.

55. On 24 March 2016 Ms Gilmore wrote to the claimants (pages 257 to 260). She was responding to the letter of 17 March 2016 and following up on the meeting of that day. She noted that, as the claimants had wanted sight of the occupational health report before it was released to the respondent, the reports would not be issued until 31 March 2016. She then said, "I have also been notified that Dr Oliver wishes to seek further information regarding your condition from your specialists. We have agreed to fund the additional report costs for this and asked him to go ahead".

56. On 31 March 2016 the occupational health reports were released to the respondent. These are at pages 262 to 272. We shall not cite extensively from these reports. In summary:

56.1. Dr Oliver gave a description of retinitis pigmentosa.

56.2. He described the mobility problems caused by the condition by reason of the reduction of peripheral vision. These include difficulty in moving about, negotiating the factory site and difficulty going to and from the canteen. The claimants have to be careful not to bump into things and to be aware of vehicle hazards on site. They arrive early at work so that there are fewer people around and take their breaks later for the same reason. They have poor sight in dark conditions but can read if the lighting conditions are bright enough. However, they suffer glare in over-bright conditions.

56.3. The claimants were keen to emphasise that they wished to keep working but need help at work in order to do so.

56.4. In MAS' report, Dr Oliver said that, "as I do not have specific details of Mr Sabir's condition I can only give general advice about retinitis pigmentosa today but I have obtained Mr Sabir's consent to write for medical reports from Mr Sabir's treating specialists, Mr Michaelides and Mr Acharya and also from his GP Dr Vasan." In MRS' report, he said, "I can only answer the basic questions about retinitis pigmentosa today but as you have indicated that you would like me to obtain medical reports from Mr Sabir's treating specialists I have obtained his permission to write to Mr Michaelides, Mr Rehman and also his GP Dr Vasan."

56.5. Dr Oliver opined that each claimant was fit to carry out his contractual role on the assembly line based upon the information supplied with the referral from the respondent. About MAS, Dr Oliver said that adjustments in the workplace would undoubtedly be of benefit. About MRS, Dr Oliver said that he could return to work now provided suitable adjustments could be made.

56.6. The condition of retinitis pigmentosa is permanent and a long term progressive condition which will lead to an increasing degree of visual impairment.

57. In the report prepared for MAS, Dr Oliver recommended counselling. He also recommended the respondent to carry out a vulnerable person risk assessment of his ability to safely negotiate the factory site. He recommended the respondent pay particular attention to a number of hazards as set out in paragraph 7 (at pages 265 to 266). These primarily concern vehicle hazards and pedestrian routes together with access and egress and steps taken to enable him to negotiate the site safely.

58. Dr Oliver opined that MAS was a disabled person for the purposes of the 2010 Act. He recommended a number of adjustments as follows:

- Allowing him to change to daylight working because of the night blindness.
- Allowing him to change to part time working because of the fatigue caused by his condition.
- Ensuring that lighting in the areas of the site that MAS uses is optimal for him.
- Obtaining advice about workplace adaptations or adjustments from Access to Work and the RNIB.
- Allowing him to continue to work in a familiar environment and role.
- Ensuring that his work area is free of tripping hazards.

- Ensuring that co-workers are trained about sight loss and the steps that they have to take to accommodate MAS' condition.
- Ensuring that any of his "minor duties" that are difficult for him to carry out could be transferred to colleagues.
- Ensuring that written instructions are in a large enough font for him to read them easily.
- Allowing time off for medical appointments.

Dr Oliver recommended that he review MAS with the reports from the two specialists and his GP to see if any adjustments to his advice are necessary.

59. Dr Oliver's advice appears not to be as comprehensive for MRS. He opines that MRS is a disabled person for the purposes of the 2010 Act. He makes recommendations that adjustments be made for MRS.

60. On 31 March 2016 the claimants wrote to Mr Wright (pages 274 and 276). They observed that as at 31 March 2016 seven individuals now knew about their health condition. (Mr Wright had been added to the list of those who had been informed about it). In the circumstances it was reasonable for Mr Sandeman to suggest on behalf of the respondent that the claimants were wishing to keep control of the dissemination of information about them. The letter of 31 March 2016 requested adjustments by way of the provision of daylight working hours upon a part time basis. The letter had been written upon the assumption that they would meet with Mr Wright that day. In fact, no meeting took place. Nonetheless, the letter was placed upon Mr Wright's desk by the claimants. It included some brief information about the claimants' condition and that it affected night time vision and caused extensive loss of peripheral vision. They mentioned having sought adjustments to the duration and timing of their working hours as a consequence.

61. On 4 April 2016 MAS emailed Ruth Gilmore (page 278). He asked for *"clarification on our return to work timetable."* He referred to a meeting with Mr Hamilton and Richard Bedford (Unite Regional Officer) on 1 April. In summary, they asked what the respondent was proposing to do now that the occupational health reports had been received and what the claimants should do pending the making of reasonable adjustments. He also said that occupational health had recommended a return to work only once reasonable adjustments had been made. By this stage the claimants considered themselves able to work and were asking the respondent for a return to work plan.

62. The claimants' sick notes (at pages 72 to 88) refer (over a period between early February and October 2016) to work related stress. It is not clear from them whether the claimants' stress was caused by Ms Gilmore's handling of matters, the respondent's failure (as the claimants saw it) to make reasonable adjustments or a combination of the two.

63. Mr Wright says that upon receipt of the letter at pages 274 to 276 he discussed matters with Ruth Gilmore and a meeting then took place. This was held on 8 April 2016 and was attended by Ms Gilmore, Mrs Brooksbank, Mr Littlefair, Mr Calderbank, Mr Darius and Mr Wright. The meeting notes are at pages 282.

64. In summary, the following issues were discussed at the meeting:

64.1. Ms Gilmore summarised the contents of the medical reports. It seems that copies were not made for all participants.

64.2. The claimants would not be in a position to be flexible with their working hours once they started to work part time. This was so that they could work daylight hours.

64.3. This would have the consequence (because of the shift system described at paragraph 4) that full time employees would need to be moved around to other workstations during the shift to accommodate them. For example, a full-time employee commencing the morning shift at 6am would have to move at 8am to allow for the claimants to work between 8am and 12pm. A similar problem was anticipated should the claimants work between 12pm and 4pm as it would entail a full- time worker changing sections. The view of the meeting that this was "a messy solution".

64.4. Concerns were expressed about the claimants' ability to operate the pedtrucks and other hazards should they return to their substantive roles.

64.5. It was observed that "ideally their workstation needs to be well lit, within easy access to the facilities and exit, out of the way of moving traffic risk ..……..and *[have]* the same repetitive tasks every shift." *[Emphasis added].*

65. The claimants were not invited to this meeting. Mr Wright said that he did not discuss the matter with them upon receipt of the letter at pages 274 to 276. He did not discuss with the claimants their perception of their ability to do their substantive roles.

66. We accept Mr Wright's evidence that a return to the claimants' substantive role was contemplated: the discussion referred to at paragraphs 64.2 and 64.3 corroborate his account. As we shall see, in the event the claimants returned to work in a new role. The new role undertaken by the claimants upon their return to work did not impact upon the respondent's shift system. Had return to the substantive roles been ruled out from the outset then discussion of the shift system would be otiose. (However, we find that while a return to their substantive role was not ruled out altogether matters proceeded upon the assumption that a new role would be found for the claimants because of Mr Darius' evidence: see paragraphs 68 and 88 below).

67. When asked about the non-involvement of the claimants in the discussions around this time, Mr Darius explained that it is common for management to have meetings about employees but without them being there in order that they could "brainstorm". It was suggested to Mr Darius that occupational health had recommended a discussion with the claimants about their condition. Mr Darius said that that was a matter for HR.

68. In evidence given under cross-examination Mr Darius accepted that the meeting proceeded upon the assumption that the claimants would not return to their substantive roles. There was also no discussion at the meeting about involving Access to Work. Similar points were put to Mrs Brooksbank in her cross-examination. She said that she knew "all along" that the claimants wanted to

return to their substantive roles "but the overriding responsibility is our duty of care and concern for their safety in getting to their old role positions".

69. Mr Wright did not see any of the occupational health reports at any stage. The information he had about the claimants' condition was from the claimant's letter of 31 March 2016 and the information he was provided with by others at the respondent (particularly Ruth Gilmour). He said that she informed the meeting of 8 April 2016 that the brothers had a hereditary eye condition which affected their peripheral vision and impacted upon their working hours and ability to work without adequate lighting. He did not seek permission to see the occupational health reports.

70. In paragraph 7 of his witness statement, Mr Wright said that he considered a return to the substantive roles to be high risk because of the risk of collisions, bumps and trips and the need to segregate the claimants from mobile plant. No individual risk assessments were carried out at this time and Mr Wright said that he reached this conclusion based upon the evidence that he was given by others within the respondent.

71. Two days prior to the meeting, on 6 April 2016, Ruth Gilmore sent an email to the claimants (page 280). She said that matters were being considered by management. She went on to say that, "in the interim period, I would advise you that you need to remain on certified sick leave (via your GP) until such time as adjustments can be considered and if acceptable implemented". Mrs Burkin was asked what the position would have been had the claimants' GP certified them as fit to work with adjustments. She seemed unsure of her ground and confessed to having no experience of medical suspension. She said that she looked into the issue of the decision taken by Ruth Gilmore that the claimants should remain on sick leave when she dealt with the grievance appeal in October 2017 (as to which see paragraph 199 below). She ascertained that in fact this decision was taken by Mr Littlefair, Mrs Burkin presumed, upon the basis that sick notes were in place.

72. The respondent did not call Ruth Gilmore to give evidence. Mr Morgan was therefore left having to ask Katie Brooksbank about the position adopted by HR at this point. She accepted, in evidence given under cross-examination, that the message conveyed by Dr Oliver in his occupational health reports was that the claimants were fit for work (in their substantive roles with adjustments) and that Dr Oliver reserved the right to review his recommendation upon receipt of the specialist reports.

73. We find that the work-related stress attributable to Ruth Gilmore's conduct on 3 February 2016 was, by this stage, no longer the operative cause of the claimants' absence. The claimants continued to be signed of as unfit to work by their GP for work related stress and/or stress related problems (pages 71A to 88). No enquiries appear to have been made by the respondent as to the cause of the stress. The claimants being fit for work (according to Dr Oliver) is contrary to the respondent's case that they were unfit to work because of the stress caused by the incident with Ruth Gilmore of 3 February 2016.

74. The position at the end of March 2016 was that nothing in the occupational health reports contra-indicated a return to work. Mrs Brooksbank conceded that that was what the occupational health reports said. She could not say why the brothers had not been invited to return to work at that stage as she was "not case managing it". Mrs Burkin conceded this to be Dr Oliver's opinion albeit that he had wanted further information from the claimants' GP and specialists.

75. Mrs Burkin's understanding from Katie Brooksbank (following Mrs Burkin taking up her role) was that the claimants were not in work because further reports were awaited and they had been signed off as unfit to work because of stress. Mrs Burkin also accepted that: occupational health was familiar with the respondent's operation and site; occupational health had dealt with employee issues for the respondent on a number of occasions; nothing was said to indicate that the opinions expressed by Dr Oliver were provisional in nature; nothing was said either to the effect that the claimants should remain off work pending receipt of further medical information. (This was contrary to what Mrs Burkin later said when dealing with a grievance appeal on 24 October 2017: page 566).

76. We accept of course that Mrs Brooksbank was not handling the claimants' case at this stage. It was in the hands of Ruth Gilmore who, by way of reminder, left the respondent in June 2016.

77. A second management meeting about the claimants took place on 18 April 2016 (page 283). Again, the claimants were not involved. Those present said that "it has been agreed that a 'job share' situation will be the most suitable solution for MAS and MRS, whilst supporting 24/7 production needs." It was envisaged that "MAS would work 8am to 12pm (no break) and MRS could work 12pm to 4pm (or *vice versa*), Monday to Friday. This would mean that for the most part daylight work would be possible for both, 20 hours per week each can be accommodated". There was then discussion about other adjustments including the possibility of Mr Hamilton acting as a buddy "in cases of emergency evacuation *etc*". Consideration then turned to the work which those present considered that the claimants may undertake. The minutes record that "this includes the adjuster ring function – much of which is currently sent out to Remploy in Birmingham currently". It was resolved to explore the possibility of returning that work to be done in-house instead. Another option was to relocate the lever press currently in located in the tractor sector. Whichever option was pursued, those present thought that the best solution was for the claimants' workstation to be located (and for the claimants to be relocated) into the re-work section of the factory.

78. Mr Darius' evidence was that he could not see how the machines being operated by the claimants in their substantive roles could be safe for partially sighted individuals. He was also concerned about production and quality standards. He was concerned about the possibility of overmanning by reason of a full-time worker having to be displaced to accommodate the claimants' part time hours (given their lack of flexibility) in the event of them returning to their substantive roles. The machines upon which the claimants worked in their substantive roles were known as "bottle neck machines". Essentially, this means that they were crucial to production and loss of productivity upon them would have a knock-on effect in other parts of the respondent's operation. Mr Darius said it would be

prohibitively expensive to move their machines to another safer area such as the re-work section and that it would not be practical or efficient to do so.

79. The claimants became concerned that they were becoming the subject of shop floor gossip. They wrote to the respondent with these concerns on 22 April 2016 (page 288). Ms Gilmore replied on 26 April 2016 (pages 289 to 292). She assured the claimants that there had been no breach of confidence within management. She noted that regrettably "rumour and gossip on our shop floor and indeed in most workplaces in the UK are common place". She then said that, "work is ongoing in terms of volume and regularity of specific tasks that could be allocated to you and where that workstation could be located in order to ensure your safety optimal within the workplace. Consideration is being given to potential working patterns that would support your needs for part time/daylight hours working as well as maintaining production flow in 24/7 areas and maintaining utilisation of machines and output. Maintenance of a quality product and the safety of our customers is also paramount, therefore consideration is being given to ensuring that your workstation would not be the final production stage before shipping".

80. A further internal meeting took place on 27 April 2016 (page 293). The claimants were again not involved. Those present confirmed that they had not been responsible for the divulging of any details about the claimants' situation. Mr Darius is recorded as saying that he had "carried out research into what the Sabirs could reasonably do and has reviewed the volumes of various pieces of work to ensure there is enough work to justify a 40 hour job share arrangement between the two brothers".

81. Mr Darius produced spreadsheets at the meeting of 27 April 2016 to demonstrate the work that could be done and which could be moved into a safe area. Other supporting documentation about the work that the respondent perceived that the claimants could do is at pages 294 to 300. The work identified for the claimants in their new workstation was: the adjuster ring function (then being subcontracted to Arlington, (formerly known as Remploy); work upon the lever press from the DC (tractor) segment; and segment sorting as a possible "fill in". These steps would entail the respondent purchasing a new lever press at a cost of around £2,000.

82. On 20 May 2016 Ms Gilmore wrote to EEF occupational health chasing up progress. She was told on 23 May 2016 that, "we have received two out of the six reports required".

83. On 8 June 2016 Adams Holmes of EEF occupational health emailed Katie Brooksbank. (By this stage, she was dealing with the matter, Ruth Gilmore having left). Mrs Brooksbank gave evidence, which we entirely accept, that she found herself in a difficult position around this time. As we know, Jayne Burkin did not join the respondent until 15 August 2016. Mrs Brooksbank was therefore left to deal with matters on her own without a manager or assistant. Such cannot of course exonerate the respondent whose responsibility is to ensure that the HR function is properly resourced. However, the Tribunal has sympathy with the position in which Mrs Brooksbank found herself.

84. Returning to the email from Adam Holmes of 8 June 2016 (at page 312), Mrs Brooksbank was told that the specialist for MAS was "waiting for him to confirm that they can release the report to us". Mr Holmes went on to say that, "as for MRS we are still waiting for two out of three specialist reports to come through before we can progress with his final appointment". It appears from the email at page 314 that only one report for MAS was awaited (being presumably the one that was awaiting release pending his consent).

85. There was then a further meeting which was held on 8 June 2016. The minutes are at pages 315 and 316. This was said to be a "reasonable adjustment meeting" at which were present Mr Littlefair, Mrs Brooksbank, Mr Darius and Mr Wright. The claimants were again not involved.

86. Mr Darius said that it was established that a workstation in the DC 'tractor' section would not be suitable because of the location and other risks with navigation. We refer to paragraph 45 of his printed witness statement. He goes on to give evidence that the estimate for the cost of a new workstation in re-work was £3,000 with a timescale for installation of three months from the date of order. There was also a need to investigate bringing back in-house the adjuster assembly work being carried out by Arlington/Remploy. That said, Mr Darius gave evidence that, "we were aware that at least 80% of the Arlington/Remploy work could be brought back in-house without further investigation because they were way over budget. In any case, there was enough of the other work available". He went on to say (at paragraph 48) that, "we also discussed whether Riaz and Alyas would benefit from 'group working'. This is an additional payment which is made in general production. Workers in re-work do not normally participate. However, Riaz and Alyas would participate because it was their involvement on the line which determined whether they were eligible and not the actual location of their workstation. It has always been accepted since this meeting that Riaz and Alyas would receive the payment and it was not discussed again".

87. Mr Darius said that, "at the conclusion of the meeting, we had a workable proposal for reasonable adjustments which could be put in place reasonably quickly and that would meet the recommendations in Dr Oliver's report". There was then a discussion about the pending specialist medical reports. The conclusion was reached (according to the meeting minutes) that, "only once all six reports are received from the specialists will the EEF occupational health be in a position to finalise the appointments and submit their final reports to Schaeffler". The view was taken therefore that "we are in a limited position of making an accurate proposal regarding reasonable adjustment" pending the receipt of further medical evidence.

88. In cross-examination it was suggested to Mr Darius there had seeped into the respondent's collective mindset a view that the claimants needed repetitive and familiar tasks. There is reference to this in the "overview" section of the minutes at page 315. Mr Darius fairly accepted this to be the case.

89. Mr Wright said that he was present at the meeting in a supportive role and had not actively participated in it. He accepted that the claimants had not been involved. The purpose of the meeting was, he said, "to put together available options." He accepted that by this stage the respondent had formed a view as to the claimants' likely role upon their return to work. However, there was no suggestion of any consultation with them about matters ahead of the anticipated occupational health reports.

90. Mr Wright said that "HR were dealing with matters" in the latter half of 2016. Mr Wright himself had no further involvement in matters until 12 April 2017 (save for attendance upon the visual awareness training arranged for 23 January 2017). As we have said, he did not see any of the occupational health reports at any time nor was he told of the content of them. His actions were based upon what he had read in the letter of 31 March 2016 and information relayed to him by others within the respondent.

91. Mrs Burkin was not in role when the four internal meetings took place. When asked to comment, she agreed that the claimants' input was crucial but defended the respondent's decision to hold meetings without them as "there are some circumstances where staff cannot be involved for confidentiality reasons." She did not know why the proposal worked through between April and June 2016 for them to return to work in a new role was not put to the claimants until November 2016, why no more discussion took place after 8 June 2016 or why there had been no regular feedback from the respondent.

92. When asked why the claimants could not have returned to work shortly after the end of March 2016 (as he did not acquire or seek any further information anyway) Mr Wright said that "it was waiting for the medical records to come through and for HR." He did not ask the claimants for consent to disclosure of any medical information or reports to him.

93. On 28 July 2016 Katie Brooksbank attended a meeting along with the claimants and Mr Hamilton. There are no minutes of this meeting but it is mentioned in the log commencing at page 138 (in particular at page 145). Mrs Brooksbank explained that occupational health services were waiting upon a report from one specialist in the case of MAS and "2 or 3 specialist reports" in the case of MRS. She asked the claimants to "chase their GP and explained that until all the medical reports are received the EEF cannot write their final report to Schaeffler". The claimants then asked if they could return to work and be placed upon medical suspension rather than continue to be signed off as sick. They were concerned that their entitlement to full sick pay would shortly be coming to an end (as matters were now moving towards the period of six months from commencement of their sick leave in February). They were also concerned about the impact of being on sick leave upon their entitlement to Child Tax Credits.

94. The following day (29 July 2016) Mrs Brooksbank ascertained from the EEF occupational health service that now just one report was awaited for each brother. Under cross-examination Mrs Brooksbank accepted that she had advised the claimants to remain upon sick leave. She justified this upon the basis that they were suffering from work related stress "because of the adjustments". In the light

of that, it was suggested by Mr Morgan that it would have been fairer to place them upon medical suspension. Mrs Brooksbank said that the doctor had diagnosed them as unfit for work by reason of work related stress. As has been said earlier at paragraph 62, the sick notes are at pages 71A to 88. All of those for the first half of 2016 refer to stress related problems and in some cases to work related stress without any specific attribution of the cause.

95. Mrs Brooksbank fairly accepted that there was some confusion as to which reports were awaited in relation to which of the brothers. She sought to defend her position upon the basis that she was on her own within the HR department dealing with this difficult case among other tasks. Her view was that it was entirely foreseeable that there would be a significant delay once the view was taken that further medical reports were required as it can take time for medical practitioners to produce them. This contrasted with Mrs Burkin's view (in paragraph 11 of her witness statement) that the delay for this reason was unforeseeable.

96. On 28 July 2016 the claimants wrote to Mrs Brooksbank (pages 331 and 332). This followed upon the meeting that day. The claimant said, "with our GP sick note about to expire week commencing 8 August 2016 what would the company like us to do? There was a couple of options to explore. The first being to return to our GP and get another sick note. The HR assistant *[presumably Mrs Brooksbank]* made it clear this was her preferred choice. The second option that was discussed *[at the meeting of 28 July 2016]* was being suspended on full pay until the company was in a position to make reasonable adjustments (this was our preferred option). We feel it is unfair on us using our sick days in this manner when our sick notes states "work related stress" is as a result of failure to make reasonable adjustments. We did inform the HR assistant that failure to make reasonable *[adjustments]* was keeping us off work and causing us worry and stress on how the company deal with us. On reflection the HR assistant said she would get back to us in due course to clarify the company's position".

97. Mrs Burkin accepted that the claimants had raised the issue of medical suspension at this stage. She said that she thought that the cause of the claimants' stress was the episode with Ruth Gilmore of 3 February 2016 and that they considered themselves unable to do their jobs in January 2016, hence the approach to HR. This view about an ability to do their jobs was at odds with the claimants having worked satisfactorily until 8 February 2016. The logic of her position was therefore that they would not have been able to return to work even with adjustments in place. She conceded that part of the reason for the claimant's stress was the failure to make reasonable adjustments.

98. Mr Sandeman said that the respondent's position was that it accepts not having medically suspended the claimants but that they should be on sick leave as they were unfit to do their jobs.

99. Mrs Brooksbank prepared an internal note dated 28 July 2016 at page 323. Mrs Brooksbank confirmed that the handwriting upon the note (recording outstanding matters) is hers. There is a record made of outstanding matters. We accept that Mrs Brooksbank was making efforts to get to the bottom of matters.

100. A further chasing email was sent to EEF occupational health services on 4 August 2016. Mr Holmes replied the same day confirming that the position was still that one specialist report was now awaited from each claimant.

101. In evidence given under cross-examination MAS complained that the first he knew that the respondent was chasing up medical reports and records was on 28 July 2016. MRS complained that there was a lot of confusion. MAS made a similar complaint when he gave evidence. MAS accepted that he and his brother knew that the respondent was awaiting further medical evidence but said that they were unsure exactly what the respondent was waiting for. There is some merit to the claimants' complaint. It has been difficult for the Tribunal to piece together the sequence of events.

102. On 4 August 2016 Katie Brooksbank was informed that a report was awaited from Dr Acharya on behalf of MAS and from Dr Vasan for MRS. The same day Katie Brooksbank wrote to Dr Vasan. A copy of that letter was sent to MRS for his information. She also informed MAS that she was waiting to hear from Dr Acharya. She asked for MAS's written authority to write to him (pages 333 to 335).

103. On 28 September 2016 the respondent received Dr Oliver's second report for MAS (pages 339 to 342). He confirmed that MAS remained absent from work because of stress and not because of his eye condition. The stress was attributable to being unable to return to work "because the workplace adjustments I recommended in March to facilitate his return to work have not yet been put in place".

104. Dr Oliver confirmed that he had now received a report from Dr Vasan, Mr Acharya and Mr Michaelides (the latter being in the form of correspondence to the GP). Dr Oliver confirmed that MAS was in no way responsible for the delay in obtaining this medical material.

104.1. Dr Oliver recommended a vulnerable person risk assessment directed at the question of MAS' ability to safely negotiate the factory site paying particular attention to the eight matters listed at page 340. He confirmed his opinion that MAS was disabled for the purposes of the 2010 Act. He then listed a number of adjustments likely to be of benefit. These were:

104.2. Allowing him to change to daylight working because of the night blindness.

104.3. Allowing him to change to part time work because of the fatigue his condition causes.

104.4. Ensuring optimal lighting.

104.5. Obtaining advice from Access to Work and the RNIB.

104.6. Allowing him to continue to work in a familiar environment and role.

104.7. Ensuring his work area is free of tripping hazards and is suitably laid out for him to negotiate it safely.

104.8. Ensuring co-workers are trained about sight loss and have an awareness of it.

104.9. Considering whether any of his minor duties that are difficult for him to carry out could be transferred to colleagues.

104.10. Ensuring that he has written instructions in a large enough font size for him to read.

104.11. Allowing him to take time off work to attend medical appointments related to the management of his visual problems.

105. The adjustments recommended by Dr Oliver were very similar to those in his first report of 17 March 2016. Dr Oliver recommended any adjustments in place should be made in consultation with MAS. He said that MAS did not require any follow up.

106. The claimants met with Jayne Burkin on 3 October 2016. There appears to be no minutes of the meeting but it is referred to in an email that she sent to MRS the following day (page 348). However, the log at page 146 refers to the meeting of 3 October. It is recorded that "we were unable to make reasonable adjustments until we had heard from both of their doctors, otherwise we would be adjusting the wrong thing or potentially making the situation worse". At paragraph 17 of Mrs Burkin's written statement she says that MRS' outstanding medical report was awaited. It appears to be the case therefore that the respondent took the view that until both reports were to hand no adjustments could take place. She said in evidence that the meeting was informal and held at the claimants' instigation. She said in the email at page 348 that once the outstanding report was to hand she would contact Joanne Arden and schedule a meeting.

107. She justified the decision not to return MAS to work at this stage because of the claimants' wish to involve Access to Work and obtain any equipment that they may recommend. She justified not having put in place any of the adjustments referred to in the March 2016 reports upon the basis that the specialist reports may have thrown up something different and in any event the claimants were signed off as unfit to work through stress. However, at no stage did Dr Oliver say that the claimants were unable to work because of stress caused by anything other than the failure to make adjustments.

108. Mrs Burkin chased up MRS' report (page 356, being an email dated 7 October 2016). On 20 October 2016 Mrs Burkin was informed by Mr Holmes that the report was to be released the following week, MRS having been in to his GP to authorise the release of the report to the respondent. MRS confirmed that he had done this in an email of 18 October 2016 addressed to Mrs Burkin (page 364). On 19 October 2016 she wrote to MAS requesting his availability for a reasonable adjustments meeting (page 357). MRS' occupational health report was still awaited at this point. However, MAS wished to proceed with the meeting but wished MRS to attend. The respondent had no objection to that suggestion. No detail was provided in any of the letters before the meeting of 17 November 2016 as to what the respondent may suggest for the way forward.

109. The meeting proceeded on 17 November 2016 (pages 375 to 379). This was attended by MAS, MRS, Mrs Burkin, Mr Darius, Mr Calderbank, Mr Hamilton, James Cadman (a student trainee), Mr Bedford and Joanne Arden who, as we have said, is an advisor with the Sheffield Royal Society for the Blind. She was there at the suggestion of MRS. Mr Wright was not in attendance at this meeting

(and the subsequent one arranged for 19 December 2018). He did not know why he was not invited and had no recollection of being asked to attend.

110. Joanne Arden recommended that, in addition to Dr Oliver's report, the respondent should obtain an Access to Work assessment and a vision awareness test. MAS said that he would like to work between 9am and 1pm. Mr Darius identified the work that the respondent considered suitable for MAS to carry out, that being "stacking, adjuster work (springs), bushes to leaver work". Also discussed was the setting up of a new workstation for the brothers in the re-work area. Mr Hamilton considered that to be the best area for MAS as it was near to the toilets, canteen and the fire exit access. MRS is recorded as saying that re-work is a familiar place for them. Mr Darius explained that it would be difficult to move machines such as 0501 and 0507 and also because of the traffic in those areas there were health and safety concerns. There was then discussion about physical adjustments such as to the lighting and the acquisition of magnifying equipment. MAS suggested there be a phased return to work and that Access to Work should come in to do an assessment.

111. The claimants' evidence is that they always wished to return to their substantive posts. MAS said that working in re-work was postulated as a temporary and not a permanent solution. Mr Sandeman suggested to him that the idea of working in that area being temporary was not recorded in the minutes. MAS said, "no, because the discussion was about re-work so it won't be in the minutes". It was then put to MAS that his substantive role was not discussed at all. MAS said, "we were told before it would be a temporary role. We were told that by Ian Hamilton. That has always been understood. This is a filler to get us back to work". MRS's evidence was that the first suggestion to the claimants of working in an alternative role was at the meeting of 17 November 2016 (even though the respondent had had it in mind from early April 2016). This evidence was not challenged.

112. Mr Darius was asked whether it was his understanding that the claimants wished to return to work in their old substantive roles. He said, "I can't recall that". As we observed earlier the first internal meeting held on 8 April 2016 touched upon the issue of how the claimants return to work may fit with the shift system. That would not have been the subject of discussion if there was no question of a return to the substantive roles.

113. Mr Darius said that he showed Joanne Arden and Jayne Burkin the proposed new work area. Mr Morgan observed that there was no reference to this within the minutes. Mrs Burkin told us (in evidence given under re-examination) that although no one was actually working upon the bench in the proposed new area it was functionally ready for anyone so do to (albeit without any adjustments to accommodate the claimants).

114. It was suggested by Mr Morgan that the reference in the fourth paragraph on page 376 to it being difficult to move machines such as 0501 and 0507 indicated that there had been discussion about the substantive roles. Mr Darius accepted that to be the case but said that the claimants did not say that they wished to do the old job and, on the contrary, there was no indication from them that the new

role was not acceptable to them. It was suggested that this was because the claimants viewed the new role as being temporary. Mrs Burkin said that the claimants were keen to stress what they were able to do and did not take issue with the suggestion put to her by Mr Morgan that work in the substantive roles was raised at the meeting. She said that the new workstations could have been ready "fairly quickly but the claimants wanted Access to Work to be involved."

115. The Tribunal was presented with work activity risk assessments for machine 0501 dated 30 March 2016 and 0507 dated 17 November 2016 (pages 1076 to 1084). These rated the risks of working upon these machines as low or very low in respect of the numerous activities there set out. We appear not to have risk assessments for machine number 0539 and are not confident that we have had all of the risk assessments for machines numbered 0501 and 0507. At all events, it appears not to be in dispute that the risks of working upon all three machines was rated as very low or low. Mr Wright accepted this to be the case "for a fully sighted person." As we shall see (at paragraphs 171 to 176), that position changed in July 2017. When asked about the risk assessments during 2016, Mr Bowgen accepted what the risk assessments said but qualified his concession with the remark that the risks were not low or very low for somebody with a visual disability.
116. The occupational health report for MRS was sent on 24 November 2016 (pages 380 to 383). As with MAS, Dr Oliver said that MRS was "currently absent from work due to stress and not because of his eye condition".

117. He said that he was now in receipt of a medical report from Dr Vasan, Mr Rehman and clinical letters written by Mr Michaelides. He confirmed his opinion that MRS was a disabled person for the purposes of the 2010 Act. He identified very similar health and safety concerns for MRS as with MAS and recommended a vulnerable person risk assessment be carried out. The reasonable adjustments likely to benefit MRS were set out upon the third page of the report (at page 382). Again, these are very similar to those recommended for MAS. Additional recommendations for MRS were to allow him a short break mid-shift as a further means of reducing fatigue and to facilitate travel to work possibly with financial assistance from Access to Work. He also recommended a phased return to work. Although dated 24 November 2016 the report was received by the respondent only in the middle of December.

118. On 28 November 2016 (page 384) the claimants said that they had seen Mr Bedford who had recommended that they approach the respondent to ask for reinstatement of full pay "as we only went off sick due to the company telling us to do this after their failure to make reasonable adjustments". Mr Bedford wrote about the same matter on 8 December 2016 (page 386). He said that the claimants had now exhausted their sick pay entitlement and requested that their pay be reinstated. They continued to be certified as unfit for work due to "stress related problem". We refer to the sick note of 29 November 2016 (page 83). This certified them as unfit for work until 29 January 2017. When asked why the claimants were not able to return to work at that time Mr Darius said that it was "in HR's hands".

119. Upon the issue of sick pay, Mrs Burkin said (at paragraph 27 of her printed witness statement) that the claimants were paid full pay as sick pay until the middle of September 2016 at which point their sick pay was reduced to half pay under the respondent's sick pay scheme. She said that she discussed the matter with Mr Littlefair. It was their view that the respondent was not responsible for the delay in obtaining the medical reports or that the claimants had been instructed to stay off work. She said, "they were being signed off by their GP with stress. Even if that had not been the case, they were considered to be unfit to carry out their normal duties and had been offered alternative duties which were suitable. Unless they accepted their new duties, it was appropriate to treat them as absent due to their medical condition. Although we concluded that it would be reasonable to apply the sick pay scheme, this had been an unusual case involving a complex medical condition and there had been lengthy delays in obtaining medical reports. We did not want Alyas and Riaz to be in difficulties so we decided that the company would extend full sick pay for a reasonable period to enable them to return to work. They have been offered alternative duties on the terms they requested and so we considered that a reasonable period would be until March 2017. We fully expected the brothers to be back at work by then. Payroll were instructed to make up Alyas' and Riaz's pay on 6 January 2017".

120. On 13 December 2016 Mrs Burkin asked MRS to let her have the contact for Access to Work so that she could schedule a meeting with them. He responded on 14 December. He appeared unwilling to let her have those details commenting that, "in the last meeting with my brother you mentioned that no one was to be contacted until you had sight of my occupational health report and had arranged a meeting to discuss the report". That was not Mrs Burkin's understanding but she suggested that the matter be discussed at the meeting that was arranged for and held on 19 December.

121. The notes of this meeting are at pages 393 to 395. MRS brought in the contact information for Access to Work and it was agreed that the claimant would make contact. Mrs Burkin acknowledged that the claimants had also provided information about Access to Work (with which she was very familiar) back in January 2016.

122. At the meeting Mrs Burkin went through MRS' occupational health report. MRS confirmed that the adjustments for him were "near enough the same as for MAS". Mr Hamilton observed that a wider work bench may be needed which Mr Darius confirmed would be investigated. Mrs Burkin said that the next step was to invite Access to Work to assess the situation. MRS said that Access to Work would be able to help with the budget "as each person is entitled to a £41,000 grant". MRS encouraged the respondent to allow him and his brother to show the respondent what they were able to do. He said that, "they shouldn't be treated any differently, they could even work on their old sections". Plainly the question of a return to their substantive roles remained a live one for the claimants. MAS also raised the issue of transportation into work.

123. When questioned about this meeting, Mr Darius was unable to say why the lighting had not been made ready. The meeting notes record that it was "almost ready." He said that "a return to work date was the next step and an Access to

Work assessment. We didn't want to start something and find we needed to do it again". Mr Darius fairly accepted the claimants wished Access to Work to look at their old role and that the new role was assessed by Access to Work when they visited the premises at the behest of the respondent.

124. Mrs Burkin accepted that there were no significant differences between Dr Oliver's first and second reports for both claimants. She also conceded that all four reports that he had done by him were upon the premise of the claimants returning to their old roles and adjustments to facilitate that.

125. The claimants' position was that they were seeking Access to Work involvement only upon the question of a return to their old roles. The respondent's view was that Access to Work involvement was sought to help with both the substantive old roles and proposed new roles. The reason for Access to Work to be involved in the latter was upon the issue of equipment to facilitate it. Hence the claimants did not return to work in the new roles pending that assessment.

126. The respondent arranged and paid for disability awareness training for its employees. This was organised through the RNIB and took place on 23 January 2017. There we see a list of those who attended the visual awareness training session at page 405.

127. On 5 January 2017 MRS emailed Mrs Burkin to confirm that the Access to Work applications had been sent. He apologised for the delay explaining that it was the first chance that he and his brother had had to meet with Joanne Arden since the Christmas holiday. Mrs Burkin responded to say that she would let the claimants know as soon as Access to Work had contacted her. MRS explained in evidence that Access to Work had recommended enlisting the help of Joanne Arden to complete the form.

128. The Access to Work assessment in fact took place on 28 April 2017. (The steps taken between January and the end of April 2017 are summarised below at paragraphs 130 to 143). A report was prepared that day (pages 439 to 453). Mr Darius explains that "in the meantime *[between the end of 2016 and the date of the Access to Work visit at the end of April 2017]* the company decided to install a heat treatment plant in the factory. This is a new line and is important for the future of the factory. As a result, the re-work area had to relocate. The area previously identified as suitable for Alyas and Riaz in re-work would no longer be available. However, part of the planning for the new line and relocation of re-work was to ensure that there would be a suitable area for Alyas' and Riaz' workstations. The new area we identified was actually preferable to the previous location. The new area is closer to the toilets, canteen and emergency exits and there is even less traffic. We also re-named re-work as disassembly".

129. Mr Wright accepted that Access to Work came to look at the original work stations and were also asked by the respondent to look at the new work stations. All that could be shown to Access to Work at this stage was the area where the new work stations were to be located following the installation of the heat treatment plant (as opposed to the work stations themselves which obviously had not yet been set up in that area). That said, the benches upon which the claimants were to

work in their new role had been *in situ* from November 2016 in the old rework area (but without the equipment recommended by Access to Work) and were there to be seen in April 2017 (albeit not in the new disassembly area). Mr Wright accepted that he had not pointed out to Access to Work that he considered that it was a high risk to allow the claimants to return to work upon their old machines. He maintained there to be a high risk because of the issue of navigation around the site (page 438).

130. Mrs Burkin gives evidence (at paragraphs 30 to 41) of the efforts made between January and April 2017 to contact Access to Work to set up the meeting and to progress matters. She explained that MRS had told her that Access to Work had sent the claimants a list of 16 questions which they needed to discuss with Joanne Arden before answering. On 17 January 2017 MRS told her that this had been done. Access to Work had then sought information from the claimants' GP (pages 403 and 404 being an email exchange about this on 17 and 18 January 2017).

131. On 27 February 2017 MRS confirmed that he and his brother had been to see their GP to see if he had done the letters needed by Access to Work. On 27 February 2017 Mrs Burkin asked for an update from the claimants. (We refer to pages 408 and 409).

132. On 15 March 2017 the form ATWE1 was issued to the respondent by Access to Work. This form informs the employer that an employee has asked for help from the Access to Work programme. On 17 March 2017, upon return from a business trip to Germany, Mrs Burkin discovered a voicemail message and email for her from Jagdish Davda of Access to Work. He wanted to know when the claimants would be returning to work. Mrs Burkin replied that day saying that the sick notes were due to expire on 1 May 2017 (page 413).

133. Upon the issue of sick pay, Mrs Burkin says that, "the brothers' sick pay expired at the end of March 2017. Having paid full pay for more than 12 months and in the absence of any progress since making the offer of reasonable adjustments in December, the company did not consider it reasonable to extend the sick pay further. I should add that Riaz and Alyas Sabir wished to work part time 20 hours a week, from when they first asked for reasonable adjustments and this had been agreed in principle. If they had returned to work earlier, working four hours a day, it would have been effectively on half pay".

134. On 4 April 2017 Mrs Burkin emailed MRS and invited the claimants to a meeting on 12 April to discuss a way forward (pages 414 and 415). She stated that in the meantime the new heat treatment plant referred to by Mr Darius in his witness statement was to be installed in the factory and the new work area for the claimants had been identified.

135. We can see from the Access to Work log (page 663) that the information which they sought from the claimants' GP was received on or around 15 March 2017. The log also notes that the form ATWE1 was issued to the respondent that day. The form is at pages 411 and 412. This explains that Access to Work was contacting the respondent because an application had been made to them for

help from their employees. It was explained in the form that Access to Work *"is a government programme delivered by Job Centre Plus to help overcome barriers that disabled people come across in getting or keeping work. The programme helps by providing advice, an assessment of your employee's disability needs in the workplace and if required a financial grant towards the cost of any necessary support. Access to Work enables disabled people to contribute to the success of your business".* The six elements of the programme were then explained. This includes special aids and equipment, travel to work, travel within work, the provision of a support worker and adaptations to premises and equipment. Some details are then given about funding.

136. On 17 March 2017 the claimants went on to nil pay. This is confirmed in the letter commencing at page 580 (in particular at page 584). A form was sent to the claimants to help them with claiming state benefits upon the expiry of their sick pay entitlement (the handwritten annotation upon the form at page 416 says that this was sent to the claimants at the beginning of April 2017).

137. A meeting was then arranged for 12 April 2017 (pages 422 to 425). The claimants were present along with Mr Hamilton. Mr Bedford was unable to attend due to bereavement. Jayne Burkin, James Cadman, David Wright and Robert Darius were present on behalf of the respondent. Mrs Burkin summarised the position following the last meeting held on 19 December 2016: that the claimants could work part time hours with a phased return when fit to work. The claimants said that their preference was to work between 9am and 1pm five days a week. Mrs Burkin mentioned the re-location of the proposed work area by reason of the heat treatment plant installation. Mr Hamilton said that he had shown the claimants the area in which they would be working and it was agreed that this was a better location than the one previously proposed. Mrs Burkin confirmed that although part time workers generally are not entitled to a break the respondent was happy to accommodate the claimants' request for one to help alleviate fatigue. She also said that the lighting had been adjusted as had the workstation.

138. Mrs Burkin then went through the history of contact from Access to Work. Mr Hamilton said that Access to Work "needed to be involved a lot sooner. They may be able to highlight issues we have missed but given the timescale that this situation has been running for I believe that we have thoroughly covered what we need." That Mr Hamilton appears to have complained that Access to Work should have been involved earlier is corroborated by MRS' observation that Access to Work should have been involved "since February". MRS then suggested telephoning Access to Work there and then in order to move matters forward. Mrs Burkin agreed so to do. The meeting notes then record the following:
"Jagdish Davda answered the phone call to which MRS asked what is happening with his application. JD said that they had closed the claim as no information was provided. JB asked JD what information was needed which JD responded the return date. JB confirmed to JD that she emailed back on the same day the date that his email and voicemail message was received. JB told JD that the email concerning the application was only regarding a taxi to work and not a work assessment on the old workplace of Sabirs. Information could not be provided

with regarding a start date but JB confirmed that she emailed on 17 March and advised JD about the end date on the fit for work note".

139. (Although this note is not a model of clarity, the reference to taxis and a workplace assessment appears to relate to what had been said during the meeting of 12 April 2017: MRS had been asked by Mrs Burkin what his expectations were from Access to Work. MRS had said that the claimants were expecting an assessment of the entire workplace. It is then recorded that her understanding was that Access to Work were going to provide the claimants with transport to work and that the respondent was willing to fund the adjustments discussed).

140. MRS, in evidence given under cross-examination, said that Jayne Burkin had become angry during the course of the telephone call with Jagdish Davda and had closed the meeting. He complained that Jayne Burkin appeared not to understand the purpose of Access to Work. For her part, Mrs Burkin acknowledged to feeling frustrated by the call with Access to Work. She denied getting angry but fairly acknowledged having made her feelings plain.

141. Mr Wright fairly accepted that the claimants made clear at this meeting that they wished to return to their substantive roles.

142. In evidence given under cross examination Mr Wright said that he was not told anything before the meeting of 12 April 2017 about developments since he was last involved in the matter in June 2016. This was notwithstanding the fact that he had had no involvement in matters since then. He said that he took no action towards getting the claimants back to work after the 12 April 2017 meeting "because the area was being transferred and the Access to Work case had been closed." He also could offer no explanation as to why there was no discussion in the meeting of a return to work after 1 May 2017 (being the date of expiry of their sick notes).

143. Mrs Burkin's evidence before us was that she was surprised to discover at the meeting that the claimants wished to return to their old jobs. She said this while acknowledging that the claimants had maintained that position throughout. Her evidence of being taken by surprise was thus difficult to understand. She said that the claimants were unable to return to work in their new roles pending receipt of the Access to Work reports as equipment may need to be ordered. She fairly accepted there to be no refusal to return upon the part of the claimants.

144. Mrs Burkin arranged for Mr Sandeman to speak to Mr Davda. There is an email confirmation of this dated 13 April 2017 at page 426. Mr Sandeman emailed on 13 April 2017 (page 428) asking that a work place assessment be arranged. He observed that the claimants' sick notes expire on 1 May 2017 and the respondent's understanding was that they would be fit to return to work on the following day. Mrs Burkin confirmed the same day that the respondent would pay the first £1,000 of expenditure for adjustments agreed for the claimants. Thus, although it appears to be the case that the Access to Work application lodged by the claimants had been closed there appears to have been no difficulty in resurrecting it.

145. Arrangements were made for Access to Work to visit the premises on 28 April 2017 and a report of that date was prepared as we have seen. Notes of the meeting of 28 April 2017 are at page 438.

146. The needs assessment report for MAS prepared by Access to Work is at pages 439 to 442. In summary it was noted that:

146.1. MAS has difficulty travelling to work.
146.2. The respondent had agreed in principle to part time working hours totalling 20 hours per week and only covering daylight hours as an adjustment.
146.3. Some physical features may present a difficulty for MAS. In particular, the corridor from the workplace access results in a significant drop in lighting, there is high traffic and uneven ground.
146.4. The respondent had made several adjustments to enable MAS to maintain his work but these relate to working on a different production method (in the new role). This involved working at an inspection desk with overhead lighting and a stainless-steel top which results in glare. There was also a problem with contrast.
146.5. MAS was keen to return to his original role.
146.6. It may be beneficial to supply MAS with a handheld magnifier and a desktop magnifier and ensure optimal lighting.
146.7. There may be difficulty with accessing certain areas such as welfare facilities and the canteen. A recommendation was made that the stair edges be fitted with yellow strips.
146.8. It was noted that it may be beneficial for MAS to have a support worker to help undertake final visual checks guaranteeing that his work is up to the quality standard required. The support worker could bring parts to MAS' workstation and act as an aid during any evacuation, help with navigation around the premises and access and egress to and from the building. Access to Work's reference to a support worker at the meeting of 28 April and the subsequent report appears to have been the first mention by anybody of the possibility of the involvement of a support worker. Mrs Burkin confirmed in evidence given under re-examination that the suggestion of a support worker first arose sometime after she had met Joanne Arden.

147. A number of aids and appliances were then recommended as set out at pages 443 to 445.

148. The Access to Work report for MRS is at pages 447 to 453. This was in very similar terms to that for MAS. It was noted that MRS was also keen to return to his original role. Mr Wright said that the reports had been sent to HR and that he did not see them at this time. The note shows concern being raised by Mr Darius and Mrs Burkin about the reference to the use of a support worker to help the claimants return to their old jobs. This concern was grounded upon health and safety concerns. Mrs Burkin said that the respondent had at no stage ruled this out as a possibility. She did not think it was an option but accepted that it was a decision for others.

149. On 5 May 2017 Access to Work approved the grant to help towards the cost of taxi fares in the form of travel to work support. They were also prepared to contribute a large proportion of the cost of obtaining portable and desktop magnifiers. We refer to pages 454A to 454F.

150. On 11 May 2017 Access to Work emailed Joanne Arden with support worker logs for the claimants to complete setting out justification for their need for a support worker. This is at pages 681 and 682.

151. Mrs Burkin had not received a doctor's fit for work note from the claimants to cover the period of absence following 1 May 2017. She emailed MRS on 9 May 2017 (page 455). The missing fit notes were received on 15 May 2017. Mrs Burkin said that she was not concerned that MAS and MRS were not back at work because as far as she was concerned they were signed off as unfit to work pending the acquisition of the equipment.

152. Mrs Burkin appears uncertain as to the precise date upon which the Access to Work reports were received by the respondent. She says that Ian Hamilton brought copies to the HR office. There is no note in the log at page 149 to help us with the date upon which the respondent received these reports. She also says that there was a delay in the grant letters being received (pages 454A to 454F). Mrs Burkin said that she believed the reports to have been delivered around 15 May 2017.

153. A meeting was arranged for 7 June 2017. Minutes of the meeting are at pages 456 to 462. The purpose of the meeting was to discuss reasonable adjustments and what additional equipment the respondent needed to purchase. Present were the claimants, Mr Hamilton, Mr Bedford, Mr Wright, Mr Bowgen, Mr Cadman, Mrs Burkin and Mr Sandeman.

154. Mr Sandeman said (at the meeting) that it was his understanding that the claimants wished to return to their old jobs. MRS confirmed this to be the case. Mr Sandeman then said that the respondent was concerned about them returning to their old duties because: there was a general risk of working in the old roles; there were issues around quality; there were concerns about the production targets; and there were concerns about the working hours. Mr Sandeman said that the respondent wanted the claimants to return to the new roles as soon as possible. He said, "we are by all means not confirming that this is a permanent job switch. However, it would most certainly be until an informed decision can be made on the old roles". Mr Sandeman said that the respondent was surprised that the claimants' stance was a wish to return to their own jobs.

155. The respondent had received little information as to what a support worker would be required to undertake. Mrs Burkin expressed concern at the meeting that the respondent was "over on our budget cost which is calculated by head count, so we need to find out what this support worker does and if we can use an existing member of staff". Mrs Burkin said that the return to work would be temporarily undertaking the new role pending assessment of the old substantive role: see the fifth paragraph on page 457.

156. There was then a discussion about risk assessment. MRS said that a risk assessment to return to the old role ought to be undertaken when the reasonable adjustments had been put in place. Mrs Burkin said that there needed to be an initial assessment to identify what the risks are in order to establish what adjustments need to be made. She confirmed that the yellow strips on the floor as recommended by Access to Work and the lighting had not yet been put in place because no return date had not been fixed. The benches had not been set up but "that would not be an issue."

157. MAS said in evidence that he "could not believe" the respondent's expression of surprise that they wished to return to their old roles. He said that this had been discussed in April 2017. Looking again at the minutes of the meeting of 12 April 2017 there clearly was an expectation upon the part of the claimants that Access to Work would look at their substantive roles (by reference in particular to page 424).

158. Mr Bowgen confirmed in evidence that he understood from the meeting of 7 June 2017 that the claimants were keen to return to their old roles and that the adjustments referred to (substantively on page 441 but beginning in the final sentence of page 440) were all directed at enabling them to return to work in their old roles. This also extended to the reference to the support worker (at page 442). Mr Bowgen also accepted that the occupational health reports had been prepared upon the premise of the old role. He said that he did not have those reports before him but he "knew vaguely of their content". He accepted that neither the occupational health physician or Access to Work opined that the claimants could not do their substantive role.

159. Given that the need for magnification and extra lighting (as opposed to adjustment to optimal lighting) was a recommendation of Access to Work and not occupational health Mr Bowgen was unable to explain why the claimants were unable to return to work shortly after the meeting of 7 June 2017. He said that the workstation for the new role was not set up on that day as the respondent was waiting for a return date. He said that it could be set up and that "we just needed the parts". By this, he clarified that one workstation had been set up in order that Access to Work could see it but the second workstation needed to be attended to. Mrs Burkin was unable to explain the several weeks' delay in ordering the necessary equipment.

160. Mr Bowgen had given evidence that the new roles were ideally suited to the claimants as the workstations would be located in disassembly away from the hustle and bustle of the production line in a relatively quiet area. Also, Mr Hamilton was located in that area and would then be on hand to help them. Further, they would not have to achieve difficult production targets because the rest of the line would not be dependent upon them and it would also afford greater flexibility as to their working hours.

161. Mr Bowgen was asked to comment upon the fact that the claimants had worked in their old role notwithstanding the onset of retina pigmentosa for several years before the condition had been disclosed to the respondent and with little impact upon their productivity. It was suggested that Mr Bowgen was simply assuming

that the claimants' eye condition would be a problem. This he denied. He said that when the condition came to light it gave rise to health and safety issues.

162. Mr Bowgen was asked as to whether the respondent had been taken by surprise by the possibility of the engagement of a support worker to help the claimants. He said that it did come as a surprise although qualified that comment by saying that it may have been a surprise to him rather than the respondent as a whole.

163. The meeting noted that the claimants' current sick notes were due to expire on 13 June 2017 (page 459). They were unable to return upon the expiry of the notes as the equipment had not been ordered. This process was put in hand two days after the meeting (on 9 June 2017).

164. Mr Bowgen says in paragraph 12 of his witness statement that adjustments to the alternative workstations were delayed because the company was due to install the new heat treatment line (as we have seen) but this was not completed until early August. He said, with some justification, that such projects take a long time to plan and come to fruition.

165. Mrs Burkin confirmed that as at 12 April 2017 the respondent knew that this installation would be going ahead later in the year. She said that had the claimants been allowed to return to work around 1 May 2017 (following expiry of the sick note that day) then there would have been a three week period in which the claimants would have not been able to do any work by reason of the installation of the heat treatment plant. She said that in any event the claimants were signed off an unfit to work until the end of July: this is corroborated by the sick notes at page 87 (giving 'work related stress problem' as the medical reason for unfitness).

166. On 23 June 2017 a further meeting took place attended by the claimants, Mrs Burkin, Mr Wright, Mr Calderbank and Mr Hamilton. The purpose of this meeting was firstly to discuss what tasks a support worker would provide to assist the claimants to return to work on their old workstations and secondly to carry out risk assessments. MAS observed that in order to return to his role on machines 0501/0507 it would be beneficial for the support worker to remain on hand throughout the shift. MRS took the same position to enable him to return to work upon machine 0539. The brothers expressed confidence that the quality of their work would not be affected by their condition "but believe that the support worker would provide that second visual check of parts and completed assembly thus providing the quality reassurance that the company requires".

167. Mrs Burkin said (at the meeting) that the workstation area for the alternative role proposed by the respondent was not yet in place. The disassembly area move was due to be completed within the next few days and an additional work bench was currently being sourced with a non-reflective bench cover. She said that lighting was also in the process of being installed and that the handheld magnifiers had been ordered about 10 days prior to the meeting. Mrs Burkin said that the respondent itself would be unable to provide support workers and would be looking to any help that Access to Work could provide. In the event, as we know, there was a delay in completion of the disassembly area by reason of the installation of the heat treatment plant.

168. Mr Bowgen helpfully tells us that the second work bench was in fact ordered on 23 June 2017 (pages 467 to 470) and a second bench top on 11 July 2017 (pages 477 to 479). The magnification equipment recommended by Access to Work was delivered and invoiced on 3 July 2017 (page 476). The electrical work was completed by 17 August 2017 (pages 504 and 506). The acquisition of the equipment coincided with the installation of the heat treatment plant. Mrs Burkin also told us that the Access to Work report had by this time found its way to Katy Brooksbank who was unfortunately absent for a period around this time. Hence there was a delay in progressing the orders.

169. As we have said, the claimants prepared a description of their substantive roles together with the tasks that they considered they needed from a support worker to help them to do their jobs. The log is at pages 480 to 488. Mr Bowgen accepted Mr Morgan's summary of the tasks required of the support worker as focusing upon navigation around the premises and assistance in using a pedestrian truck. This included navigation to deal with mechanical breakdowns. When being cross-examined about the log Mr Bowgen was taken to the reasonable adjustments meeting held on 13 February 2018. We shall come to this in due course. It is in the bundle at pages 637 to 640. In particular, at page 640, it is recorded that MRS made the observation that the support worker was in place to do a maximum of 20% of the claimants' substantive role. Mr Bowgen fairly accepted that this was not in dispute.

170. Mrs Burkin accepted the support worker role to be primarily about ensuring the claimants' safety as the claimants maintained that they were able to do their substantive roles with support. (This assertion by the claimants has not in fact been put to the test yet even upon a trial basis conducted with an existing employee acting as a support worker for a short period). The claimants' position is that they cannot do their old roles without a support worker to ensure their safety. They do not assert that they are able to do their substantive roles on their own.

171. The next meeting took place on 4 July 2017. This was undertaken in order to review the risk assessments that had been prepared at this time by Mr Wright at the behest of Access to Work. The risk assessments themselves are at pages 491 to 499. Mr Wright expressed the view that, considering the location of machines 0501 and 0507, it would be high risk activity for a partially sighted person to work upon it. He reached a similar conclusion about machine 0539. It was put to Mr Bowgen and Mr Wright that there was no consideration in the risk assessment of the level of risk were a partially sighted person to be aided by a support worker. The omission of consideration of the position with a support worker was perceived by the claimants to be unfair and liable to jeopardise their application for assistance from Access to Work accordingly. Mr Wright said that he would assess as high risk the claimants working upon machines 501/507 and 539 even with support worker assistance.

172. That being the case, the Tribunal asked why the provision of a support worker for the claimants was still being pursued to this day. Mr Wright said that this was in order to "view all avenues of reasonable adjustments we could put in place." He

went on to say that a support worker (if recruited internally) was one of the control measures that the respondent was able to put in place.

173. Mr Wright said that he conducted the risk assessments at this time upon "the basis of the information I had." He appeared to accept that the risk assessment was done upon the incorrect premise of the claimants working upon the machines on their own. The intention (according to Mrs Burkin) appears to have been that a subsequent one would be done after the adjustment of support worker provision being made and that the ones undertaken by Mr Wright in June and July 2017 were "a starting point" (as Mrs Burkin put it). The initiative for this appears to have come from Caroline of Access to Work who recommended on 20 June 2017 that risk assessments be done (according to an email sent by Mrs Burkin to MRS on 21 June 2017: page 471). We do not read this email as showing that Caroline recommended doing a risk assessment ignoring the support worker provision.

174. Mr Wright had no explanation for the delay in doing the risk assessments shortly after the meeting of 12 April 2017 other than to say that matters were being dealt with by HR and he was awaiting instructions. This was despite his knowledge at that time that it was proposed that the claimants return to work in their substantive roles with the help of a support worker. It was even suggested by Mr Morgan that the information in Mr Wright's possession in fact had changed little from March 2016. Mr Wright explained the delay between 23 June and 4 July 2017 by reason of Mr Bedford's unavailability on the earlier date. Mrs Burkin explained the delay between 12 April and 23 June 2017 upon the basis of awaiting the Access to Work assessment. She fairly accepted that the risk assessments could have been done sooner, particularly as they were done without the reasonable adjustments being in place. She could not explain why Mr Wright had not done a risk assessment as suggested by Ruth Gilmour on 8 March 2016 (pages 224 and 225: paragraph 43 above) (which recommendation was subject to the claimants' permission being forthcoming and which was granted).

175. Mr Wright justified his assessment of high risk upon the basis that "all three machines are very compact. If you have to go into a guarded area to remove a jam for example, with reduced vision, there's a high risk of a slip or trip or a collision." He accepted that if one was to go inside machine 507 beneath the conveyor belt then one would be fully in sight. He qualified that answer by commenting that there were other areas where one would be hidden. About machine 539, he said that one's body would obscure the hands' activities increasing the risk of undertaking an unsafe activity unseen. He conceded that trainees would be observed by a trainer standing outside the machine which was deemed an acceptable risk by the respondent but observed that a trainee may not have reduced peripheral vision.

176. It was put to Mr Wright that his summary of concerns at pages 491 to 499 made no reference to going into the guarded areas of the machines. He did not accept this to be the case. He said that he had referred to this issue about both machines: in his summary he mentioned issues around "access equipment" and "unplanned circumstances." He said that machine 539 was safer than was 501/507. This was because the control panel could be operated from outside the guarded area. Concerns about both machines also centred upon transport

routes. He accepted Mr Morgan' suggestion that this was the principal concern for which a support worker may help.

177. Mr Wright conceded that he had not asked the claimants about their percentage loss of vision for confidentiality reasons. This could of course have been resolved by him simply asking the claimants whose prerogative it was to tell him. However, Mr Wright did not do so. Mrs Burkin confirmed that Mr Wright had not been shown any of the occupational health reports although these had been discussed.

178. Reverting to the meeting of 4 July 2017 MAS confirmed that the forms concerning the support worker assistance role had been returned to Access to Work. Mrs Burkin reiterated that the respondent would not be able to pay for the support workers and therefore it all depended upon the view of Access to Work. Mrs Burkin confirmed that a further risk assessment would be carried out about the substantive roles once the adjustments were in place. She confirmed that the plan was for the claimants to return to work in the alternative roles but that the bench, work surface and lighting needed to be in place first. She confirmed that there was no need for support worker provision for the claimants to undertake the alternative role although there would be a buddy in place (presumably Mr Hamilton). However, the view was taken that the claimants could not even return to work in the new roles pending receipt of the Access to Work reports as equipment may be required to facilitate the new role. The claimants' position is that the respondent had the information they needed about the new role and any equipment required for it from Joanne Arden and the Access to Work reports that came to hand in mid-May 2017 (pages 454A to F).

179. Mrs Burkin says at paragraph 51 of her witness statement that the log at pages 480 to 488 (referred to earlier in paragraphs 14 and 17) was not produced by the respondent and was only disclosed to the respondent in the course of these proceedings. She says that, "it demonstrates that a support worker was being requested by the brothers for the whole of their shifts". Her evidence before us was that Joanne Arden of Access to Work helped the claimants to complete it. The log, as Mrs Burkin accepted, showed that the claimants' perception was that a support worker would help with navigation and direction around the premises. However, Mrs Burkin said that she and Mr Darius felt that more would have to be done by a support worker.

180. Mrs Burkin tells us that the optical equipment was delivered on 7 July 2017 consisting of two clear view video magnifiers and two electronic handheld video magnifiers.

181. On 2 August 2017 Mrs Burkin emailed MRS. She explained the delay in getting the new work area ready due to the heat treatment plant. MRS replied on 4 August 2017 and told Mrs Burkin that the Access to Work application was still with the DWP (page 500).

182. On 8 August 2017 Mrs Burkin emailed MRS (page 503A). She said that the new work area was ready. The claimants were invited to view the area on 10 August 2017. It was proposed that Mr Wright carry out a risk assessment with a view to them starting work on 14 August. MRS responded to say that the claimants were

on holiday until 29 August 2017. MRS said, on behalf of himself and MAS, that he was "over the moon" about the prospect of returning to work. He said that "we both did not think this day would ever come": (page 503).

183. In anticipation of the claimants' return to work, Mr Bedford emailed Mrs Burkin. He raised 18 issues for discussion ahead of the claimants' return to work. We need not set them out. They are listed at page 508. The final point was a question about whether the lighting and yellow strips on the steps had been undertaken as recommended in the Access to Work and occupational health reports.

184. It appears that the proposed pre-return to work view of the new area and risk assessment did not in fact take place. This is due to the claimants' holiday and also that of Mr Wright. Mrs Burkin suggested on 21 August 2017 that somebody else prepare the risk assessment but the claimants preferred this to be undertaken by him.

185. On 29 August 2017 a nurse at Mediwright prepared a report upon MRS (pages 510 and 511). This was addressed to Mrs Brooksbank and had been commissioned by her. It noted that MRS was anxious to return to work. He said that he felt he had lost his confidence and was suffering from low self-esteem due to not being able to work. It was recommended that he return to work upon a phased return to work basis and noted that "all the recommendations had been put in place as below". These are then listed. We need not set them out here. There appears to be no equivalent report for MAS.

186. Upon the same day (29 August 2017) Mrs Burkin met with the claimants. This meeting was in order to discuss the 18 issues raised by the claimants' trade union (at page 508). Answers to all of the questions were emailed by her on 30 August 2017 (pages 512 to 513). It was noted that the claimants had a provisional start date of 18 September 2017. Taxis to and from work were to be arranged under the provision made by Access to Work. It was proposed that upon the return to work day Mr Wright would contact the claimants to do a risk assessment for the new work area. Upon the issue of the original roles, Mrs Burkin said that, "this is conditional on support workers being in place for the whole shift as identified by our risk assessment, Access to Work in their report and at our previous meetings. We are still waiting to hear about what provision is being offered by Access to Work, and given the risks identified establishing what support will be provided is key if you are to return to these roles".

187. She said that, "after consideration, yellow strips have not been applied due to the regular floor cleaning which would simply remove them. There is however a lift available if there is a need/desire to go upstairs". Upon this issue, MRS said that he was unimpressed by the reticence to arrange for some form of floor marking. He asked, "why can't they be painted".

188. Mr Wright opined (in evidence) that there were practical bars to painting yellow strips. There was a risk of the paint affecting the functionality of the EVAC chair or of "coming off.". He said that yellow strips may not adhere and thus create a tripping hazard. Putting yellow strips beneath the veneer on the marble stairs

presented a risk of cracking because of the drilling and fixing that such work would entail. Painting yellow strips was also an issue because the steps were made of a highly polished surface and were not made of concrete. He accepted that he had not considered alternative ways of marking the steps. That was an issue, he said, for the respondent's maintenance section. He did not accept *"wholly"* the claimant's concern about having to use the lift in an emergency. He said that people were trained for emergency evacuations and the use of the EVAC chair.

189. On 18 September 2017 the claimants returned to work in their new roles in disassembly. They were provided with the support of a number of buddies to help them move around the building all of whom are based in the disassembly section. We refer to paragraph 33 of Mr Bowgen's witness statement. The claimants evidence is that the risk assessment upon their new workstations was not carried out and has not yet taken place. No pre-return to work meeting was held with the claimants. No reviews have taken place contrary to the advice of the RNIB (who at the meeting of 17 November 2016 had recommended three' or six' monthly reviews).

190. According to the Access to Work log at page 700 Mrs Burkin told Access to Work that day (18 September 2017) that the claimants were starting work in a new role and therefore there was no need for a support worker. Accordingly, the case was closed. It has to be said that the Access to Work log is not the easiest document to follow. There appears to be a second entry of 18 September 2017 at page 701 in which a record is made that Access to Work were informed by Mrs Burkin that the brothers would not be returning to their old roles <u>for the time being</u> as it was too dangerous. Mrs Burkin's evidence was that she had said to Access to Work that the claimants were working in new roles for which a support worker was not required but that she had not told Access to Work that the prospect of a return to the old role (with support worker provision) had been ruled out altogether. We accept that it is plausible that a misunderstanding occurred about this issue. As we shall see, the application was reinstated quickly and no significant amount of time was lost.

191. On 21 September 2017 Mrs Burkin sent Access to Work the risk assessments carried out by Mr Wright (being those at pages 490 to 499). We accept that this was indicative of the respondent not closing its mind to the possibility of the claimants returning to their old roles. Mrs Burkin appears to have volunteered to send Mr Wright's risk assessment to Access to Work. The note at page 711 does not record Access to Work asking for it.

192. It appears from the log at pages 710 and 711 that Mrs Burkin was prompted to send Access to Work the risk assessments by a phone call indicating that the claimants wished to re-open their application for support worker provision for 20 hours per week in the substantive roles. The claimants' position therefore was that it was only thanks to their own intervention in seeking to resurrect the application for support worker provision that the issue was revived in September 2017. That does not detract from our finding that the respondent had not closed their minds to the possibility.

193. We also see from page 712 that Access to Work have recorded that Mrs Burkin apprehended that the claimants may raise a grievance about her "because they told her she stopped the [support worker] funding."

194. On 21 September 2017 Mrs Burkin told Access to Work that the respondent was not closing the door upon the prospect of the claimants returning to their old roles but the respondent would like to see what Access to Work may provide. We refer to pages 524 and 713. That said, there was some hesitation upon the part of the respondent evidenced by the need (expressed in an email to Access to Work of 21 September 2017: page 521) to seek legal advice before allowing them to return to their old roles.

195. On 21 September 2017 the claimants did indeed raise a grievance. They complained about their absence from work from 8 February 2016 and the significant financial loss suffered by them. This led to a grievance meeting held on 2 October 2017. The minutes are at pages 532 to 538. The contents of the meeting may be summarised as follows:

    195.1. The claimants felt discriminated against "due to what happened in HR and we received an email from [Ruth Gilmore] informing us to stay off work until reasonable adjustments were in place."
    195.2. They complained about the consequent loss of earnings.
    195.3. The claimants maintained that they have been fit for work "since day one."
    195.4. The claimants said that taking a period of 20 months to implement reasonable adjustments was unreasonable.
    195.5. The claimants complained that they had been financially disadvantaged.

196. The grievance meeting was attended by Mrs Brooksbank, Mr Darius, Mr Hamilton and a minute taker. Mr Darius heard the grievance.

197. Mr Darius rejected the grievance for the reasons set out in his letter of 6 October 2017 (pages 539 to 546). He said that he did not consider that the respondent should be blamed for the delays in obtaining the medical reports and the claimants had been paid sick pay on the basis of full time work even though they would only have returned to work on a part time basis. He therefore considered that the respondent had acted reasonably in extending the sick pay until the end of March. He also considered it reasonable to apply an average bonus grading until they established a track record following their return. He saw no reason to enable them to carry over any more than the four weeks' statutory holidays provided for under the Working Time Regulations 1998 and did not consider it reasonable to expunge their sickness record. The respondent did however accept that the reason for the absences would be taken into account should it need to be considered.

198. The respondent arranged for training in the use of the handheld and desk top magnifiers to take place on 5 October 2017. MRS complained that this was provided only three weeks after their return. MAS said that only one handheld magnifier has been provided and he does not know the whereabouts of the second one.

199. The claimants appealed against Mr Darius' decision. The grievance appeal hearing took place on 24 October 2017. The minutes are at pages 561 to 570. The grievance appeal hearing was chaired by Mrs Burkin. She upheld Mr Darius' decision (pages 572 to 587). We need not set out Mrs Burkin's findings in detail. It is sufficient, we think, to record that she considered the following issues:

199.1. The allegation that the claimants were instructed to remain off work.
199.2. The delays in obtaining the medical records.
199.3. Whether Access to Work could have been contacted earlier.
199.4. That the claimants' absence was due to the events of 3 February 2016 and the failure by the respondent to make reasonable adjustments.
199.5. That Access to Work could not release funds until the workstations were ready.
199.6. The sick pay and bonuses.
199.7. The claimants' sickness absence work record.
199.8. Holiday pay.

200. Most of these matters are of course central to the issues before the Tribunal and it is for the Tribunal to make their own determinations upon them. It is therefore not fruitful for us to set out in any detail Mrs Burkin's conclusions. She rejected all of the claimants' grievances save that she upheld the complaint about the delay in dealing with the earlier grievance about Ruth Giilmour's actions. That said, she did not consider that this delay contributed to any delay in implementing reasonable adjustments to facilitate the claimants' return to work.

201. On 26 September 2017 Access to Work had written to Mrs Burkin to inform her that the claimants were able to get an Access to Work grant for six hours of support each week at the rate of £10 per hour. Confirmation is in the letters at pages 525 to 528. On 23 October 2017 the claimants sought reconsideration of that decision (page 721). The reconsideration application was successful and on 28 November 2017 Mrs Burkin was notified that the claimants were now able to get support in the form of an Access to Work grant to fund a support worker for up to 20 hours per week at the same hourly rate. The basis of the reconsideration application was that the respondent had provided a risk assessment for work by the claimants in the substantive roles but without adjustments hence the risk was upon the incorrect premise and wrongly assessed as high (pages 822 to 825).

202. On 21 November 2017 the claimants requested an increase in their working hours. They had returned in September 2017 on a phased return to work basis working 12 hours per week over three days. This was increased to 16.5 hours over three days on Monday, Tuesday and Wednesday of each week although this is subject to variation. They have not yet in fact returned to working 20 hours per week.

203. On 30 November 2017 the claimants wrote to Mrs Burkin. They said that they were "delighted to inform you that our application for a support worker has been approved to the full 20 hours by Access to Work". They said that it was the case that having this support was crucial in enabling the claimants to return to their substantive jobs. They said that the cost of the support worker would now be

paid by Access to Work. A compliment was paid to Mrs Burkin as the claimants said, "we are sure that if you were the HR manager from January 2016, when we first contacted ATW, then things would have been a lot different. All the help that has been given like the taxis to work, assistive technology equipment, and now the support worker (aid) would have been in place from the start, and we would have most definitely not been off work for 20 months as we were".

204. It was suggested to MRS by Mr Sandeman that this passage was at odds with the criticism that the claimants now seek to make of Mrs Burkin. MRS said in answer that, "we were delighted to get 20 hours. We were being positive". He accepted Mr Sandeman's point that the six hours previously granted by Access to Work was "no good to anyone" (as Mr Sandeman put it).

205. This development led to an internal meeting held on 12 December 2017. According to paragraph 74 of Mrs Burkin's witness statement the meeting was attended by Mr Wright, Mr Bowgen and Mr Sandeman. The meeting was in preparation for a proposed meeting with the claimants and Mr Bedford which had been provisionally set for 11 January 2018. The conclusion was reached at the internal meeting of 12 December 2017 that "if this was to work in terms of ensuring quality, production and fitting in with the shift system, then it would be necessary to use members of the existing work force as support workers". Mrs Burkin confirmed that it was decided to seek support workers internally. This was because it would be less (indirectly) costly in terms of training, displacement and disruption to those already familiar with the respondent's systems. She was unable to say why this meeting could not have been held before Access to Work confirmed the grant of 20 hours per week on 28 November 2017.

206. Mrs Burkin tells us (and Mr Wright confirms) that Mr Wright produced a note setting out the risks and hazards for a support worker in his email of 14 December 2017 (pages 618 to 620). He also produced a list of those employees who may be suitable on each shift (pages 623 to 626). The risks specifically identified for the support worker are unique to that role. The others there identified were, said Mr Wright, common to all employees. He conceded that the risks to a support worker were thus less than for a machine operative. He said that the support worker role was "more like a supervisor role."

207. Mr Bowgen set out the work that would have to be carried out by a support worker in his email of 18 December 2017 (pages 621 and 622). Mr Bowgen's email is written in blue and green typeface. The green entries are those tasks which he considered that the claimants could do and the blue entries are those which he considered they were unable to do. In other words, those parts of the job description set out in blue would in Mr Bowgen's opinion have to be carried out by a support worker. Mr Bowgen fairly accepted that with a support worker the claimants were able to carry out the majority of their substantive role.

208. In the event, the meeting proposed for 11 January 2018 did not take place. Unfortunately, Mr Bedford could not attend the meeting due to a prior engagement. 19 January was then suggested as the next alternative date but this was inconvenient both for Mr Bedford and the claimants. Mrs Burkin therefore emailed asking for further details of Mr Bedford's availability (page 627).

In that email (dated 16 January 2018) she considered it prudent to meet to have a discussion about the claimants' working hours. In the event, the meeting with Mr Bedford was scheduled for 13 February 2018.

209. In the meantime, as suggested by Mrs Burkin, she met with the claimants to discuss working hours on 20 and 22 January 2018. The claimants followed up on this with a letter at pages 629 to 630 expressing their reservations about how the respondent had approached the issue of risk assessment. They cited advice which they had been given by the RNIB legal team which is that only once adjustments have been put in place can a full risk assessment be carried out and it would be unreasonable for any such assessment to be carried out prior to adjustments being made. The claimants concluded that, "we feel that the risk assessment in July of last year was wrong and should never have been done without any reasonable adjustments being put into place first. This has left us disadvantaged, we would ask the company to withdraw the risk assessment and offer an apology".

210. On 1 February 2018 the claimants wrote again to Mrs Burkin (pages 630a and 630b). Following discussions with Mr Hamilton, they set out a number of other concerns. In particular, they said that no risk assessment had been carried out following the return to work on 18 September 2017 of the new work area. Further, they were concerned that having to use the lift to get to the canteen which was upstairs may present a hazard in the event of fire. They were concerned about the prospect of having to use the stairs given that the yellow strips had not yet been laid.

211. On 8 February 2018 Mrs Burkin wrote to Access to Work concerning the grant offer dated 28 November 2017. She referred to the forthcoming meeting of 13 February 2018. She asked for confirmation that the respondent may use existing employees on the line as support workers. She said that if this is acceptable there will be a "cost to the company (unless this can be covered by the grant) because the grant does not cover the hourly rate of production operatives (an additional £1.08 per hour) and also because we will need to train all the support workers in visual awareness (£650 per person)". A copy of that letter was sent to the claimants. She said that the delay from the date of the grant of support worker provision to 8 February 2018 was because of the Christmas break and a business trip she made to Germany.

212. We now turn to the meeting of 13 February 2018. The minutes are at pages 637 to 640. Present were the claimants, Mr Hamilton, Mr Bedford, Mrs Burkin, Mr Darius, Mr Wright, Mr Bowgen, Mr Sandeman and Mrs Brooksbank (who attended as minute taker). The following issues were amongst those that arose:

    212.1. The mat was to be removed from the work bench to eliminate glare. A lower heat intensity lamp had been ordered to see if this would assist. The respondent maintained that it was impracticable to install high visibility stair strips because they would become unstuck and cause a tripping hazard.
    212.2. The issue of a second monitor was discussed. This was to be installed shortly.

213. Mrs Burkin confirmed that the aim of the meeting was to discuss the claimants move back to their original jobs. There was then a discussion at the meeting about those who may fill the support worker role following the grant of the support worker funding. The respondent was concerned about the recruitment of an external person such as an agency worker because of the training requirements involved, the skills required and production line continuity. The best option was therefore to use an internal employee who is fully trained and familiar with the processes. She explained that continuity in the shift is a concern and therefore "we need someone already working on the section; this person would change each week due to shifts. A total of six support workers would be required to cover holidays, sickness, shifts etc". Her position in evidence that a trial run was not carried out "for production reasons" sits uneasily with the respondent's position during this meeting that they were open to the claimants returning to their old roles with support worker assistance. We accept that there are cost pressures upon the respondent by reason of overseas competition but those external factors will still remain were the claimants to be reassigned with support.

214. Mr Sandeman opined at the meeting of 13 February 2018 that the respondent would need to be "quite persuasive" when looking for support workers as the employees could not be compelled to take on that responsibility. It is recorded that a suggestion was made that the union seek to encourage employees to step up.

215. Mrs Burkin then said that although Access to Work was to provide funding the respondent was "not profiting as they still need to pay four people for working two machines (when normally only two people are required)". She went on to say that "because of the shift system it will only work if we use existing employees as when the brothers go home these employees will need to continue running the machines". It was at this meeting that MRS made the observation that the support worker was in place to do a maximum of 20% of the brothers' substantive role (a proposition with which Mr Bowgen agreed when he was taken to it during the course of his cross-examination).

216. Mr Sandeman said at the meeting that "the key thing now is how practically we go about getting the support worker in place". It was put to MRS in his cross-examination that the issue of displacement of employees working upon the machines when the claimants turned up for work was a major concern for the respondent. Mr Sandeman explained (while conducting cross examination of the claimants) that this meant that when the brothers arrived to undertake their shift an operative has to come off and go and do something else (or act as support worker) and contrariwise when the brothers finish their shift. MRS said that, "agency staff could be laid off and staff moved around. When I leave the next shift start. That's the case anyway". It was put to MRS by Mr Sandeman that there would be no displacement if the support worker was a current employee. That said, it is of course the case that for four hours (or whatever length of the brothers' shift) the respondent is overmanned by having one more worker on site than otherwise would be the case.

217. It was recognised by Jayne Burkin on 20 February 2018 (at page 867) that, "due to our shift pattern of days/afters/nights then we estimated that we would need

approximately three people to accompany both Alyas and Riaz". (This was said in an email addressed to the DWP). This information was conveyed to Access to Work in reply to an enquiry from them of 12 February 2018. The message conveyed to Access to Work that each brother would need three support workers (that obviously being six altogether) was consistent with the passage from the minutes of the meeting of 13 February 2017 cited at paragraph 213.

218. Mrs Burkin's evidence before us however was that in fact 12 support workers were needed: two support workers *per* brother *per* shift. This was because the working hours may cut across two different shifts were they to work from 2 pm to 5 pm. It was not clear when the need for 12 support workers was raised as an issue.

219. Mr Bowgen gives similar evidence about the need for 12 support workers in paragraphs 36 and 37 of his witness statement. With standalone support workers there would be displacement of the operatives working the machines until the brothers come into work. He said that if support workers were to be recruited from the existing workforce "there would need to be a support worker on each of the shifts, because the machines are running continuously and the shifts rotate. This would require a backup to provide flexibility for illness and holidays. Consequently, we would need a minimum of six support workers for each brother."

220. At paragraphs 34 and 35 of his witness statement Mr Darius gave similar evidence. He said that there were issues around loss of production with the changeovers. This gave rise to cost concerns which are important as "the company is competing for products and cost efficiency are important considerations."

221. On 21 February 2018 Access to Work emailed and confirmed that they were content for the support workers to be drawn from the respondent's staff. This appeared to be the green light for the respondent to then canvass staff to step up to act as support workers for the claimants.

222. The respondent arranged shop floor meetings for this purpose. Mrs Burkin said (in her witness statement prepared for the subsequent grievance investigation generated by this aspect of the matter: pages 932-934) that the original intention was that the meeting should not involve the claimants. She says that this was a view shared by Mr Hamilton upon the basis that there was a risk of the claimants being offended by comments made by the workforce. (She did not expect this to be the case but of course there was the risk of the claimants interpreting remarks made in a negative way). However, the claimants wished to be involved. They thought that it would assist the process as they could give their ideas to the meeting and put their ideas "into the mix" (as they put it in their email to this effect of 27 February 2018 (at page 877)). Mrs Burkin had confirmed to Access to Work that the idea of the support workers was to facilitate the claimants' job responsibilities and not replace them or do tasks which the respondent would deem to be unsafe or high risk (page 874).

223. Two meetings were arranged for 8 March and a third meeting for 12 March to capture all of the three shifts. A pre-meeting was held on 7 March 2018 attended by the claimants, Mrs Burkin and Mr Hamilton (page 880). The claimants produced some literature which they have printed from the internet. Mrs Burkin was uncomfortable about circulating this at the meeting. The intention was for Mrs Burkin to introduce the meeting. She was unable to stay during the first of the planned three meetings. It was thus agreed that Mr Hamilton would speak on behalf of the union and the claimants could then address the meeting. There would then be an open forum for questions. She says, "I planned to have a job description and flyer for the support worker role available at the meetings. I sent these to Richard Bowgen for his comments. I also prepared some handwritten notes for the first meeting on 8 March 2018 (page 881)." She acknowledged (by reference to the note at page 880) that both management and the trade union had a role to play in seeking to entice volunteers. This is consistent with the strategy suggested by Mr Sandeman at the meeting of 13 February 2018 of what he called "a two-pronged approach" involving the union and the employer seeking to encourage volunteers.

224. Unfortunately, Mr Bowgen was delayed in the snow on 8 March 2018 and was unable to make the first meeting. The flyer and job description could not therefore be discussed with Mrs Burkin. Nonetheless, it was resolved to go ahead with the meeting as arranged. She made her opening statement and then left the meeting as had been agreed the previous day. She did not accept that her departure left the meeting without management control. She said that Mr Milton was there and had a managerial role. However, Mr Milton's evidence was that he was there only as a member of the audience and not in a managerial capacity. Mrs Burkin seemed uncertain as to whether or not Mr Bowgen had in any way briefed Mr Milton ahead of the meeting. We find that Mr Bowgen did not do so and the reality is that Mr Milton was only there to listen to the presentation as a member of the audience. Mr Milton said in evidence that there was no management leadership at the meeting. He would not have said this had he been delegated with the task of attending it in a managerial capacity.

225. Mrs Burkin's evidence was that the second meeting scheduled for 1.45pm on the same day (for the second shift) was moved to a different area because the shop floor rest area where the first meeting had been held had been too noisy. Mr Hamilton was told by the claimants that they were concerned about the conduct of the first meeting before the second one took place. Mrs Burkin was unable to attend the second meeting. Mr Bowgen, who had arrived at work by this stage, made the opening statement upon behalf of the respondent. The flyer and the job description were not available for the second meeting either.

226. Mr Hamilton told Mrs Burkin that the claimants were unhappy about the conduct of the two meetings of 8 March. The third meeting with the staff arranged for 12 March was therefore postponed and in fact took place on 21 March 2018. Mrs Burkin attended the third meeting. She made the presentation on behalf of the respondent. Mr Hamilton presented for the claimants who were there to answer questions. She told us that the format of the third meeting was the same as for the first two.

227. Mrs Burkin in fact met with Joan Spink, another union representative, on 12 March. She also met the claimants at the same time. Katie Brooksbank attended as a minute taker. The notes of that meeting are at pages 893 to 899.

228. At the meeting of 12 March, the claimants raised a number of concerns about the two meetings held on 8 March. These were:

228.1. That Mrs Burkin had not been present throughout the first meeting.
228.2. The claimants felt that had she been present then some of the comments made at the meeting would not have been uttered. Mrs Spink said that she and Mr Hamilton intervened when questions or comments had become inappropriate.

229. The claimants were unhappy that the job description had not been available as it would have focused the meeting upon the support worker role. They were concerned that there was a lack of understanding about what a support worker was supposed to do. The claimants were concerned that this had diminished the prospects of obtaining volunteers. To help allay the claimants' concerns Mrs Burkin agreed to send the job description and flyer to the brothers by email after the meeting and before the third meeting with the staff scheduled for 21 March. Her email of 12 March 2018 is at page 890 and the job description and flyer follow at pages 891 and 892. There was then some dialogue about making revisions to the documents and ultimately those at pages 910 and 911 were the version used at the third works meeting held on 21 March.

230. Particulars of the claimants' concerns about the conduct of the first two meetings may be found in a letter addressed to Mrs Burkin of 9 March 2018 at pages 882 to 889. They complained that the location of the first meeting was too noisy. They complained about negative language, their medical condition having been referred to as "horrible" and comments from some that they "would not like to wish it on anyone else". They complained about some negativity emanating from some co-workers as to why the claimants should remain in their substantive role and other employees be moved around. There was also a concern about there being no job description which led, in the claimants' view, to the questions being targeted about their disability rather than the support worker roles. The claimants accepted that the second meeting had taken place in a quieter area but felt that it should not have gone ahead quite so quickly given the problems that had been encountered during the first meeting.

231. Mr Milton said in evidence that the claimants had become upset when some present expressed the opinion that they couldn't understand why the claimants wanted to move to their old roles when they had a job in the new roles. Mr Milton detected there to be resentment from some present. He agreed that the conduct of the meeting (with little provided in the way of information) had done little to encourage volunteers.

232. The day after the first two shop floor meetings Mrs Burkin emailed an employment agency to canvass the possibility of sourcing employees to act as support workers. The option being explored was, therefore a bespoke role providing support for the claimants. We refer to page 901 (being an email dated 9 March

2017). The employment agency expressed some optimism about this course of action bearing fruit in an email of 13 March 2017. (page 900). The operations director of the agency (who we were told by Mrs Burkin was a regular visitor to site) asked her if there was a prospect of more than 20 hours' work and suggested a site visit.

233. Mrs Burkin told us that she replied to his email by telephone. She did not send the job description to him. She did not suggest he inspect the relevant parts of the site when he was next visiting. No advertisement was put out through the agency.

234. Mrs Burkin sought to attribute lack of progress by reason of the departure of the agency's operations director shortly after their exchange of emails. However, the issue has not been taken up by her with his successor.

235. In sum, it strikes us that little progress has been made in progressing this matter though the agency. Mrs Burkin told us that Mr Littlefair had decided to recruit for the position internally and that a positive decision had been taken not to recruit externally. She was unable to say when this decision was made, whether the claimants were notified that this was the respondent's position and satisfactorily explain why overtures had been made to an agency at all. The aspect of her evidence around the use of a recruitment agency was unimpressive and left the Tribunal with the impression that the respondent was (at best) half-hearted about external recruitment.

236. It was suggested by Mr Morgan on behalf of the claimants when cross-examining Mr Bowgen that the respondent had left it late to prepare the flyer and job description. He put it to Mrs Burkin that no effort had been made to seek the claimants' input into the flyer or job description from December 2017 until March 2018. While accepting this to be the case Mr Bowgen said that it would have been done but for the inclement weather that day. That said, the flyer and job description had not in fact been done by the time of the second meeting either. Mrs Burkin acknowledged the importance of the documents in seeking to encourage volunteers (which all parties had agreed would not be easy) but was unable to explain why this preparation had been left so late.

237. The claimants submitted a grievance about the conduct of the support worker meetings. This is dated 9 March 2018 at pages 882 to 889 (although it was in fact received by the respondent on 15 March 2018). During the course of his cross-examination Mr Bowgen was taken to a statement which he had given on 19 June 2018 as part of the grievance appeal investigation (page 1028). He accepted that questions had become inappropriate during the course of the second meeting. The meeting was cut short. Mr Bowgen said that the employees did have the right to ask questions but the questions had become inappropriate. He agreed that the meeting had become "passionate" (as it was put by Mr Morgan).

238. Mr Bowgen (somewhat reluctantly) accepted that the meetings may have gone better with the benefit of a job description and flyer. Mr Bowgen accepted that the three iterations of the flyer (at pages 1014, 1015 and 1017) evolved from

being about the substantive role with the support worker duties "tagged on" to a more persuasive document focusing upon and also providing a job description for the support worker. He accepted that a discussion with the claimants beforehand may have encouraged more people to come forward. That could not of course be guaranteed but Mr Bowgen accepted that it was likely to have been more persuasive than in fact was the case given the conduct of the meetings. When the same point was put to Mrs Burkin, she said that she "could not answer that." She said that the volunteers that came forward did not do so from the third meeting but from the ones held on 8 March 2018. Those meetings produced six volunteers; four employees and two agency workers. Of those six, three remain: (the two agency workers have now left).

239. Following an investigation into the claimants' grievance about the conduct of the support worker meetings and a grievance hearing with the claimants on 24 April 2018 the grievance outcome was sent on 8 May 2018 (pages 968 to 977). The grievance investigation was conducted by Kevin Robson, segment leader (machine shop). The grievance was not upheld.

240. Mr Robson noted that the claimants had retreated from their position that the meeting should be repeated and held again. At the grievance hearing of 24 April 2018 the trade union now suggested that a letter be sent to all of the employees making them aware of the claimants' condition and of the support worker role. Mr Robson said that, "now this grievance has concluded it is important to get the process of looking for support workers back on track. I am therefore recommending that this might be done by sending a letter along the lines suggested on your behalf".

241. On 26 April 2018 Mrs Burkin emailed the claimants (page 967). She told them that three members of staff had put themselves forward for the support worker roles.

242. On 18 May 2018 the claimants appealed against the grievance outcome. The appeal is at pages 981 to 1002. This need not be set out in detail. In summary:

242.1. The claimants complained that the meetings were badly structured and poorly delivered.
242.2. They were concerned that there had been inadequate preparation in particular of the flyer and the job description.
242.3. They were concerned that the management presence was diluted which allowed the meetings (or at any rate the meetings held on 8 March 2018 at least) to get out of hand.

243. On 21 May 2018 the claimants emailed Mrs Burkin (page 1003). This was sent in anticipation of a meeting the next day. The claimants wanted to discuss the next stage in advancing the support worker roles and to discuss the letter that was to be handed out to the workforce about it. The next day the claimants suggested "untangling the grievance from the support worker position" so that the latter could be moved forward.

244. On 23 May 2018 the respondent said that this was inappropriate (page 1006). Mrs Burkin was of a view that she could not see how the grievance could be separated from issue of the support worker provision given the grievance was about the steps taken to obtain volunteers. When asked about this in cross examination she was unable to satisfactorily explain her view. She said that she was uncomfortable in dealing with the matter because of the claimants' grievances and that there was no one else to deal with the matter. We accept this to be the case but cannot understand why that presented a bar to the practical progression of the support worker issue.

245. The grievance appeal meeting took place on 5 July 2018. It was chaired by Mr Littlefair who wrote on 13 July 2018 with the outcome. He concluded that the respondent had made reasonable adjustments by bringing the reassembly and adjuster rings back into the factory at additional cost. He observed that there had only been three volunteers following the meetings in March 2018 and one of those was not currently available. Mr Littlefair rejected the claimants' criticism of the meetings held in March. However, he was proposing to write to all of the production operators asking for volunteers to act as support workers. He said that Mrs Burkin would draft a letter for the claimants' consideration.

246. Mrs Burkin did this and on 19 July 2018 emailed the claimants accordingly (pages 1068 to 1070). The draft letter invited volunteers from the Pascar section. On 9 July 2018 the claimants had emailed her asking to progress the matter and indicated an openness to other roles than the two with which we have been principally concerned (page 1063).

247. The claimants sought advice from Mr Bedford and then responded to Mrs Burkin's email of 19 July on 26 August 2018 (page 1090). They were unhappy with the draft letter. She replied on 29 August 2018 suggesting a meeting to discuss the way forward. She set out the respondent's position that reasonable adjustments had been made for the claimants in their new role in disassembly. When asked about this by the Tribunal, she said that she understood the claimants' wish to move away from their new role and use different skills and avoid de-skilling hence the support worker option still being pursued.

248. Mrs Burkin justified the decision to limit the volunteers to those in Pascar because employees in other areas of the business had a different skill set and Pascar had a pool of around 90.

249. The claimants complain that on their return to work on 18 September 2017 adaptations were not in the right place, they had to wait for them to be altered and they were waiting for anti-glare matting to be put on the workstation table. One of the workstations, the claimants said, does not have a non-reflective surface to alleviate glare from the artificial lighting. The monitors that are in place are too close to see being about a foot away from their field of vision.

250. When MRS was cross-examined about this issue, Mr Sandeman put to him that the respondent had set up one bench with the desk top magnifier and one bench with the handheld magnifier so that when the claimants returned to work it could be gauged how best to proceed. MRS accepted this to be the case but said that

they were never consulted. He referred to the training evaluation sheet following the magnifier equipment training carried out on 5 October 2017 (page 530). There he complained about the position of the screen. He said that even today the monitor was not in the right position and it had taken several weeks for the matter to be attended to.

251. Mrs Sandeman put to MRS that Chris Burdon, the special machine technician, had ordered a new mounting arm on 3 November 2017, a new swing arm on 9 November 2017 and that those devices arrived on 20 November. MRS was referred to page 604A.

252. The second monitor was installed on or around 5 February 2018. MRS complained that the second monitor was too close and that both monitors were still not in the right position. He accepted that the lighting and the matting had been resolved within about three or four months of their return.

253. MRS accepted that the magnifiers are not needed for the current role but only for the substantive roles. It was accepted that the respondent had acquired the magnification equipment which will be installed as and when they move to their substantive roles. In the meantime, the handheld magnifiers can be used if required for the current role.

254. It has been quite difficult for the Tribunal to piece together the issues around the equipment and the adjustments. As we understand matters the only issue remaining is that of the position of the monitors (on the second workbench). Mr Darius accepted that when the claimants returned only one monitor had been set up and that that was too close. He said that he considered the respondent to be right to have only installed one monitor otherwise it would have transpired that both were unsuitable which would have been a waste of resource. Likewise, Mr Bowgen accepted that the monitor upon the first workstation was too close. He accepted it took around six weeks to sort the matter out. However, he maintained that the claimants could still work effectively by use of the handheld magnifier. It is possible to use that as it opens to enable the device to rest upon the table thus freeing up both hands.

The relevant law

255. The claimants have brought complaints of discrimination under the Equality Act 2010. The scheme of the 2010 Act is to lay out (in Part 2) the protected characteristics and then the prohibited conduct upon the grounds of or related to the protected characteristic(s) in question. In this case the relevant protected characteristic is, of course, the claimants' disability. The relevant prohibited conduct with which we are concerned is to be found in sections 15 and 20 and 21 of the 2010 Act. The claimants complain that they were discriminated against because they were unfavourably treated because of something arising in consequence of disability. They also complain of discrimination because the respondent failed to comply with the duty to make reasonable adjustments.
256. This prohibited conduct is made unlawful in the workplace pursuant to the provisions to be found in Part 5 of the 2010 Act. As the claimants are (and were at all material times) employees of the respondent then section 39(2) is engaged

which provides that an employer must not discriminate against an employee by (amongst other things) subjecting the employee to detriment. Discrimination in this context includes treating the employee unfavourably for something arising in consequence of disability. Further, by section 39(5) a duty to make reasonable adjustments applies to an employer.

257. We shall look at the law as it relates to complaints of discrimination because of failure to make reasonable adjustments in a little more detail. By section 20(3)(4) and (5) of the 2010 Act there is duty to make reasonable adjustments where:

- A provision, criterion or practice *('PCP'*) of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- A physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- A disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

258. Upon a complaint of discrimination by way of failure to make reasonable adjustments where an employer's PCP is said to disadvantage a disabled employee it is necessary to identify the nature of the disadvantaging PCP. The particulars of claim presented along with the claimant's claim form on 13 June 2016 did not seek to identify the relevant PCP. The matter then came before Employment Judge Keevash on 19 September 2016. He made an Order that the claimants were to send to the Tribunal and to the respondent additional information explaining how the PCP of requiring them to attend work in order to perform the substantive duties of their post put them at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. On 20 October 2016 the claimants' solicitor wrote to the Tribunal with confirmation that, *"The PCP of requiring the claimants to attend work in order to perform the substantive duties of their post puts the claimants at a substantial disadvantage as if they are unable to carry out their substantive duties they are likely to be subject to capability proceedings and/or similar proceedings which may result in the termination of their employment and/or not being permitted to attend work and be placed on sick or other leave".*

259. The respondent presented amended grounds of resistance. In answer to what was said on behalf of the claimants the respondent denied requiring the claimants to attend work in order to perform their substantive duties. It was said that the respondent had been actively considering what adjustments could be made to the claimants' duties in order to accommodate their disabilities. That pleading appears to elide the disadvantaging PCP (of been required to carry out their substantive role) with the adjustments made to alleviate the disadvantage (being the relieving of the claimants of that responsibility and finding them an alternative role).

260. The matter then benefited from a further case management hearing. This came before Employment Judge Maidment on 15 February 2017. He recorded that the PCP relied upon is the requirement of the claimants to attend work and perform their duties as assembly operatives. (It is not clear whether this is meant to be a reference to the claimants' substantive role or the new role in disassembly).

261. At paragraph 11 of his written submissions Mr Morgan says that the *"first provision, criterion or practice contended for is the requirement to attend work and perform [the claimants'] duties as assembly operatives. This is a requirement that applies to all assembly operatives being in effect the definition of the job".*

262. In Mr Sandeman's list of issues presented on the first morning of the hearing (with which Mr Morgan agreed subject to certain caveats (albeit that the caveats did not apply to Mr Sandeman's identification of the PCP)) the same formulation was repeated: the PCP there stated being *"the requirement to attend work and perform their duties as assembly operatives".*

263. In our judgment, the correct formulation of the disadvantaging PCP is that set out by the claimants' solicitor in his email of 20 October 2016 at paragraph 25 *viz. "The PCP of requiring the claimants to attend work in order to perform the substantive duties of their post."* The move from the claimants' substantive role to their new role in disassembly was one of the adjustments in order to ameliorate the disadvantage caused to the claimants by application to them of that PCP.

264. Having identified the relevant PCP, the Tribunal must then go on to consider the nature and extent of the substantial disadvantage suffered by the claimants in comparison to non-disabled comparators. *"Substantial"* in this context means *"more than minor or trivial".* The claimants bear the burden of proof to establish a *prima facie* case that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that the duty to make reasonable adjustments has been breached. There must be evidence of apparently reasonable adjustments which could be made. The claimants must therefore identify in broad terms the nature of the adjustments that have a prospect of ameliorating the substantial disadvantage and having done so the burden will then shift to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

265. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective one. As the reasonable adjustment provisions are concerned with practical outcomes rather than procedures the focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about a proposed adjustment.

266. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. However, there does not necessarily

have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for the Tribunal to find simply that there would have been a prospect of it being alleviated.

267. A significant change brought about by the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when that was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with the duty, regards should be had to a number of factors. Those factors are not mentioned in the 2010 Act. However, paragraph 6.28 of *the Equality and Human Rights Commission's Employment Code* gives examples of matters that a Tribunal might take into account. The Code stipulates that what is a reasonable step for an employer to take will depend on all the circumstances of each individual case. The factors to have in mind include for example the extent to which taking the step would prevent the effect in relation to which the duty was imposed, the practicality of such step, the costs that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking.

268. Paragraph 6.33 of the Code lists a number of adjustments that might be reasonable for an employer to make. These include allowing a disabled worker to be absent during working hours for rehabilitation, assessment or treatment and allowing a period of disability leave. A further example is the alteration of a disabled worker's hours of work which could include permitting part-time working or different working hours or a phased return to work with a gradual build-up of hours.

269. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee would be placed at a substantial disadvantage by reason of the application to him or her of the PCP in question. The issue therefore is whether the employer knew or ought to have known both of the disability and the likelihood of the disability placing the employee at a disadvantage by reason of the application of the PCP: the latter concept is known as constructive knowledge. The question therefore is what objectively the employer could reasonably have known following reasonable enquiry.

270. The second situation in which the duty to make reasonable adjustments arises is where a physical feature puts a disabled person at a substantial disadvantage. A physical feature extends to something arising from the design or construction of a building, the feature of an approach to, exit from or access to a building and a fixture or fitting, or furniture, equipment and materials in or on premises. The EHRC's Employment Code says that the physical features can be temporary or permanent. They can include but are not restricted to steps, stairways, building entrances and exits (including emergency escape routes) and floor coverings.

271. The Tribunal must identify whether the claimants were put at a substantial disadvantage by the physical feature complained of. If not, the duty to make

adjustments does not arise. The Tribunal must then consider whether the adjustment would reduce or avoid the disadvantage to the claimant and consider whether the adjustment was a reasonable one to make.

272. The third and final situation to which the duty to make a reasonable adjustment arises is where, but for the provision of an auxiliary aid, a disabled person would be put at a substantial disadvantage in comparison with non-disabled persons. An auxiliary aid is a piece of technology or equipment intended to assist a disabled person. However, in the context of the 2010 Act, auxiliary aid is drawn more widely and can include auxiliary services (such as the provision of a support worker for a disabled employee: see paragraph 6.13 of the EHRC's Employment Code).

273. We then turn to the complaint of discrimination for something arising in consequence of disability. This is a complaint that may be raised where an employer treats an employee unfavourably because of something arising in consequence of the employee's disability which the employer cannot show to be a proportionate means of achieving a legitimate aim. An employer facing a complaint of discrimination arising from disability has a defence of lack of knowledge: that is to say, there will not be discrimination if the employer shows that the employer did not and could not reasonably have been expected to know that the employee had the disability.

274. Again, the burden is upon the claimants to show a *prima facie* case of discrimination because of something arising in consequence of disability.

275. Upon a consideration of unfavourable treatment there is no need to compare a disabled person's treatment with that of another person. Unfavourable treatment means in this context putting the employee at a disadvantage. The consequences of the disability which give rise to that disadvantage includes anything which is the result, effect or outcome of a disabled person's disability.

276. A defence of justification may arise where an employer has a legitimate aim. This must represent a real and objective consideration. The unfavourable treatment of the disabled person has to be a proportionate means of achieving the legitimate aim in question. Thus, to be proportionate the measure has to be an appropriate means of achieving the aim and be reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements.

277. Where an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for the employer to then show that the treatment was objectively justified.

278. Upon the first morning of the hearing, an application was made by the claimants to amend their claim to include complaints of harassment. This is prohibited

conduct pursuant to section 26 of the 2010 Act which is made unlawful in the workplace by section 40.

279. The Tribunals have a broad discretion to allow amendments at any stage of the proceedings pursuant to Rule 29 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. In determining whether to grant an application to amend the Tribunal must carry out a careful balancing exercise of all of the relevant factors having regard to the interest of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. The following are relevant factors to be considered upon an amendment application:

- The nature of the amendment.
- The applicability of time limits.
- The timing and manner of the application.

280. In this case, the nature of the proposed amendment is to add a new cause of action. The harassment complaint sought to be made by the claimants arises out of the workforce meetings of 8 March 2018 (referred to at paragraphs 223 to 230).

281. Plainly, there was factual evidence before the Tribunal about the events leading up to the meetings of 8 March 2018 and about some of the events at the meetings themselves. We have considered this at paragraphs 222 to 238. However, in our judgment Mr Sandeman was correct to say that allowing the amendment was likely to involve substantial different areas of enquiry because the focus would shift (upon consideration of a harassment compliant) from the managerial decisions around the meetings to the contents of the meetings themselves. Although the respondent had called Mr Milton who could give some evidence about what transpired at the meetings (in particular the first meeting of that day) the respondent would, if the amendment application were to be allowed, be substantially disadvantaged by not having other witnesses' accounts readily available.

282. Although not decisive upon an amendment application, it is at least arguable that the complaints around the conduct of the meetings of 8 March 2018 would if presented at the time of the amendment application on 30 July 2018 be out of time. This of course depends upon the nature of the claimants' case. If it is to be argued that the conduct of the meetings coupled with the immediate aftermath around the subsequent grievances s a continuing course of conduct then the claims may well in the event be in time. Even if out of time the Tribunal retains the discretion to allow amendments which would (if by way of an originating process) be out of time. That is not an absolute bar to allowing the amendment. However, this has to be factored in to the balancing exercise.

283. The third key factor is the timing and manner of the application for amendment. Particulars of the complaint of harassment were in fact presented by the claimant's solicitors to the Employment Tribunal as part of the further details of claim on 26 March 2018. There was no reference to an application to amend the claim to include that of harassment. It is difficult to understand why the claimants'

solicitors did not make such an application. It is most unsatisfactory to leave matters until the first morning of the hearing.

284. Therefore, taking into account all the factors the Judgment of the Tribunal is that the amendment application should be refused. The respondent would have been significantly prejudiced by allowing the amendment application on 30 July 2018. The respondent does not have sufficient particulars of the harassment allegation. Although the claimants could give evidence about what happened the respondent will not have the relevant witnesses to hand. Such a course will therefore be unjust to the respondent. Further, it is not in the interests of justice to adjourn the matter in order to enable the parties to prepare evidence to deal with the harassment complaint. There was no application by the claimants that matters should be adjourned for that purpose.

285. In our judgment therefore, the balance of prejudice favours the respondent and it would be contrary to the interests of justice to allow the amendment application which is refused.

The issues and the Tribunal's conclusions

286. We now turn to our conclusions upon the discrimination cases brought by the claimants. The Tribunal has carefully read the very helpful submissions presented by Mr Morgan and Mr Sandeman. These are lengthy and we do not intend to burden an already lengthy Judgment by reciting the submissions. No discourtesy is intended to either advocate by this approach. On 3 February 2020 (upon the resumed hearing of the linked case) Mr Sandeman drew to our attention the case of ***Linsley v Commissioners for Her Majesty's Revenue and Customs*** (UKEAT/0150/18) which was decided after the conclusion of the hearings in the instant case. This is authority for the proposition that the test of reasonableness upon a reasonable adjustment complaint is an objective one. ***Linsley*** follows the principle to that effect established by the Court of Appeal in **Smith v Churchills' Stairlifts PLC** [2005] EWCA 1220. The Tribunal applied this principle to the facts of the case at paragraph 295 *et seq*.

287. As we observed in paragraph 6 of the reasons, the respondent concedes that at all material times with which we are concerned the claimants are disabled within the meaning of section 6 of the 2010 Act because of the medical eye condition known as retina pigmentosa. No issue arises upon the issue of the respondent's knowledge of the disability. This was conceded (as confirmed in paragraph 3 of Mr Sandeman's closing submissions). It follows therefore that the defence of lack of actual or constructive knowledge of disability available in the claim brought pursuant to section 15 of the 2010 Act (of unfavourable treatment for something arising in consequence of disability) is not open to the respondent on the facts of this case.

288. There is however an issue as to when the respondent had sufficient knowledge of the claimants' disability and of substantial disadvantage for the duty to make reasonable adjustments to arise pursuant to section 20 of the 2010 Act.

289. From our factual findings (in particular at paragraphs 18 to 47) we find that the respondent had actual knowledge both of the fact of the claimants' disability and that the application to them of the relevant PCP disadvantaged them because of the disability in comparison with non-disabled employees by the end of February 2016 at the very latest. In our judgment, the earliest date upon which the respondent can be fixed with knowledge was 25 January 2016 (by reference to paragraph 20). It was upon that date that the respondent recorded in its log that the claimants shared details of their condition with Katie Brooksbank.

290. If we are wrong about the respondent acquiring knowledge on 25 January 2016 then the respondent was certainly aware on 7 February 2016 both of the condition and of the disadvantage by virtue of the claimants' letters of that day referred to in paragraph 26 and 37. By way or reminder, these letters provided an explanation of the claimants' condition and of the reasonable adjustment that they suggested had a prospect of ameliorating the disadvantage. If the respondents did not have actual knowledge of the disadvantaged caused by the PCP at that stage they did, in our view, have constructive knowledge by virtue of the claimants' need to explain to them the desirability of making adjustments to the substantive role. The claimants had also made reference to the involvement of Access to Work. On 11 February 2016 Ruth Gilmore wrote to the claimants acknowledging the claimants' serious condition with their eyesight (paragraph 40). Those concerns were reflected in the occupational health referral 16 February 2016 (paragraph 43).

291. If there were any doubt about the matter that can be dispelled by the letter from the Royal National Institute of Blind People's legal rights service of 29 February 2016 (paragraph 47). This made reference to the claimants' severe sight impairment and to the possibility of the respondent making suitable adjustments.

292. As we shall see, nothing turns upon the question of when exactly (between 25 January and 29 February 2016) the respondent became fixed with constructive (and if not, actual) knowledge of the disability and the disadvantage. Our finding is that the respondent acquired that knowledge at the end of January 2016 and, if we are wrong on that, by the end of February 2016 at the latest.

293. We hold that the date of knowledge of the disadvantage caused to the claimants by the physical features of the workplace and the absence of auxiliary aids and equipment (as opposed to auxiliary services) came a little later. The letter of 7 February 2016 to which we refer at paragraph 37 made no reference to physical features of the premises creating a difficulty for the claimant or the need for auxiliary aids. It asked for a workplace assessment to be carried out.

294. However, on 7 March 2016 (paragraph 49) the claimants made reference to needing help with movement due to peripheral vision loss and the provision of auxiliary aids such as lighting and magnifiers. On 31 March 2016 Dr Oliver opined (paragraph 58) that the claimants were fit to work with adjustments but that the respondent should ensure that the work area was free of tripping hazards, that co-workers are trained about sight loss and steps taken to ensure that the claimants' condition could be accommodated and also the importance of the

provision of lighting and the obtaining of advice about workplace adaptations or adjustments from Access to Work and the RNIB.

295. There then followed the management meetings to which we refer at paragraphs 63 to 91. The claimants were not of course invited to these meetings. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made. It is good practice so to do but the only question is, objectively, whether the employer has complied with its obligation to make reasonable adjustments.

296. In **Tarbuck v Sainsbury's Supermarkets Limited** [2006] IRLR 644, EAT, Elias P said that *"any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray that ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so."*

297. The significance of this upon the facts of the instant case is that had the claimants been invited to any of these meetings the respondent would have been in a position to better understand the claimants' needs in terms of access and egress in and around the building and for auxiliary aids.

298. Even absent the involvement of the claimants, we hold that the respondent had actual knowledge both of the disadvantages caused to the claimants by reason of the layout of the premises and the need for auxiliary aids. Upon the former (*viz*. physical layout) we refer in particular to paragraph 77 around the meeting of 18 April 2016. Upon the latter (*viz.* auxiliary aids) we find that the respondent acquired actual knowledge at the time of the first meeting by reference to our factual finding in paragraph 64 about Mr Wright's actual knowledge of the claimants' need for adequate lighting and the respondent's knowledge of the difficulties that working upon their existing machines in their substantive roles would have for the claimants by reason of their visual impairment (as recognised by Mr Darius in paragraph 78).

299. In summary, therefore, we hold that the respondent had actual and if not had constructive knowledge of the claimants' disability and of all three of the requirements in section 20(3)(4) and (5) by 18 April 2016.

300. In our judgment it would not have been objectively reasonable for the respondent to allow the claimants to return to work until they obtained medical opinion that it was safe so to do. By reference to the findings of fact at paragraphs 32 to 56, we determine that the respondent progressed matters reasonably quickly and with appropriate expedition between 4 February 2016 and 31 March 2016. It was reasonable for the respondent to approach the claimants' GP first and then upon him declining to provide an opinion to seek the assistance of the EEF occupational health service. Bearing in mind the respondent's duty of care to the claimants and to other employees it would in our judgment have been foolhardy for the respondent to have allowed the claimants to return to work prior to the end

of March 2016 pending the receipt of occupational health advice as to their fitness to undertake their substantive roles and what adjustments may need to be carried out.

301. By early April 2016 the claimants were fit to return to work. They effectively asked for a return to work plan on 4 April 2016 (paragraph 61). Dr Oliver did not say in terms that the claimants were unfit to work either by reason of their disability or because of any supervening stress.

302. It is unfortunate that the respondent did not make enquiries about the cause of the ongoing stress referred to in the claimants' sick notes (at pages 72 to 88 of the bundle). However, doing the best we can we have determined that upon the evidence the stress caused by the episode with Ruth Gilmore on 3 February 2016 was relatively short-lived. We make this determination because Dr Oliver did not say at any stage after the end of March 2016 that the claimants' return to work was contra-indicated for any medical reason when he reported upon them. Thus, there was no medical bar to the claimants' return to work at that time. Further, on 28 September 2016 and 24 November 2016 he attributed the stress suffered by the claimants to the failure to allow them to return to work (paragraphs 103 and 116). He did not attribute the stress to any other cause such as the eye condition itself or the episode with Ruth Gilmour.

303. As we know, the claimants did not return to work until 18 September 2017 (paragraph 189). At that time, they moved into their new roles in disassembly.

304. The question that arises therefore is whether the respondent failed to make reasonable adjustments in order to allow a return to work sooner. Upon this issue, there is in our judgment much merit in the claimants' complaint that time was wasted between April 2016 and November 2016. We say this because Dr Oliver's opinion of 31 March 2016 was that the claimants were fit to return to work (with adjustments). True it is that he said that he would like to review the claimants once the specialists' reports were to hand but he did not say that in the meantime the claimants should not return to work.

305. An additional feature telling in favour of the claimants being allowed to return to work is that they had been allowed to work in their substantive roles following their disclosure in January 2016 of their condition. The only reason that they were absent at all was because of the incident with Ruth Gilmore of 3 February 2016. Had that not happened it seems likely that they would have been allowed to continue undertaking their substantive roles given that they were not prevented from so doing at any point during January 2016. In addition, the claimants were registered as sight impaired in or around 2014 (paragraph 6). It was only towards the end of 2015 that they resolved to inform the respondent of their condition because it was deteriorating. They had therefore been performing their duties in their substantive roles perfectly satisfactorily notwithstanding the onset of the retina pigmentosa.

306. We accept, of course, that the respondent could not simply invite the claimants to return to work in an adjusted role immediately after the claimants asked for the return to work plan on 4 April 2016. It was necessary for the respondent to take

stock of Dr Oliver's reports and decide, following a workplace assessment, whether it was safe for the claimants to return to their substantive roles (with adjustments) or by way of adjustment offer them a new role. Subject to the criticism of not having involved the claimants, the respondent did in our view progress matters reasonably quickly in April 2016 (paragraphs 63 to 80). In short, plans were worked up for the claimants to return to a new role the view having been taken that it was not safe for them to return to their substantive roles.

307. Mr Darius fairly accepted that there had seeped into the respondent's collective mindset a view that the claimants needed repetitive and familiar tasks and were not fit to return to work in their substantive roles (paragraph 88). We find this to be misplaced as the claimants could do their substantive roles with the assistance of a support worker. However, the adjustment of support worker provision was not in our judgment a reasonable adjustment for the respondent to undertake. As will be seen we have determined that the respondent was not in breach of the duty to make reasonable adjustments by refusing to allow the claimants to return to their substantive roles at any stage (even with support worker assistance).

308. However, it is our judgment that it was a breach of the duty to make reasonable adjustments to fail to allow the claimants to return to a new role sooner than September 2017.

309. In our judgment, matters became muddied by the claimants' wish to return to their substantive roles and their wish to involve Access to Work upon the question of an assessment of their workstation should they return to their substantive roles (paragraph 125). The respondent's position of course was that they wished to involve Access to Work upon the question of a return to work in both roles. At all events, the wish of both parties to involve Access to Work caused a delay as it took between November 2016 and 28 April 2017 to organise the Access to Work visit.

310. There is no suggestion that the respondent was in any way to blame for the delay in organising an Access to Work assessment. The chronology at paragraphs 130 to 143 in our judgment demonstrates that the respondent was dealing with matters with reasonable expedition. In our judgment, this was an objectively reasonable step for the respondent to take particularly given the claimants' needs for auxiliary aids and to ensure a workplace safe for their condition.

311. The Access to Work assessment report came to hand around two weeks or so after the inspection (on 15 May 2017: paragraph 152).

312. There was then a further meeting arranged for 7 June 2017 at which matters were discussed further. There was a short delay before the respondent set about purchasing the auxiliary aids for magnification and extra lighting (paragraphs 166 to 168).

313. There was then a further delay while Mr Wright carried out risk assessments (of the claimants' substantive role). There was then the intervention caused by the installation of the heat treatment plant.

314. We hold there to have been no failure by the respondent to make reasonable adjustments by allowing the claimants to return to their substantive roles with adjustments. The claimants fairly and realistically accepted that without the provision of support worker assistance they cannot work in those roles (paragraph 170). Hence, there would be no utility in the respondent making any other adjustments to accommodate the claimants' return to work for those roles as they would not serve to ameliorate the disadvantage caused by the application to the claimants of the PCP of being required to work upon them unless support worker provision is made. Plainly, it would not be reasonable for the respondent to have to make adjustments if in the final analysis there was of no utility in them absent the provision of support workers.

315. The issue of support worker provision was determined by Access to Work to be necessary to enable the claimants to return to their substantive roles. As observed in paragraph 170, the claimants' position was that they are unable to do their substantive roles without a support worker to ensure their safety.

316. The key question that arises therefore is whether the provision of a support worker for each claimant is a reasonable adjustment. Access to Work approved funding to assist with financing of support workers on 26 September 2017 (paragraph 190). This was limited to six hours per week which was of little use. The claimants therefore applied for a reconsideration of Access to Work's decision. The original decision was overturned and on 28 November 2017 Mrs Burkin was notified that the claimants were now able to get support from Access to Work to fund support workers to enable them to work for up to 20 hours per week.

317. As we have seen from the factual findings, the respondent then set about trying to recruit support workers. There may be some criticism of delay between the end of November 2017 and early February 2018 (by reference to paragraphs 203 to 210). However, whatever the deficiencies, in the final analysis this is an objective test. The Tribunal has to ask itself whether the provision of support workers would be a reasonable adjustment for the respondent to make.

318. There is merit in the claimants' criticism of the way in which the respondent went about the task of finding support workers. The staff meetings held in March 2017 were not well organised and the prospects of successfully recruiting support workers was, in our judgment, impaired by the failure to properly prepare flyers and job descriptions. Matters were also not helped by Mrs Burkin absenting herself from the first meeting of 8 March 2018. It was of course no fault of hers that Mr Bowgen was delayed in the snow but the fact remains that Mrs Burkin commenced the meeting and then left after several minutes (paragraph 224). She may have had another appointment to go to. However, one questions the wisdom of even commencing the meeting that morning rather than postponing it. We imagined there would have been little dissent upon a postponement given the adverse weather conditions that prevailed that day.

319. Notwithstanding the merit of the claimants' complaints that the support worker issue was badly handled by the respondent (and a summary of their complaints is at paragraph 242) we hold that objectively it would not have been a reasonable

adjustment for the respondent to recruit support workers to enable the claimants to return to their substantive roles. As we said in our summary of the law, the EHRC Employment Code gives (at paragraph 6.28) examples of matters that a Tribunal might take into account upon the issue of reasonableness. Amongst those is the practicality of taking a step, the costs to be incurred by the employer in taking the step and the extent to which it would disrupt any of the employer's activities.

320. We are satisfied from the evidence of Mr Darius and Mr Bowgen that enabling the claimants to return to work with a support worker to their substantive roles would be significantly disruptive. It is difficult to accommodate the claimants' part-time hours within the respondent's 24 hours' shift system. In our judgment, the evidence of Mr Bowgen and Mr Darius at paragraphs 219 and 220 is particularly pertinent. This is all the more so given the tight margins and competitive environment in which the respondent operates. We take into account that these are "bottle neck machines" running continuously. On any view, it is inefficient for assembly operatives other than the claimants to commence work upon the machines at the start of a shift and then have to make way for the claimants and then for the process to be reversed at the end of the claimants' shift. Further, such a practice is likely to generate discontent amongst other workers displaced from the machines who would have to go and find something else to do.

321. The issue, therefore, is not so much with the recruitment of support workers (whether internally or externally) but rather the disruption caused to the respondent's operation by the claimants working fixed day time and daylight hour shifts for four hours a day in their substantive roles. Even if external recruits could be found to fill the vacancies of effectively shadowing the claimants at work as support workers or recruiting internally the underlying issue is the complexity of the respondent's shift pattern and the adjustment of accommodating the claimants' varied hours around that shift pattern.

322. It has not been suggested by the respondent (and we certainly do not mean to suggest) that the claimants are incapable of carrying out the substantive roles satisfactorily. As we have observed, they did so for many months before divulging their condition to the respondent. The issue is accommodating the adjusted fixed hours required by the claimants' condition into the respondent's shift pattern, the commercial ramifications of so doing and the industrial relations issue caused by the displacements of those workers rostered to work upon the claimants' old machines when the claimants turn in for work. Taking into account all of these matters we determine that this aspect of the claimants' reasonable adjustment complaint must fail.

323. The claimants are on stronger ground upon the question of failure to make reasonable adjustments in allowing them to return sooner than was the case in their new roles. In our judgment, there is merit in this aspect of the claimants' claim and which succeeds.

324. As we have said, it was reasonable for the respondent to consider Dr Oliver's initial reports received at the end of March 2016. Whether done in conjunction with the claimants or not the respondent had effectively decided how to proceed (by the provision of a new role) by the end of April 2016. The claimants had of

course already contacted Access to Work at this point (the initial application having been closed in February 2016). In our judgment, it would have been reasonable for the respondent to commission a workplace assessment from Access to Work before allowing the claimants to return. That took a period of around five months or so to organise between November 2016 and April 2017: (there is no suggestion that it may have been done quicker or that the respondent delayed in commissioning the report). Had the process started not in November 2016 but in April 2016 (as we find should have occurred in light of Dr Oliver's opinions and allowing the respondent a reasonable period to consider them) the respondent would then have had the Access to Work report containing a workplace assessment (to move the claimants to a safer area thus overcoming the difficulties caused by the physical feature of their old workplace) by the end of September 2016/mid- October 2016.

325. The Access to Work report recommended the purchase of auxiliary aids. As we have said, there was some delay in the purchase of these. In our judgment, it would have been possible to obtain them within one month or so of the receipt of the Access to Work report given a prompt order upon the same timescales such as at paragraph 168. There would then have been the necessary electrical work to e undertaken before the workstation was ready. Allowing a period of time for the provision of the Access to Work report upon the adjustments of around two weeks or so from the date of inspection and some time for contingencies, in our judgment a realistic timescale for the respondent to have been ready to allow the claimants to return to work in their adjusted role was at the end of November 2016.

326. In summary, in compliance with the duty to make reasonable adjustments, the timescale would have been:

326.1. Claimants fit to return to work – at the end of March 2016.
326.2. Meetings (with or without the claimants) to consider the occupational health reports – by the end of April 2016.
326.3. Access to Work report commissioned and received – by mid-October 2016 at the latest.
326.4. Purchase of equipment and installation in new work area – by the end of November 2016.

327. In our judgment, the respondent failed to make reasonable adjustments by delaying the taking of these steps. Firstly, there was no medical contra-indication from Dr Oliver or the claimants' GP that they were unfit to work at the end of March 2016. Secondly, a great deal of time was wasted in commissioning unnecessary specialist reports in circumstances where Dr Oliver did not indicate that his view was in any way provisional. All he said was that he was prepared to review matters again once specialist reports came to hand. Thirdly, although not a breach in and of itself of the duty, the respondent did not help itself by failing to consult the claimants.

328. In conclusion therefore, we hold that the operation of the relevant PCP when applied to the claimants of undertaking work in their substantive role disadvantaged them in comparison with non-disabled employees. Those without

the claimants' condition would have been able to work in the substantive roles. The claimants had difficulty so doing because of their condition. The duty to make reasonable adjustments was therefore engaged. The respondent took reasonable steps to ascertain the claimants' fitness to work and conducted matters appropriately to the end of April 2016. There was then an unfortunate and unnecessary delay amounting, in our judgment, to a breach of the duty to make reasonable adjustments. Had that duty been fulfilled the claimants would have been able to return to work some nine-and-a half or ten months sooner than was the case (*viz*. in November 2016 rather than in September 2017). That return would have been in the new role in disassembly, it not being a reasonable adjustment to allow the claimants to return to the substantive roles at any stage even with the provision of support worker assistance.

329. The claimants' return to work sooner would have avoided the delay to their return to work caused by the installation of the heat treatment plant. The heat treatment plant work would still of course have had to be undertaken but the claimants would have been in role at that point. The respondents would therefore have had to find the claimants something else to do within their capabilities or medically suspend them pending the heat treatment plant installation. However, they would have been in the new role at that point and not made to wait further by reason of the failure to implement the adjustments.

330. Our conclusions upon the operation of the PCP in this case is largely determinative of the claimants' case upon the issue of auxiliary aids and assistive technology. As we said at paragraph 254, it has been difficult for the Tribunal to piece together factually the issues around the purchase of the equipment. In our judgment however, it would have been a reasonable adjustment for the respondent to have acquired and installed the necessary auxiliary aids to enable the claimants to do their new roles within the timescale at paragraph 326 above.

331. As we observed in paragraph 253, it is accepted by the claimants that the magnifiers are not needed for the current role but only for the substantive role. It would therefore not be reasonable for the respondent to have acquired those because the substantive role could not be undertaken by the claimants anyway for the reasons that we have given. That said, in our judgment it is difficult to see why the necessary auxiliary aids and appliances that were required could not be in place to enable the claimants each to work upon their work bench by the end of November 2016. The delays and difficulties that have beset the claimants after September 2017 with some of the equipment is in our view a breach of the duty to provide auxiliary aids to the claimants to enable them to undertake their adjusted work.

332. That then leaves the issue of the physical feature of the premises. As we understand it, this refers only to the question of the visibility strips on the stairs to which we referred at paragraphs 187 and 188.

333. Plainly, there is a disadvantage to the claimants in not having these due to their visual impairments. We agree with Mr Morgan that different explanations have been given about the practicality of marking the stairs with yellow strips. However, we do accept the respondent's evidence that for whatever reason there

are practical difficulties with laying or painting yellow strips on the stairs. We were struck in particular by Mr Wright's evidence that the paint may affect the functionality of the Evac chair. In our judgment, the respondent has made reasonable adjustments which come with a prospect of alleviating the disadvantage caused to the claimants by the absence of yellow strips upon this physical feature of the respondent's premises in that buddies have been arranged to accompany the claimants when they need to move around the premises and in particular to go upstairs to the canteen and rest area. Given that the claimants are (or are going to) work between 9am and 1pm it is unlikely that they will be alone in the canteen area and thus there will be plenty of people around to help them in the event of an emergency.

334. Upon the first morning of the hearing Mr Morgan advanced a second disadvantaging PCP in addition to that of the respondent's requirement for the claimants to attend work and perform their substantive roles. This was that the respondent carried out a risk assessment in July 2017 that was not done on the assumption that the reasonable adjustments had been put in place.

335. The factual basis for this is at paragraphs 171 to 173. The Tribunal finds that the respondent did have a PCP being the practice of carrying out risk assessments. There are of course risk assessments for these machines in the bundle.

336. We agree with the claimants that the practice of undertaking of the risk assessments without adjustments disadvantages those with the claimants' disability. The reason for the disadvantage is that the risk assessment is upon the wrong premise for the claimants as disabled persons if adjustments are not factored in. Plainly, an assessment of risk presented by working upon the relevant machines if undertaken for a non-disabled comparator will result in a lower assessment of risk than where the risk assessment is undertaken (without factoring in adjustments) for employees with the claimants' eye condition. The disadvantage manifested itself in Access to Works assessment that support work provision should be limited to six hours per week for which the claimants had to seek reconsideration (paragraph 190). The disadvantage to the claimants as disabled persons caused by Mr Wright's approach was that the assessment was upon the wrong basis and caused a complication with their application for assistance for Access to Work. (The disadvantage does not of course extend to the non-provision of a support worker as that would not have been a reasonable adjustment to make in any event).

337. A reasonable adjustment in order to avoid the disadvantage at paragraph 336 would have been to undertake the risk assessment factoring in reasonable adjustments. By application of the factors at paragraph 6.28 of the EHRC code we hold that it would have been practicable for the respondent to have undertaken the risk assessment upon the correct basis. After all, by this stage the respondent had in its possession the Access to Work workplace assessment which came to hand in mid-May 2017. We agree with Mr Morgan's assessment of the case at paragraph 107 of his submissions. This complaint is therefore upheld.

338. Before leaving the issue of reasonable adjustments we conclude for the avoidance of doubt that it would not have been a reasonable adjustment for the respondent to provide an auxiliary service (by way of the provision of support workers) as a form of auxiliary aid to alleviate the disadvantaged caused to the claimants but for the provision of that auxiliary service. This is upon the basis that we find that allowing the claimants to return to their substantive roles upon a fixed part-time basis is not practicable upon an objective basis for the reasons given already.

339. Finally, we now turn to the complaint of unfavourable treatment for something arising in consequence of disability. This claim relates to the requirements for the claimants to remain on sick leave during the period between February 2016 and September 2017. The claimants were required to remain off work and were required to take the time as sick leave rather than being on medical suspension or otherwise kept off work on full pay pending the respondent making adjustments. We hold that the requirement for the claimants to remain off work and to take the time off work as sick leave was unfavourable treatment. This is because the claimants were in fact fit to work by the end of March/early April 2016 as confirmed by Dr Oliver. On any view, that would reasonably be considered to be a disadvantage.

340. The position is somewhat nuanced because we hold it not to be unfavourable treatment for the claimants to have been required to stay off work pending the making of reasonable adjustments and, as we have seen, in our judgment the respondent ought to have done so by the end of November 2016. The claimants cannot complain, it seems to us, of not being permitted to physically return to work very shortly after their request for a work plan. The fulfilment by the respondent of the duty of care to the claimants by the carrying out of a workplace assessment with Access to Work and working up a plan for the adjusted role cannot be objectively unfavourable treatment. It cannot be said to be to the claimants' disadvantage (and thus be unfavourable) for the respondent to ensure their safety in the workplace.

341. The refusal to allow the claimants to return to work after the end of November 2016 is for something arising in consequence of disability. It was impact of the disability upon the claimants (and concerns for the claimants' safety and the need to consider adjustments) that led to the respondent taking the decisions to prevent the return until September 2017.

342. Even if we are wrong on this, the pre-end of November 2016 treatment can be justified as in fulfilment of the legitimate aim of ensuring a safe workplace for the claimants and it was proportionate to have them remain off work when balancing the real and objective need to pursue that aim against the disadvantage to the claimants of being off work.

343. Where the claimants have good cause for complaint is after November 2016 where the refusal to allow them to return to work was, in our judgment, attributable to the respondent's failure to make the reasonable adjustments within a reasonable time. From that point the claimants can complain of unfavourable treatment in not being allowed to return to work as the timely making of the

adjustments would have had them return to work by then. The failure to make reasonable adjustments renders justification of the unfavourable treatment difficult if not impossible.

344. The claimants can however complain of unfavourable treatment from early April 2016 by being required to take time off as sick leave. The simple fact of the matter is that they were not unable to return to work by reason of ill health. Requiring them to take sick leave and accruing an unfavourable sick leave record in our judgment is plainly unfavourable treatment.

345. The unfavourable treatment (by reason of requiring the claimants to take the whole period from early April 2016 to September 2017 as sick leave and not allowing the claimants to return to work from the end of 2016) was by reason of the respondent's failure to recognise that the claimants were not sick and are actions that arise in consequence of the claimants' disability. The very reason why the respondent refused to allow the claimants to return to work until September 2017 and to take sick leave was because of the claimants' disability, the need to consider adjustments, the claimants' safety and the difficulties in them returning to their substantive roles as a consequence. All of these arose in consequence of the claimants' disability.

346. We accept that the respondent had a legitimate aim in not permitting the claimants to return to work at least until the time at which reasonable adjustments ought to have been put in place. The legitimate aim is, of course, the safe running of the respondent's operation and the health and safety of the claimants and their fellow workers. It was proportionate in pursuit of that aim to keep the claimants out of the workplace until reasonable adjustments were made. The difficulty for the respondent however is that reasonable adjustments ought to have been made by the end of November 2016 but were not. Therefore, continuing to keep the claimants off work beyond that time was not a proportionate means of achieving the legitimate aim.

347. Further, it is difficult to see how making the claimants take their absence as sick leave from the end of March 2016 until the end of November 2016 as opposed to putting them on medical suspension was reasonably necessary for the respondent to achieve the legitimate aim. Putting the claimants on medical suspension would just as well have served to achieve the aim of a safe working environment. They would still have been out of the workplace. Imposing the unfavourable treatment upon the claimants of requiring them to take the whole period as sick leave did nothing to advance the aim and that requirement did not represent a real need upon the part of the respondent in order to achieve it.

Summary

348. In summary therefore, the conclusions of the Tribunal are:

348.1. The application to amend the claim to include harassment related to disability is refused.
348.2. The reasonable adjustments complaint succeeds in part upon the issues of:

- The failure to make reasonable adjustments to allow the claimants to return to work in their new role by the end of November 2016.
- The failure to provide auxiliary aids to enable them so to do within the same timescale (*ie* by the end of November 2016).
- The undertaking by Mr Wright of the risk assessment in July 2017.

348.3. The complaint of unfavourable treatment for something arising in consequence of disability succeeds wholly with regard to the unfavourable treatment of compelling the claimants to take sick leave from April 2016 until September 2017 and in part in refusing to allow the claimants to return to work after the end of November 2016 by reason of the respondent's failure to make reasonable adjustments.

349. The claimants' complaint of a failure to make reasonable adjustments by reason of the respondent's failure to return them to their substantive roles with adjusted hours and with the provision of an auxiliary aid in the form of support worker assistance fails.

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Employment Judge Brain

Date 3 March 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS