EMPLOYMENT TRIBUNALS

Claimants: **Miss H Kalaya**

Respondents: **(1) Wimbledon Broadway Specsavers Limited**
(2) Mr Andrew Kemp
(3) Miss Mahika Jayasena
(4) Mrs Sherrie Yates
(5) Mr Richard Sandiforth
(6) Mrs Daniella Mann
(7) Miss Cheher-Bano Kashmir-Ali
(8) Miss Anoushka Desai
(9) Mr Peter McCrory

Heard at: **London South (Croydon)**

On: **10, 11, 12, 13, 14, 17, 18, 19, 20 & 21 December 2018 and 8 February 2019 (both in chambers)**

Before: **Employment Judge John Crosfill**
Ms J Forcast
Ms M Foster-Norman

Representation

Claimant: In person

Respondent: Mr Orlando Holloway of Counsel instructed by Eversheds (Sunderland) International LLP

JUDGMENT

1. By a majority, the Claimant's claim for unfair dismissal against the First Respondent is well founded.
2. The Claimant's claim that she suffered a detriment by reason of making a protected disclosure is dismissed.
3. The Claimant's claim that she suffered a detriment by reason of her trade union membership/activities is dismissed
4. The Claimant's claims under the Equality Act 2010 are dismissed.
5. The Claimant's claim for employer's pension contributions is dismissed.

REASONS

1. The Claimant is now a qualified and registered dispensing optician. She started working for the First Respondent on 18 December 2012. The First Respondent owns and operates a retail optician under the banner of a national brand. The claims that the tribunal had to decide arose from the interactions between the Claimant and her managers and colleagues who are the Second to Ninth Respondents. The events that the Claimant complains of started in perhaps as early as 2013 and led to her resignation which took effect on 4 April 2017. She complains of discrimination and harassment on the basis of her gender, race, age, religious beliefs and her disability and brings further claims of victimisation. In addition she says that she was subjected to detriments on the basis of her trade union membership and on the ground that she made (a) protected disclosure(s).

The hearing

2. We should record at the outset very early on in the hearing both the Claimant and the Respondents (through Mr Holloway) expressed a strong wish to get through the evidence and submissions in order to bring the matter to a conclusion. Whilst the hearing was a difficult experience for all concerned it is to the credit of all parties that this ambition proved to be achievable. We would express our thanks to the parties for the co-operation they showed which made this possible.

Case management prior to the hearing

3. The Claimant submitted three separate claims. These were:

    3.1. Case No:2300658/2017 which she presented on 27 February 2017 (prior to her resignation taking effect) which is mainly concerned with claims brought under the Equality Act 2010 (referred to here as 'the first claim')

    3.2. Case No:2301775/2017 which she presented on 11 July 2017, which amongst other complaints includes a claim of unfair dismissal (referred to here as 'the second claim'); and

    3.3. Case No: 2300907/2018 which she presented on 15 March 2018, which contains a variety of complaints including complaints that she had been subjected to a detriment for making protected disclosures and additional claims under the Equality Act 2010 (referred to here as 'the third claim').

4. Case management of these claims had proved difficult. The Claimant's claim forms make numerous references to discrimination but she had not specifically stated how the narrative she set out meshed with the statutory framework she relied upon.

5. The Claimant had originally brought her first claim against the beneficial owners of the company that owns the Specsavers brand. There was no possible basis for doing so and at a hearing before EJ Sage which took place on 19 April 2017 those respondents were released from the proceedings. EJ Sage ordered that the Claimant set out her claims in a schedule. The Claimant provided a schedule which runs to 29 pages. Whilst that document usefully sets out the factual incidents giving rise to the

complaints the attempt to link those incidents to the statutes remained unclear. There were 61 factual complaints in all. The Claimant had set out the 55th to 61st of her factual complaints under a heading 'Other Background Incidents'. The Respondent had set out its response to the Claimant's schedule but had understandably assumed that the 'background' incidents were not relied upon as separate claims. The Respondent's reply provides a number 1- 54 for each factual incident. Where in these reasons we refer to any factual incident in the first claim we shall do so by reference to those numbers. It is fair to say that the claim was at that stage in some disarray

6. The Claimant's second and third ET1s include a schedule of events that are said to be the claims brought in these proceedings. Those are much shorter than that provided for the first claim. There are 9 incidents referred to in the second claim together with a claim of unfair dismissal and a further 9 listed in the 2 schedules forming the third claim. We have dealt with each allegation below but beyond that have not sought to seek out claims that have not been brought to our attention or argued before us.

7. On 18 August 2018 (prior to the third claim) a preliminary hearing took place before EJ Tsamados. The record of hearing shows that the Claimant raised the possibility of seeking an amendment to include a claim that she had suffered a detriment on the ground that she made a protected disclosure. It is recorded that the Claimant decided not to do so. It is further recorded that the Claimant informed the Tribunal that she did seek to pursue, as separate claims, the incidents that she had categorised as 'background'. It is evident from the record of the hearing that EJ Tsamados strived to identify the legal claims advanced by the Claimant. It is worth quoting paragraphs 9 and 10 of the case management order:

> *'9. During the course of this hearing I attempted to clarify the claimant's claims in order to determine the issues arising. This proved very difficult. The Scott Schedule is not the clearest of documents and I was loathe to order the Claimant to provide yet another document particularising her complaints. In any event it was very apparent that the Claimant, whilst setting out statutory authority for her complaints, does not understand the different elements of each complaint that she has brought. In particular victimisation and the protected act relied upon, and the PCP vs the adjustment required to show a failure to make reasonable adjustments.*
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> *10. In the end, it simply proved impossible to clarify how the elements of those complaints arose. The Respondent's solicitor generously conceded that these were matters that could be dealt with at the full hearing and would come out in the evidence. In the view of the Claimant's impairments and her lack of legal advice and representation this was the best achievable.'*

8. EJ Tsamados then set out his understanding of the other issues raised by the Claimant. Before we heard the evidence the Claimant indicated that she thought that EJ Tsamados had correctly set out the issues. As such we have treated these issues as agreed. A copy of the relevant parts of the case management order are attached to this judgment as 'Schedule 1'.

9. A third preliminary hearing took place on 28 June 2018 before EJ Fowell after the Claimant submitted her third claim. The third claim was set down to be heard with the other two. In his case management order EJ Fowell set out his concerns about the Claimant's mental health. He was concerned about the language used by the Claimant

in her third claim form which in many places uses graphic sexualised terms to set out her claims. He ordered that the Claimant provide confirmation from her treating Psychiatrist that she was sufficiently fit enough to cope with the final hearing. EJ Fowell considered that the Claimant's third claim sufficiently set out the issues to be determined by the Tribunal.

10. A final preliminary hearing was conducted by EJ Sage on 22 November 2018. The principle purpose of that hearing was to identify what if any accommodation needed to be made for the Claimant to ensure a fair hearing. The Claimant had provided a psychiatrists report in accordance with the order of EJ Fowell. That report suggested that:

    10.1. That the Claimant had capacity and that she was *'looking forward to the hearing'*; and

    10.2. that the Claimant had a diagnosis of PTSD; and

    10.3. that cross examination should be limited to short intervals with breaks during the proceedings; and

    10.4. the Claimant would benefit from seeing written questions proposed as any cross examination or in lieu of that, some time to consider her responses.

11. The Claimant asked that she be permitted to record the proceedings to enable her to review the evidence. She further expressed concern about walking past press photographers using flash photography.

12. EJ Sage declined the request by the Claimant to see the Respondent's cross examination in writing. However, with the apparent agreement of the parties she agreed:

    12.1. That the Tribunal would be equipped with a dual tape recorder with one recording available to each party; and

    12.2. That the Claimant should indicate at any point if she needed a break or additional time to respond to any questions put by the Respondent; and

    12.3. She was assured that photography was not permitted on the Tribunal premises; and

    12.4. The Claimant was asked to discuss any additional medical needs with the clerk on her arrival at the hearing.

13. Whilst the order of EJ Tsamados had provided for the preparation of an agreed bundle of documents followed by an exchange of witness statements there had been delays in complying with those orders. The Claimant had raised objections to the bundle prepared by the solicitor for the Respondents. EJ Sage indicated that if no resolution could be reached then the Claimant could produce her own bundle for the hearing. Witness statements had not been exchanged. EJ Sage accepted an offer by the Respondents that they would send their statements to the Claimant on 28 November 2018 and the Claimant would send any witness statements she relied upon by 7 December 2018 (the last working day before the hearing).

14. In preparation for the hearing additional arrangements were made by the Tribunal Service. A clerk was allocated for the duration of the hearing, to provide continuity and a conference room was reserved for the use of the Claimant throughout the proceedings.

15. The Tribunal convened on 10 December 2018 for what had been agreed to be a reading day. We had been provided with 4 bundles. These were:

    15.1. A 'pleadings bundle' which contained the ET1s and ET3s, all supplementary information and the schedules of the claims brought in the first proceedings.

    15.2. There was the agreed bundle which was in 2 volumes and had page numbers up to 794 pages although as a matter of fact there were more pages than that.

    15.3. The final bundle was entitled the Claimant's supplementary bundle and included additional documents that the Claimant wished to put before the tribunal.

16. We were referred only to a fraction of the documents in the bundle. The index of the bundle had clearly been the subject of disagreement and had commentary by the Claimant. Included in the bundle was a considerable amount of correspondence. That correspondence disclosed that the Claimant had little understanding of the steps needed to prepare for the hearing. She had frequently robustly criticised the Respondent's Solicitor. That criticism was unhelpful and in many respects misguided. Despite these problems we were able to deal with all of the evidence and were able to read most if not all of the bundles placed before us.

17. We had been provided with witness statements by the Respondents. Unfortunately there was no witness statement from the Claimant. As a consequence we spent the first day, 10 December 2018, reading the Respondents' witness statements together with the documents referred in them.

18. On each day of the hearing the Claimant was accompanied by either her Priest or other friends. The support shown clearly assisted the Claimant.

19. On 11 December 2018 the Claimant had telephoned the Tribunal at 9.45 explaining that she had transport difficulties and would be late. She arrived at 10:55. As it happened one of the members had been asked to assist with another case and that provided a little time to deal with case management matters. For that purpose only, given the absence of one member, EJ Crosfill sat alone.

20. The Claimant said that she had not yet completed her witness statement. EJ Crosfill discussed this with the parties. The Respondents were anxious that the hearing should not be derailed and wanted the matter concluded within the allocated 10 days. Other than that, the Respondent made no objection to the Claimant being allowed time to complete her statement. The Claimant proposed that she had the balance of Tuesday and the whole of Wednesday to prepare her witness statement and would start her evidence on Thursday (the 4th of the 10 days allocated). The Respondent was concerned that that might mean that the hearing went part heard. We discussed whether we could make a start with the Respondents giving their evidence first. The Claimant was uncomfortable with that suggestion. EJ Crosfill discussed whether the

Claimant was content simply to rely on the extensive narrative in her ET1s. The Claimant indicated that she wanted to furnish a witness statement. At the end of the discussion EJ Crosfill ordered the Claimant to provide her witness statement by 9:00am the following morning and directed that the proceedings would commence at 2pm with the Claimant giving evidence first. The Claimant had been given every accommodation to provide her witness statement and there was no good reason for the delay. In particular the delay was not caused by the Claimant's health. She was able to produce extensive correspondence in the period when she ought to have been preparing her witness statement. Issues about what was, or was not, in the bundle did not provide a good reason for the delay. The Respondent had already been prejudiced by not seeing a statement before the proceedings commenced. Any prejudice to the Claimant in pressing her to complete her statement would be mitigated by permitting her to rely on her extensive and narrative ET1s.

21. The Claimant has requested and had been granted a witness orders for former employees of the Respondent. Neither witness had attended both having e-mailed the Tribunal with their reasons for not wishing to attend. The Claimant suggested that she had considerable sympathy with those reasons. I gave the Claimant time to consider what she wanted to do. After that she indicated that she was content that the witness orders were discharged.

22. EJ Crosfill explained the arrangements that had been made to accommodate the Claimant including the provision of a conference room. It was emphasised that the Claimant should make it clear when she needed breaks and she was told that as far as possible these would be accommodated.

23. The final matter that was dealt with was the addition of some extra documents to the bundles. This was done without any objection by the Respondents.

24. The hearing resumed at 2:00pm on 12 December 2018. The Claimant had provided a witness statement that morning. Prior to hearing evidence the Respondent was asked to explain the extent of its concession that the Claimant was disabled for the purposes of S6 of the Equality Act 2010. The Mr Hollloway explained that the Respondents accepted, what it believed to be the Claimant's case, that she suffered from a mental health condition from 8 November 2016 (shortly after disciplinary proceedings were commenced). No concessions were made about the Respondents knowledge of the Claimant's disability or the effect that it had upon her.

25. Despite the extra time she had been given the Claimant's witness statement was clearly not a complete narrative. It contains very little factual narrative but includes bible references and some argument. The Claimant did however adopt her previous narrative in her claim forms as being her evidence. Both she and the Respondent expressed themselves as content to rely both on the witness statement and the somewhat fuller narrative set out in the 3 ET1s that the Claimant had provided.

26. Whilst the Tribunal Service had provided a dual tape recorder that machine proved to be old and inadequate for the task in hand. In the course of the hearing we abandoned using that machine and permitted the parties to record the proceedings each using a mobile telephone to do so. In addition EJ Crosfill recorded the proceedings on a Dictaphone.

The Claimant's evidence

27. The Claimant commenced her evidence at 14:48 on 12 December 2018. Mr Holloway asked her questions until 16:20 whereupon the Claimant became distressed. The Tribunal concluded the proceedings for the day.

28. The Claimant's evidence continued on 13 December 2018. After a short period of time the Claimant became distressed. She initially asked to carry on but after a further short period the Tribunal decided to take a break to allow the Claimant to compose herself. During the day the periods during which the Claimant was able to give evidence became shorter and shorter. We gave the Claimant as much time as she asked for (and often more) to enable her to give her evidence. We should record that Mr Holloway conducted his cross examination courteously and efficiently and nothing we say here is intended to suggest that the cross-examination was inappropriate.

29. During her evidence, and occasionally thereafter, the Claimant would use 'props' to illustrate some points. For example she had made a swear box into which she inserted coins when she described an episode when she says she was sworn at. We suggested to her that this was not necessary and that we were unlikely to be offended if she recited the language used or referred to it obliquely.

30. After some hours of attempting to make headway it became apparent that the Claimant found it very difficult when her perception of events was challenged. After some discussion of the position and of the principles in ***Shui v University of Manchester & Ors*** **UKEAT/0230/16/DA** Mr Holloway agreed that he would restrict his questions to the bare bones of the Respondent's case on the understanding that he had not put every point to the Claimant for the sake of her wellbeing. The Claimant's evidence concluded at 14:30 on the fourth day of the hearing. We finished early on that day to permit the Claimant some time to prepare to cross examine the Respondents and their witnesses.

31. The Claimant had expected to call Ms G Gatz as a witness. Ms Gatz had attended on 12 December 2018 had been unable to attend all of the days of the hearing. In the event on 14 December 2018 the Respondents indicated that they were prepared to accept the contents of Ms Gatz's witness statement and she did not need to give evidence. They had previously made the same concession in respect of Fr Peter Burns, the Claimant's priest and her other witness.

Cross examination of the Respondent's witnesses.

32. The Claimant had attended on 14 December 2018 but within minutes of the hearing started had to rush from the room. The Claimant had explained that because of her impairment she ground her teeth and to stop this wore a mouthguard. She explained that this sometimes made her nauseous. We had explained that if she needed to leave the room in a hurry she should just do so. When the Claimant returned she remained too distressed to make any progress. We put the matter back to give the Claimant some time to recover. At 11:15 the Claimant returned but remained distressed she indicated that she did not think she could go through with the hearing. The Respondents offered to keep all unnecessary witnesses out of the room but the Claimant was adamantly opposed to that. EJ Crosfill explained that whether or not to continue was a matter for her and reminded her that she could if she wished withdraw

her claims but that if she chose to carry on the Tribunal would continue to make such accommodations as it could. We discussed what could be achieved on that day and it was proposed that the Claimant cross examine just one of the Respondent's witnesses Mr Matt Rising. The Claimant asked for time and we started the cross examination at 14:00.

33. The Claimant was generally able to cross examine the Respondent's witnesses without undue difficulty. With one witness the Claimant asked if the Tribunal could read questions she had prepared which the Respondent agreed to. However, after that, the Claimant was able to conclude the cross examination without any such assistance. On another occasion, the Claimant asked that Mr Holloway alter the order of witnesses to accommodate her preparation. He agreed to do so. The Claimant was very familiar with the bundles and documents and was able to take the Respondents and witnesses to the relevant documents. Over the following days there were several occasions when the Claimant did become distressed, when that happened she was offered, and usually took, a break in the proceedings. but she was able to conclude her cross examination by Wednesday 19 December 2018.

34. We would repeat that despite the difficulties that presented themselves it was the position of all of the parties that the hearing should proceed to a conclusion and, other than asking for time to prepare her witness statement or for breaks in the proceedings no application was made for an adjournment by any party.

Submissions and deliberations

35. On Thursday 20 December 2018 we heard submissions from both parties. Mr Holloway had prepared extensive written submissions he explained that he was anxious not to cause any distress to the Claimant and would not be putting any emphasis on some of the factual points that he made. The Claimant made oral submissions in the afternoon.

36. We had hoped to conclude our deliberations on the final day of the hearing. Given the volume of evidence and the issues we had to determine this proved to be an overambitious target. We arranged an in chambers day for 8 February 2019 and were able to conclude our deliberations on that date.

Structure of the judgment

37. The first section below sets out our findings of fact in respect of what occurred in the period in which the Claimant's complaints arise. As we set out above we have used the paragraph numbers of the schedule of issues (which deals with the first claim) to denote various events. Our findings of fact are not limited to this section of the judgment and do not invariably include specific matters such as the reason for any treatment that occurred or whether any act by the Claimant satisfied any particular statutory requirement (i.e. was a protected act for the purposes of Section 27 of the Equality Act 2010).

38. Having made findings of fact we have dealt with the statutory claims. We set out our general self-direction in respect of the applicable law in respect of each statutory head of claim. Then we go on to consider whether each claim is made out. Whilst we head those sections 'discussion and conclusions' we have made additional findings of fact in those sections as well as referring back to our general findings. We hope we have clearly indicated where we have made such additional findings.

39. This judgment is inordinately long. Whilst the Employment Judge would wish to apologise to the parties for the time it has taken to provide these reasons a great deal of time has been taken dealing with the many hundreds of individual claims that have been brought.

The burden and standard of proof

40. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

41. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act and provides that, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**.

42. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said *'the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race''*. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim.

General Findings of Fact Applicable to all of the Claims.

43. We must make findings of fact as to the events relied upon by the Claimant. It is not necessary for us to make any finding as to whether any witness was deliberately misleading us and we have not done so. We have had to decide whose account or each event is more likely to be true. We are alive to the fact that the parties might now see events that took place in the past in a different light than they did at the time. Litigation can and frequently does distort witnesses perception of events. At the conclusion of this section we make some general findings about the reliability of the recollection of the Claimant. These findings informed the conclusions we reach below.

44. The Claimant directed considerable criticism against 'Specsavers'. For this reason she had earlier sought to join the Specsavers Optical Group Limited and its ultimate beneficial owners into the proceedings. Those parties were released from the proceedings by EJ Sage but, as the Claimant contends that she should have been transferred to another Specsavers store it is necessary to set out how the Specsavers brand is marketed in the UK.

45. The model that has been adopted by Specsavers is one that it describes as a 'Joint or Shared Venture Partnership'. Under this model each store is owned and operated by a limited company. Each company will usually have two directors an 'Optometry Director' and a 'Retail Director'. Each Director bringing a skill set which Specsavers consider necessary to run a successful business. The Specsavers Optical Group Limited together with its two beneficial owners are the other Directors of the company. In the main the Optometry and Retail Directors are recruited from existing employees and put through a training program (there are rare exceptions to that general rule). Once fully trained the Directors will purchase shares in a store.

46. The shares are held in two classes A shares and B shares. The Optometry and Retail Directors hold 50% each of the A shares with the B shares being held by the Specsavers Optical Group Limited and Specsavers UK Holdings Limited. The voting rights of the B shareholders are limited but include the right to appoint and remove directors.

47. The company operating a Specsavers Store uses the generic Specsavers branding and sells products purchased from Specsavers (this expression is used to connote one of the many companies owned by the ultimate parent company and its founders). Each store owning company has access to HR advice from Specsavers and may, but does not have to, recruit employees through a portal 'SRS' operated by Specsavers. If it does that it pays a commission of 8%.

48. In many respects each store operates as a small business operated by its two Directors albeit one which can draw for support on the larger Specsavers companies.

49. The Claimant was born in Burma (we adopt that name as it was that used by the Claimant). She came to the United Kingdom to study but whilst here applied for and was granted refugee status. The Claimant was brought up as a Buddhist but whilst living in the United Kingdom she has become a practicing Catholic. Her adoption of Catholicism has disrupted her relationships with her sister(s) who live in Australia.

50. The Claimant started studying for a Diploma in Ophthalmic Dispensing in September 2010 at the City and Islington College. Prior to that she had obtained qualifications in other professions (Accounting, Business Management and Teaching) but had been working as a Level 1 (later Level 2) Optical Advisor. In November 2012 the Claimant contacted the Specsavers Recruitment Services and expressed an interest in working as an Optician. There was some dispute about how the Claimant was introduced to the Wimbledon Store but that is immaterial. The Claimant was offered an interview on 11 December 2012 with Peter McCrory.

51. In 2012 Peter McCrory was employed by Wimbledon Broadway Specsavers Limited as the Store Manager. He was undertaking the 'Graduated Pathway Program' used by Specsavers to train potential Directors. He graduated from that program in mid 2015 and became a Retail Director of a store in Wandsworth in June 2016. It is material to say that he attended a Catholic secondary school and displays that on his LinkedIn profile.

52. Peter McCrory says that in the course of the interview the Claimant opened up to him about her reasons for leaving Burma and her previous job. We accept his account of the Claimant explaining why she left Burma as it is consistent with his copy of the Claimant's CV which includes an annotation in handwriting '*Parents decision-arranged marriage'.* The Claimant's explanation of why she left her last job (at Boots)

was actually in her application form and suggests that she had been placed in 'witness protection'.

53. Peter McCrory offered the Claimant a job. She was to work for 40 hours per week having Thursdays off (to attend College) and Sundays off (because of her wish to attend church. The Claimant started work on 18 December 2012 and was issued with a statement of the terms and conditions of her employment shortly after that on or around 8 January 2013.

54. The Claimant sent Peter McCrory a number of e-mails in the early weeks of her employment. On one occasion she was rostered to work on one of her usual days off and she sought clarification of her working days. On another she described herself as *'very upset today, not really happy at all'*. It seems from that e-mail that the Claimant was upset about not being able to respond to enquiries about her course. On 10 February 2013 Peter McCrory sent the Claimant an e-mail responding to a query she had raised about her supervision. The Claimant replied by e-mail. At the bottom of her e-mail she said: *'What a surprise – this is the first time you reply to my e-mail! You surprised me. Thank you Boss. I will keep praying for you all at Church on Monday'.* Peter McCrory responded by asking the Claimant not to use the 'mgr.wimbledon' email address saying it could be viewed by others or his private e-mail address but to raise any issues in person. The Claimant sought to persuade us that this was sinister and that Peter McCrory did not want any dialogue to be in writing. We find that whilst there was some risk of communications to the 'mgr.wimbledon' address being viewed by others what Peter McCrory was seeking to do was to persuade the Claimant to raise her concerns directly and face to face as they worked together frequently. We find that he was mildly offended by the tone of the Claimant's e-mail and found that dealing with her emotional ups and downs somewhat difficult.

55. On 27 May 2013 the Claimant had her first appraisal. That was conducted by Peter McCrory. Much of that appraisal is very positive with the Claimant being praised for her attitude to work and her sales record. However, it was noted that: *'Hla initially found it hard to integrate but is making progress'* and '*Hla feels a lot more comfortable with the team…Emotional outbursts are now rare, when once were common'.*

Allegation 55

56. Chronologically the first matter upon which the Claimant relies as founding any legal claim is her suggestion that Peter McCrory said to her *'I interviewed you, I employed and gave you the job, you will be jobless on the street. I employed you. So, I can dismiss you at any time'*. Peter McCrory in his witness statement denied that he said any such thing.

57. This allegation is not to be found in the Claimant's first ET1 where she does not name Peter McCrory as being a Respondent, but does make other strong criticisms of him. It first appears as an allegation in the Schedule of Claims under the heading 'background'. The Claimant gives the date of this as '18 December 2012 and throughout employment'. When the Claimant cross examined Peter McCrory she took him systematically through most of the other allegations she made against him but she did not explore this issue in any detail. When we asked Peter McCrory if there was any truth in this allegation he denied it. The Claimant gives no context for this particular remark. We note that there was no contemporaneous complaint about this particular matter to anybody at all whereas the Claimant was not slow to complain about other matters.

58. The burden is on the Claimant to show that this remark was made. We are not satisfied that she has discharged that burden. The allegation is of an extremely brutal nature amounting to a threat to take away the Claimant's job. Had that been the case we have no doubt that it would have been raised at an earlier stage.

Allegation 56

59. The Claimant's Schedule under the heading 'background' suggests that in May 2013 Specsavers was 'dodging tax'. Specsavers (generally) was no longer a party to this claim. We had evidence that that the founders resided and (at least) one of their companies was registered in what is regarded as a tax haven. There is no evidence of any detriment caused to the Claimant herself of any tax arrangements entered into by any of the Respondents to this claim. It is not necessary, or appropriate, for us to make any other findings in relation to this.

Allegation 57

60. The Claimant makes a general allegation that Mahika Jayasena would swear and in particular use the work 'fuck' towards her and in particular during the period when she was supervising the Claimant between July 2013 and March 2016. The allegations are vague and very little context is given. They are denied by Mahika Jayasena. There is some evidence of friction between Mahika Jayasena and the Claimant in an e-mail exchange between the Claimant and Peter McCrory in 2013 where the Claimant states that she has apologised to Mahika Jayasena (for something) but that she does not consider Mahika Jayasena to be a role model for politeness. The e-mail acknowledges that there had been a conversation with Peter McCrory and we find that was an occasion where, as he says, he tried to offer advice to the Claimant in respect of her relationships with her colleagues. Had there been any complaint that Mahika Jayasena had been bullying the Claimant and swearing at her we believe that it would have been raised at this time.

61. There are other complaints made by the Claimant during this period about her rota and her contract. Had there been more significant matters we believe that the Claimant could and would have raised them. For this reason and with regard to the rest of our findings we do not accept that the Claimant has made out this allegation to the required standard.

62. Moving away from the Claimant's allegations it is during this period that the Claimant fully qualified as a Dispensing Optician. She requested and was given a pay rise and was provided with a new contract of employment reflecting these changes.

Allegation 58

63. The Claimant alleges that in December 2013 Mr McCrory said '*Do not bring anything from your church to work because it is offensive. Religion is offensive at work'*. Mr McCrory denies that he said anything of the sort. When the Claimant cross examined Mr McCrory she took him to a leaflet which gave details of events and services at her church. She suggested that she had been distributing something similar in the staff room when Mr McCrory made the remark she alleges. Mr McCrory's response was that there was nothing untoward about the leaflet and that he would not have thought there was anything wrong with handing out such leaflets. The Claimant suggested that Mr McCrory had a dislike of the catholic church generally but he denied that. In the Claimant's addendum to her ET1 she referred to a conversation where she alleges

that Peter McCrory had talked about the wealth of the Catholic Church. She said that the context was when she had revealed that she had given her first month's wages to the Church. She suggested that this had made Mr McCrory angry.

64. We would not rule out the possibility that in the years that the Claimant worked together with Mr McCrory there would have been some references to religion. The Claimant regularly refers to her beliefs and did so in e-mails to Mr McCrory. That said we do not find that Mr McCrory told the Claimant not to bring in any leaflet nor that he said that religion was offensive at work. We accept what Mr McCrory told us that he was effectively neutral in his views about religion and that he would have no objection to a church leaflet being placed in the staff room.

Allegation 59

65. The Claimant alleges in February 2014 that Mr McCrory took her into a room, invited her to take a test, and then said *'you are not a psychopath'*. Mr McCrory denied doing anything of the sort. Once again we were faced with a stark conflict of evidence. Again there was no evidence of any contemporaneous complaint. Little or no context was given other than the fact that the Claimant says in the addendum to her first ET1 that she had been expecting an appraisal. The Tribunal explored whether there had even been an occasion where there was any psychometric testing or other such test that had been introduced but Mr McCrory said that there had not been. As such the Claimant's account of events is very odd and entirely unsupported by any recollection other than her own. It is flatly denied by Mr McCrory. Doing our best to work out where this allegation might have come from we note that the Claimant was given an appraisal by Mr McCrory in June of 2014. That appraisal contains the following comments:

> *'Although generally a friendly and enthusiastic member of staff, unfortunately Hla does not really understand the team dynamic. This leads to issues within the group. Hla is focussed on dispensing , and does not really engage/show interest in other areas of focus. Whilst generally a nice person, the language barrier can cause problems/confusion and Hla does get frustrated by this. Communication as a result is not optimal, and can spill over to patients…….Hla's principle area for attention is her ability to listen, her colleagues feel that she just does not listen to them, and when asking for help/assistance, having to tell her multiple times or asking the same question to multiple people can cause resentment.'*

66. Mr McCrory's appraisal appears to be very balanced and he certainly sets out positive aspects of the Claimants work. However, he also sets out some concerns about the Claimants interactions with others. We make further findings about how the Claimant's behaviour was perceived by others below and are satisfied that Mr McCrory was one of many expressing a similar view. This message would have been difficult for the Claimant to take. We are speculating slightly but believe it likely that the episode that the Claimant refers to was most probably an occasion when Mr McCrory had spoken to her about her behaviour in which he might have repeated the sentiment that the Claimant was 'generally a nice person'. On the balance of probabilities we do not accept that this event occurred in the manner the Claimant suggests and that the phrase the Claimant attributes to Mr McCrory was not used.

Allegation 60

67. The Claimant says that in 2015 Mr McCrory said *'you are a slag'*. Mr McCrory in his witness statement denies this and in fairness to him there is no context that had been

given by the Claimant. However he went on to say, and to repeat in his cross examination that this was an expression which he never used either in his business or in his personal life. He suggested that he found it inherently offensive. The Claimant gave little further context to this in her own evidence. Once again we note that there was no contemporaneous complaint and the matter was not expressly raised until the Claimant put in in her addendum to her first ET1 some years after the event was said to have taken place. This is despite the fact that the Claimant brought grievances in which she referred to other matters relating to Peter McCrory. We are unable to accept that this event happened as described by the Claimant.

Allegation 61

68. The Claimant says that in May 2015 Peter McCrory said to her *'Would you agreed to do a surrogate for an IVF baby for me and my wife*'. Peter McCrory denies that he said anything of the sort. In her addendum to her first ET1 the Claimant says that she overheard a conversation between Peter McCrory and another Store Manager where he was telling her that his wife was recovering from a hysterectomy. Peter McCrory accepted that he had had a conversation with Tanya but stated that he would not have discussed a private matter such as this with the Claimant. He said that his wife had a hysterectomy in October 2015. The Claimant says that in May 2015 there was media coverage of 'baby Gammy' who we understand a surrogate child alleged to have been abandoned when he was found to have Downs syndrome. She says in the addendum to her first ET1 that it was at this time that Peter McCrory made the comments she attributes to her. She suggests that the subject was introduced out of the blue.

69. Faced with a stark conflict of evidence we do not find that the Claimant has established that it was more likely than not that these events occurred. It seems to us inherently unlikely that Peter McCrory would, out of the blue, and in the store, ask the Clamant if she would be a surrogate parent. We find it far more likely that Peter McCrory was, as he has said, sensitive about such a private family matter. Possibly there was some conversation about surrogate mothers in the workplace but we do not accept that the events occurred as described by the Claimant.

January 2016 and April 2016 – 3rd Claim – allegations against Peter McCrory

70. In her third Claim the Claimant has alleged that in January 2016 she was threatened by Peter McCrory who she says used the expression *'I will fuck you harder and you will feel the pain inside*'. Other than that no detail is given in the claim form. The Claimant says nothing about this in her witness statement. When the Claimant cross examined Mr McCrory she suggested that she had been beside a display of swimming goggles when these words were whispered in her ear by Mr McCrory. Mr McCrory denied that he used any such words. It was suggested that the Claimant slapped him. Again he denied this.

71. She then says that in April 2015 Peter McCrory said *'if my wife died you will be the first in my waiting list'.* Once again Peter McCrory denies that he said anything of the sort.

72. We asked the Claimant why it was that these allegations were first raised in her third ET1. She said that she had PTSD and that her memories were only just coming back. We had no medical evidence that would suggest that any condition the Claimant had meant that she could recall some things but not others.

73. The allegation made by the Claimant is such an obvious example of sexual harassment that if an employee were listing complaints it would be an extraordinary thing to have forgotten and to have left out. Another possibility, and the one we accept is more likely, is that the Claimant's recollection of events has, throughout the litigation, become more and more distorted.

74. We note that by the time that this allegation was made the Claimant had presented a number of grievances some of which included complaints directed at Peter McCrory. Again it seems very unlikely that the Claimant would have left out such a significant complaint.

75. We note that the Claimant had previously been the victim of a sexual assault (by a stranger). She had no difficulty on that occasion reporting the matter to the police. She was a member of a Trade Union but has never drawn the Union's attention to these matters.

76. We also had regard to the witness statement of Sr Gabriella Gasz who describes her relationship with the Claimant as being 'like a sister'. Her evidence was accepted by the Respondent. In that statement Sr Gatz gives examples of what the Claimant told her was occurring at work. There is no reference to these two significant events. We find it surprising that these events were not mentioned if they had occurred.

77. Sr Gatz also drew attention to the fact that the Claimant had started using strong sexualised language. She attributed that to the Claimant picking it up in the workplace. We have accepted that there was some swearing in the workplace but of a very different nature to these allegations. The Claimant had produced documents including religious paintings which she had captioned using graphic sexual language. She used such language before us in the tribunal more than was strictly necessary to put her case to witnesses. She has used graphic sexualised language in documents in the bundle, for example in her text messages to Kaye Bird when trying to persuade her to give evidence. These cause us to find that, as the litigation has gone on, the Claimant has become more and more obsessed with her claims. We have concluded that on occasions that has led her to lose sight of what really happened.

78. Applying the standard of the balance of probabilities we do not accept that these two events occurred as described by the Claimant or at all.

79. We have taken the April 2016 allegation against Peter McCrory out of order as it was convenient to deal with our findings in respect of those two allegations together. Having done so we now turn to the Claimant's allegations which are set out in her schedule in chronological order.

<u>Allegation 1 & 2</u>

80. The Claimant refers to events that she says took place on 17 January 2016. She says that she attended a team meeting 'a team huddle' conducted by the ten Assistant Store Manager Mahika Jayasena together with all of the store staff before trading started. In the addendum to her first ET1 she says that she became distracted during that meeting and checked some DVLA appointments and missed some part of the meeting. She says '*I asked and said something wrong'* . She says that Mahika Jayasena then shouted at her saying *'Shut up or get out'*. When she protested this was repeated. Her second allegation, on the same date, is that she overheard Mahika

Jayasena saying *'who the fuck does she think she is'.* She does not suggest that this was said to her.

81. We heard evidence from Mahika Jayasena. She denied shouting at the Claimant on this occasion or saying *'who the fuck does she think she is'*. She said that she believed that she had a good relationship with the Claimant and was able to point to a number of instances where text messages showed that she had been friendly and kind. In relation to this instance we also heard from Cheher-Bano Kashmir-Ali and Daniella Mann who were present on this day. Neither had any recollection of any such a disagreement taking place. The Claimant suggested that there was a close relationship between Mahika Jayasena and Cheher-Bano Kashmir-Ali but we find that they were no closer than good work colleagues. Whilst they occasionally shared a car to get to work does not provide any significant support for the suggestion that they would conspire against the Claimant.

82. On 18 January 2016 the Claimant sent an e-mail to Brian Kee a trade union representative at USDAW. She had drafted an e-mail which she intended to send to the then directors. That said *'I am NOT happy at all – with Mahika – regarding the way she told sharply [sic] at me on the shop floor, in front of other employees, during 10 minute meeting on Sunday, 17/1/2016, about 9:55 am'*. We conclude that something happened on 17 January 2016 that upset the Claimant.

83. The Claimant says that she reported this to Peter McCrory. He was adamant that it was not reported. It was not raised in any formal sense nor mentioned in any document. We are not satisfied that the Claimant did mention this at the time as we find that if it had been the more senior managers, including Mr McCrory, would have taken some action in respect of it.

84. Our conclusions in respect of this incident are informed by the rest of our findings. We have found elsewhere that the Claimant can come across to others as rude or insensitive. We have set out above that these difficulties were noted in her appraisals. Below we find that the Claimant could, even when trying to be helpful, occasionally say or do things that upset her colleagues and indeed caused customers to comment on her behaviour.

85. We looked for an explanation of an event which the Claimant appears to vividly recall which three other witnesses could not recall at all. We find that the most likely explanation was that the Claimant interrupted the team meeting in some inappropriate way that drew a sharp and justified rebuke from Mahika Jayasena. This would have been significantly less that suggesting that the Claimant *'get out'.* This was not something that particularly stuck in her mind nor that of the other witnesses because it was not as loud or aggressive as the Claimant has suggested more in line with her draft e-mail we would accept that the tone used by Mahika Jayasena was *'sharp'*. We find it more likely than not that sometime later Mahika Jayasena vented her frustration in private and used words to the effect of *'who the fuck does she think she is'*. As we set out below the Claimant could be difficult to work with as such the fact that exasperation was expressed believing it to be out of the Claimant's earshot is not surprising.

<u>Allegation 3 & 4 – 19 and 21 January 2016</u>

86. The Claimant says that she met with Peter McCrory on 19 January 2016 to raise an informal grievance with him about Mahika Jayasena's conduct. She alleges that he

told her that if she raised a formal grievance all of the employees would group together and take the side of Mahika Jayasena. She suggests he said that instead of using her trade union to pursue an internal grievance she should sue Mahika Jayasena privately. The Claimant says that on 21 January 2016 Peter McCrory showed her an online article where a woman had been victimised for bringing a grievance. She says that she declined to read it. Peter McCrory denies that any such event took place.

87. We do not accept that the Claimant has given an accurate account of any interaction with Peter McCrory in this context. Peter McCrory was by then an experienced manager. It is quite one thing to try and talk an employee out of bring a grievance (which might have been seen as disruptive) but bizarre to suggest that an employee might 'sue their manager privately'. We accept Peter McCrory's evidence that this did not take place. The further suggestion that Peter McCrory sought and found an article about a woman being victimised after bring a grievance is also somewhat unlikely. We are faced with a stark conflict of evidence. We are not satisfied that it is more likely than not that these events occurred as suggested by the Claimant.

88. We find that the Claimant's attitude towards Mahika Jayasena was very up and down. We heard from Mahika Jayasena that at about this time in January 2016 the Claimant confided in her that her family had disowned her because she had changed her religion. We find that the difficulties arose when the Claimant was given instruction and far less so when she was not.

Allegation 5

89. The Claimant says that on 22 January 2016 she told Mahika Jayasena that she would not pursue a grievance. She says that she decided to give her a second chance. We find it likely that the Claimant decided to let matters go and that she did not take any steps to pursue her grievance as she felt that the relationship had improved. Whilst the Claimant has included this as an allegation in her Scott Schedule she has not suggested that anything said or done by Mahika Jayasena on this date was improper. Whilst Mahika Jayasena has no recollection of this alleged meeting it is not necessary for us to make findings in this respect. It is sufficient to say that no further issues were raised at this stage.

Allegation 6 – meeting with Richard Sandiford 1 June 2016

90. One of the daily tasks that needed to be completed was checking NHS spectacle orders for children. This was a task most frequently undertaken by the Claimant. We find that this was a task that she enjoyed and had volunteered for. The evidence from the Respondents was that the Claimant was very good at this particular task but that whilst meticulous she could spend a lot of time at this task. The Claimant did not disagree with this assessment.

91. The Claimant says that she was constantly being telephoned in the laboratory and asked when she was coming down to the shop floor. We accept that that there would be occasional telephone calls to see when the Claimant would be finished but accept the evidence of Cheher-Bano Kashmir Ali and Mahika Jayasena that this was simply a matter of finding out when the Claimant would be able to come and assist in the store. Whilst the Claimant might have perceived it as pressure it was not intended as such. The fact that the Claimant did not enjoy being directed in her work was a matter noted by Peter McCrory in his 2014 appraisal. We find that he accurately described

this issue and that the Claimant's resentment at being asked when she would finish a particular task was a feature of her behaviour towards her managers.

92. The Claimant says that she raised this with Richard Sandiford on 1 June 2016. Richard Sandiford accepts that on one occasion the Claimant did complain that she was being rushed. That may well have been 1 June 2016. There was only one such meeting that was alleged and so the date is unimportant. We accept his evidence that he understood that to be a reference to that particular day.

93. The Claimant's account of this meeting was that she told Richard Sandiford that she had been 'told by force' to do this job every day and that she had endured language such as *'I want YOU to come downright NOW! Not even a single Second delay'*. She says that she broke down in tears but that nothing was done about her complaint.

94. We accept Richard Sandiford's account of the meeting. In essence he says that this was a minor complaint and that he did not think unreasonable to telephone the Claimant and enquire when she would be finished. The Claimant suggests that Richard Sandiford promised to speak to her managers and assured her that things would change as the new Retail Director Andrew Kemp was starting work at the store the following day. We are prepared to accept that there might have been a discussion about the change of management and reassurances about the future but do not accept that any promises were made to speak to the Claimant's managers about this particular issue. We accept that it was perceived at the time by both the Claimant and the Respondents as less important than it has been made to appear in this litigation. We do not accept that on that occasion the Claimant had any emotional breakdown.

95. We do not consider that Richard Sandiford did or could reasonably have been expected to take this matter any further than he did.

<u>Allegation 7 – events of 3 June 2016</u>

96. On 3 June 2016 Richard Sandiford asked Mahika Jayasena to deal with a customer concern. A man had returned to the store as he was not getting on with the glasses that he had been sold. In turn Mahika Jayasena asked the Claimant to do this task. The Claimant says that she was in the middle of undertaking a visual field test when in effect she was asked to leave that and move tasks. We do not accept that Mahika Jayasena asked the Claimant to walk away from one customer in the middle of an eye test. The Claimant categorises this as a misuse of power and suggests that it was done with the purpose of humiliating her in front of her customer. We do not find that this was the case. We accept the evidence of Mahika Jayasena that she delegated the task of dealing with the returning customer as part of her ordinary role as a manager. We find this is a further example of the Claimant resenting being directed in her work. We consider that the Claimant is seeking to make a mountain out of a mole hill in relation to this episode. The Claimant did as she says complain to Mr Sandiford about this incident but he told her, fairly in our view, that it was well within Mahika Jayasena's discretion to delegate in this way. The fact that the Claimant was able to raise these complaints so readily about what we find are trivial disagreements reinforces our view that some of the more serious allegations that the Claimant has made, but which were not reported, did not happen as the Claimant may now recollect.

<u>Allegation 8 – 16 June 2016</u>

97. The Claimant's account of what occurred on 16 June 2016 is not at all clear. In her Scott Schedule she suggests that on that day she told Andy Kemp that her GP had recommended that she have her eyes tested as she was suspected to be diabetic. She records that she later overheard Andy Kemp informing Daniella Mann that the Claimant should have an eye test at some point when the store was quiet. The Claimant does not mention this incident in the long addendum to her first ET1. Whilst in her schedule she cross references it to events on 20 October 2016 there was no express reference to these events in that section of her ET1. We accept that the Claimant asked for and was offered an eye test. Beyond that there was no evidence of anything unusual that occurred on that day.

Allegations 9-11 – 23 June 2016

98. 23 June 2016 was the day of the referendum on whether the UK should leave the European Union. On that day the Claimant arrived at work at 9:15am instead of 8:50am when she should have arrived. Wimbledon Broadway Specsavers Limited had a long established policy of requiring anybody who arrived late to complete a 'lateness Form' which was then countersigned by a manager. That form requires the employee to say why they were late and to say what steps they took to inform their manager. On 23 June 2016 the Claimant had been delayed due to flooding on the District line. The Claimant was asked or agreed to make up the time (or some of it) by taking a slightly shorter lunch hour. We had numerous examples of Lateness Forms in the agreed bundle both for the Claimant and for others. The Claimant was never disciplined for being late and the fact that she completed the Lateness Form on this occasion was we find completely unremarkable. Insofar as the Claimant was able to suggest that sometimes the system was not followed for other employees we conclude that that is simply the nature of things and that the Claimant was not singled out on this occasion or any other.

99. The fact that the Claimant arrived in late gave rise to Allegation 10 where the Claimant alleges that Richard Sandiford said *'here comes the Devil'*. She says that this is grossly offensive to her as a catholic. This was a matter explored at length during the grievance process. By the time that we heard the matter there was little dispute about what had occurred. When the Claimant arrived Richard Sandiford was in conversation with Daniella Mann about the allocation of staff to duties. The shop was short staffed due to the travel disruption suffered by the Claimant and others and due to staff sickness. Daniella Mann had just explained that the Claimant was due to be the Dispensing Optician for the day when the Claimant arrived. Richard Sandiford accepts that he said 'speak of the devil' when the Claimant arrived.

100. The phrase 'speak (or talk) of the devil' is common parlance and its use is typical when a person referred to in conversation then arrives. It is in such common use that it is objectively inoffensive and without being expressly told that it might offend it is unsurprising that Richard Sandiford used that expression in that particular context. We note that this was a matter explained very fairly to the Claimant during the process. The reluctance of the Claimant to let this point go is, we regret to say, indicative of the fact that the Claimant's perception of the Respondents has been distorted through the process of this litigation.

101. The final incident on this day of which the Claimant complains refers to Daniella Mann. What the Claimant says is that Daniella Mann said to her *'I am going to vote for Brexit today, after my work. If I go and vote to leave EU (European Union) today, will I be able to get rid of you from the shop-floor tomorrow morning? Do you have to*

leave your job tomorrow morning'. The Claimant says that she told Daniella Mann that Brexit would have no effect on her. She says that Daniella Mann then said pointing at her: '*If so there is no point for me to go and vote for Brexit. I just wanted to get rid of YOU from the shop. What a shame'.*

102. The Claimant says that she said that she was a member of a trade union and would contact them if she lost her job unfairly. She says that Daniella Mann responded by saying: *'Your trade union can do nothing. We are franchise stores, and your trade union membership is not welcome here it is invalid*'.

103. Daniella Mann accepted in her witness statement that she found the Claimant difficult to work with. She said she could be mean and gave an example of the Claimant saying that a sick colleague should *'hurry up and die'*. She fully accepted that on 23 June 2016 customers and staff alike were discussing the referendum and the possible consequences. She says that she was talking about the referendum with a colleague Zuzana Urzi who was of Eastern European origin when they were joined by the Claimant. She said that she knew that the referendum result would have no bearing on the Claimant's immigration status. She said that she in fact voted to remain in the EU and did not share the anti-immigration sentiment of some of those who supported leaving. The Claimant cross examined Daniella Mann asking her if she was a member of UKIP (apparently without any foundation for the question) and suggested that she had used the phrases attributed to her. Daniella Mann was unwavering in her denials.

104. Daniella Mann denied that the Claimant had made any reference to her trade union on this day. She focussed on the words attributed to her *'We are Franchise Stores'* and said that she would never use that phrase. At various points we were told that Specsavers shies away from suggesting that its business model is a franchise model. The Respondents who commented upon this all used the phrase 'partnership'. When she cross examined Daniella Mann the Claimant accepted that that phrase had not been used.

105. The Claimant did not complain about these events at the time. We are not satisfied that there was anything other than a respectful discussion about Brexit between Daniella Mann and Zuzana Urzi when the Claimant joined them. Daniella Mann was intelligent and well informed and would have known that the Claimant's immigration status would not have been affected. Had she said what was attributed to her it would have been obliquely offensive to Zuzana Urzi as well. We find that the Claimant has in hindsight viewed an inoffensive conversation as much more sinister than it was. We find that the fact that Daniella Mann criticised her behaviour later on in the context of disciplinary proceedings being instigated against her has altered the Claimant's perspective of this conversation.

106. We do not accept that Daniella Mann made the odd and inaccurate comments about the assistance that the Claimant might receive from a trade union. We find it more likely than not that there was no mention whatsoever of the trade union on this occasion.

<u>Events in July and August 2016</u>

107. As we have set out above Andrew Kemp started working at the Wimbledon Store in early June 2016. We find that his approach to staff discipline was somewhat more 'by the book' than had previously been the case. That is not to say that he was unduly

strict but that if there were incidents that required managerial intervention he would approach them more formally than had hitherto been the case. When the Claimant cross examined Andrew Kemp after a short introduction she suggested to him that he had revealed to her that he had an issue with alcohol. The insinuation being that he was an alcoholic. This had little relevance but Andrew Kemp explained that in fact what he had discussed with the Claimant was that he had had a wine collection. The Claimant has attempted to use that innocuous fact against Andrew Kemp.

108. Shortly after he started working at the Wimbledon Store Andrew Kemp became aware of the fact that the Claimant's conduct could cause offence to her colleagues. In particular towards new team members. In his witness statement he describes an event where the Claimant corrected a more junior colleague Jasleen Khurana who was attempting to explain a promotion in front of a customer. The manner in which the Claimant intervened, whilst offering assistance, was aggressive. Andrew Kemp was sufficiently concerned that he took the Claimant aside and suggested that she should moderate her tone. We accept Andrew Kemp's account of this. It is consistent with a large body of evidence that suggests that the Claimant's tone or manner could cause offence.

109. Andrew Kemp also gave evidence about a further incident where the Claimant offered assistance to Anisa Shah who was a new team member. Anisa Shah has been dealing with a customer who was purchasing a supply of contact lenses to be sent by post. She had gone a long way to explaining to the customer how the scheme worked when the Claimant, uninvited, came to offer assistance. The Claimant said: *'I will do this and you can watch because its your first time*'. The Claimant then started from the beginning and then asked Anisa Shah to press a print button. The Customer was sufficiently unimpressed as to say *'oh gosh that was very patronising, you have a lot of patience'.* Andrew Kemp again discussed this with the Claimant and told her that she should stop behaving in this way. We accept Andrew Kemp's evidence. There was little that the Claimant disputed. Anisa Shah gave an account of the event later that was moderate in tone. It is consistent with other similar events.

110. In August 2016 Sherrie Yates was the Contact Lens Manager. That gave her some managerial responsibility for the Claimant. Sherrie Yates has MS, exacerbated by stress and had been advised not to give evidence at the hearing. She decided that she wanted to give evidence as she took exception to the allegations that the Claimant had made against her personally. She told us, and we accept, that to a limited degree she had socialised with the Claimant and the bundle contained text messages that showed that there was at least degree of interaction about matters outside work (advice about a discounted swimming costume). We thought that she gave her evidence in a measured and considered manner.

111. Sherrie Yates was concerned about the Claimant's behaviour towards others. She found it hard to manage the Claimant quite possibly due to her low tolerance of stressful situations. In August 2016 she spoke to Andrew Kemp about this and he asked her to keep records of any difficulties. We infer from this that Andrew Kemp had decided that if the Claimant did not moderate her behaviour some formal steps would be taken. We make no criticism of him for that and asking Sherrie Yates to make notes was a sensible thing to do.

112. On 31 August 2016 three events took place that Sherrie Yates observed, or heard about. These were:

112.1. The Claimant, having been told at the morning briefing that Sherrie Yates had a sore arm, later grabbed her by the arm to get her attention so hard that it brought tears to her eyes; and

112.2. the Claimant referring to a child patient as *'big for your age'*. This was not tactful as the child was overweight. When another staff member tried to point out this faux pas the Claimant reacted strongly raising her voice.

112.3. Sherrie Yates had asked Kaye Byrd one of the Claimant's colleagues to undertake the Claimant's usual role of dispensing children's glasses. The Claimant suggested that if she had taken as long as Kaye Byrd she would have been called down by then. Then when Kaye Byrd did come down the Claimant questioned why the task had taken so long. Kaye Byrd responded that she had 30 years' experience. Sherrie Yates sought to de-escalate the exchange.

113. On 1 September 2016 Sherrie Yates was dealing with a customer who had come to collect her daughter's glasses. She had telephoned up to the laboratory to enquire about the whereabouts of the glasses. The Claimant, who was on the shop floor also wanted to speak to the laboratory but before Sherrie Yates realised this she had put the telephone down. The Claimant then raised her voice in front of the customer saying that she had wanted to speak to the Laboratory. The gravity of the Claimant's conduct can be discerned by the fact that the customer asked to speak to a Manager. When Sherrie Yates explained that she was a Manager the customer asked whether she allowed the Claimant to speak to everybody like that. The Claimant did not put a significantly different account to Sherrie Yates in cross examination and was seemingly oblivious to the fact that she was challenging a manager at the time.

114. Sherrie Yates found managing the Claimant very difficult indeed, so much so that by the time that she submitted her notes of events to Andrew Kemp (around 15 September 2016) she had decided to hand in her notice. We accept her evidence that a significant factor in her decision making was having to manage the Claimant. The two Directors asked Sherrie Yates to rethink her decision. She was due to go on holiday and on her return she decided to continue working at the Wimbledon Branch although due to the promotion of Daniella Mann to Assistant Manager she had less to do with the Claimant. Nevertheless she resigned in December her difficulties with the Claimant playing a part in that final decision.

<u>Allegation 12 – 7 September 2016</u>

115. The Claimant alleges that when she complained that Kaye Bird was given preferential treatment Sherrie Yates said '*Kaye is a DO (Dispensing Optician) NOT like you and she is doing her job properly NOT like you'.* Sherrie Yates denies that she said any such thing. The events described by the Claimant ware not dissimilar to those Sherrie Yates has noted on 31 August 2016. There was at least an occasion when the Claimant compared her treatment to Kaye Bird. We are not satisfied that Sherrie Yates would have said that the Claimant was not a Dispensing Optician. That would have been a very odd thing to have said. Sherrie Yates knew full well that the Claimant was a Dispensing Optician. We find it more likely than not that the exchange is the one recorded by Sherrie Yates. We further find that Sherrie Yates would have suggested, perhaps sharply, that Kaye Bird was fully qualified to do her job. It seems to us that that was a perfectly proper response to the Claimant's complaints.

Allegation 13 – 8 September 2016

116. Sherrie Yates was responsible for the training of Jasleen Khurana on 8 September 2016. She had asked Jasleen Khurana to start by focussing on the requirements for single prescription lenses. It seems to us that that was an eminently sensible instruction. The Claimant, trying to be helpful, gave Jasleen Khurana a small card with advice on varifocal lenses. It is common ground that Sherrie Yates took this card away from Jasleen Khurana. The issue is as to the manner in which this was done. The Claimant says that Sherrie Yates was screaming/yelling and aggressive. She says that Sherrie Yates threw the varifocal card at her saying *'You don't need to give this Varifocal lens card to Jasleen. She does not know it and read it. YOU take it back'.* Sherrie Yates accepts that she took the Varifocal card from Jasleen. She says that the Claimant picked it up and offered it once again to Jasleen at which point Sherrie Yates reiterated that Jasleen did not need it at that stage.

117. We do not accept that Sherrie Yates was screaming or yelling on the shop floor. We find that allegation inherently likely given the open nature of the area. Nor do we accept that she used the phrases the Claimant attributes to her or that she threw the varifocal card at the Claimant. Sherrie Yates may have expressed some exasperation at the Claimant's misguided attempts to offer assistance. However, if she did it was in moderate terms.

Allegation 14 – 16 September 2016

118. The Claimant says that on this date Mahika Jayasena swore at her saying *'Hia, next time You Fucking listen to me'*. The Claimant suggests that the context was an occasion concerning a refund to a customer. Mahika Jayasena denies that she swore at the Claimant.

119. This is the only allegation upon which the Tribunal were unable to agree. Ms Forecast and Ms Foster Norman consider it more likely than not that this occurred. The Employment Judge did not consider that the Claimant had established that it was more likely than not that this event occurred as alleged.

120. The reasons of the majority for concluding that this occurred as alleged are that there had been a long pattern of events where the Claimant had been difficult to manage. She would do things her own way rather than in the manner in which she had been instructed. She was regarded as a person who did not listen to instructions. The majority placed weight on our finding that the Claimant's actions had caused Mahika Jayasena to become sufficiently exasperated on 17 January 2016 that she let off steam using an expletive when she thought the Claimant was out of earshot. If she could become exasperated on that occasion then she could do so again. Ms Foster Norman placed some weight on Mahika Jayasena's concession that she would occasionally swear outside the workplace. Whilst the allegation was not raised immediately it was raised by the Claimant with Andrew Kemp on 29 September 2016. This was at a stage when no disciplinary proceedings had been intimated although the Claimant's conduct had been criticised.

121. The Employment Judge places no weight on the fact that Mahika Jayasena swore outside the workplace and considers that many people distinguish between their private and professional persona. The Employment Judge acknowledges the fact that, unlike many other allegations, there was a relatively prompt complaint. He also acknowledges that the conduct of the Claimant might be trying even for the most

placid of managers. The Employment Judge's reasons for not resolving this in favour of the Claimant are that he considers that in instance after instance the Claimant has used extreme language to describe ordinary events. In this particular case she makes reference to this event being torture. The findings on the other allegations show that the Claimant's current perspective is badly distorted. In those circumstances he is not satisfied that this event alleged exactly as occurred and is not prepared to speculate whether some lesser exchange occurred.

Allegation 15 – 18 September 2016

122. On 18 September 2016 the Claimant says that she was attempting to pick up and replace papers that had fallen from the staff notice board when Mahika Jayasena shouted at her saying *'Leave it! Don't Touch anything'.* The Claimant in the addendum to her ET1 describes this in graphic terms saying that she was treated like a *'modern slave'*. She says that this occurred in front of a customer. Mahika Jayasena says that this never happened. We find it perfectly possible that the Claimant might have been asked to leave some task by Mahika Jayasena as part of her managerial role. There is no evidence to suggest that, unprompted by some failure of the Claimant, Mahika Jayasena would treat her badly. As we have noted above there are instances of Mahika Jayasena showing kindness towards the Claimant one such incident being within days of this incident (Giving support about dental treatment). We are not satisfied that the Claimant has established that she was shouted at and consider that what is described by the Claimant is her perception of an innocuous event.

Allegation 16 – 22 September 2016

123. On 22 September 2016 the difficulties that the Claimant was having with her jaw/teeth came to a head and she needed to seek emergency treatment. She asked Andrew Kemp if she could leave work and he agreed. The reason the Claimant says that this supports any claims is that she says that *'I saw that Andrew Kemp was angry and annoyed'*. She does not say what it was that lead her to that conclusion. Andrew Kemp's evidence was that this was a completely routine occurrence and that he thought nothing of it. There is simply insufficient evidence for us to find that Andrew Kemp behaved in any way which was improper. We accept his evidence that this matter was entirely routine.

Allegation 17 – 23 September 2016

124. The Claimant says that it was on this date that she complained to Andrew Kemp about Mahika Jayasena swearing at her. Andrew Kemp has a handwritten note of his meeting with the Claimant on that day. He says that this meeting was called by him for the purposes of discussing his concerns, and those noted by Sherrie Yates, with the Claimant. He accepts that there was a later meeting with the Claimant where she raised her concerns but that was on 29 September 2016.. Given that there is a contemporaneous note of the meeting we find it more likely than not that Andrew Kemp has the correct date. The fact that the Claimant's 59 page addendum to her first ET1 miss-describes a meeting at which her behaviour was criticised provides an example of where the Claimant's recollection of events is inaccurate.

125. We accept that Andrew Kemp's note of the meeting is broadly accurate. We accept that it was written around the time of the meeting (but not during it as it is in the past tense). He outlined the aspects of the Claimant's behaviour that had caused him and Sherrie Yates to have concerns. The Claimant accepted that the events had occurred

and said that she was unable to explain why she had behaved like that although at one stage she said that she did not have a good relationship with Sherrie Yates. The Claimant was upset throughout the meeting. At the conclusion of the meeting Andrew Kemp told her that if this sort of behaviour continued then more formal disciplinary action would be considered.

126. We consider it unsurprising that, given the friction that was generated by some of the Claimant's behaviour Andrew Kemp thought that it was appropriate to have a more formal conversation with the Claimant about her behaviour. It was sensible to put her on notice that higher standards of conduct were expected.

Allegation 18 – 29 September 2016

127. The Claimant says, and Andrew Kemp agrees, that on 29 September 2016 the Claimant and Kaye Bird came to see him in his office. Both the Claimant and Kaye Bird wished to complain about their management by Sherrie Yates. The Claimant suggests, and we accept, that Kaye Bird suggested that Sherrie Yates was *'much too controlling'*. The Claimant lists her own complaints in the addendum to her first ET1 and says that Sherrie Yates said that the Optical Assistants *'must listen only to her words'*. This may have been a reference to the disagreement about the varifocal card that the Claimant had given to Jasleen Khurana. Andrew Kemp accepted in his witness statement that both the Claimant and Kaye Bird had come to him and said that they had found working with Daniella Mann much better than working with Sherrie Yates (who was then on holiday).

128. Andrew Kemp says that after raising joint complaints the Claimant started talking about her treatment by Sherrie Yates. There is a minor dispute as to whether, as the Claimant says, Kaye Bird was asked to leave at Andrew Kemp's instigation or, as Andrew Kemp says Kaye Bird (who was standing behind the Claimant) indicated by a gesture that she wanted to leave and that it was only that which prompted him to ask her to do so. The Claimant had sought and obtained a witness order to require Kaye Bird to give evidence. She had stated that she did not wish to become involved. As noted above the Claimant asked us to discharge the witness order. We find it more likely than not that, whilst Kaye Bird had some issues wither management by Sherrie Yates she did not want to get involved with the entirety of the Claimant's complaints. We find that it is more likely than not that Kaye Bird did, as Andrew Kemp says, gesticulated that she wished to leave. Andrew Kemp then asked her to do so and it may have appeared to the Claimant that this was his wish but in fact he was accommodating Kaye Bird.

129. What was then said in that meeting largely disputed. We note that in his witness statement Andrew Kemp volunteers (perhaps at a separate meeting on the same day – it is unclear) that the Claimant informed him that Mahika Jayasena swore at her. He says that other than asking Mahika Jayasena about this, and apparently accepting her denial without any question, he took this matter no further. In his evidence he said that *'it was one person's word against another*'. He also accepts that the Claimant raised complaints about Sherrie Yates. What he says is that the Claimant essentially revisited the discussion that had taken place on 23 September 2016 and attributed her own conduct to her treatment by Sherrie Yates.

130. The Claimant says that in this meeting Andrew Kemp asked her which trade union she was a member of (which he accepts) and then said *'Those Trade Union think only of you as their member to protect and do not know you as the person'.* Thereafter she

says that he said: *'You don't need to write to me with your trade union as your grievances'.* Andrew Kemp accepts that there was a discussion about the Claimant's trade Union Membership but denies that he made the two comments attributed to him. He says in his witness statement that there was a discussion about the companies duty of care towards her and of *'internal processes that should be followed'*. Both parties agree that the Claimant was told that Sherrie Yates would no longer be responsible for managing the Claimant and that Andrew Kemp would speak with her when she returned from a holiday.

131. We note the fact that despite the fact that the Claimant speaks good English the matters she purports to be direct quotes are in poor English. Andrew Kemp gave evidence in a clear and articulate way. We do not accept that the words quoted were the actual words used by Andrew Kemp. We imagine that there was some discussion about the need for trade union involvement at the early stage of any complaint but that is as far as we are prepared to speculate. We consider that Andrew Kemp was a straightforward witness. When he was asked about his lack of response to the Claimant's complaints, in contrast to the action taken against the Claimant, he was prepared to make sensible concessions. We do not find that it is more likely than not that Andrew Kemp said anything amounting to a criticism of the Claimant's trade union or to discourage her at an appropriate time from being assisted by a trade union.

132. We note that about this time the Claimant asked Andrew Kemp if her duties could be organised so as to allow her to fit around her activities with her church. Andrew Kemp gives two examples in his witness statement both in September 2016. On each occasion Andrew Kemp was prepared to indulge the Claimant. That is difficult to reconcile with the picture that the Claimant has drawn of Andrew Kemp as being angry and hostile towards her.

133. Whilst in the addendum to her first ET1 the Claimant categorises her complaints about Mahika Jayasena as being complaints of discrimination she did not suggest that she had described them as such to Andrew Kemp. She did not put any such suggestion to him in cross examination. We are satisfied that the Claimant did not make any allegation that there had been a breach of the equality act in the course of this meeting.

Allegation 19 – 6 October 2016

134. What the Claimant refers to on or around this date relates to the dental/jaw problems that she was experiencing. The Claimant does not in fact complain of the behaviour of any of the Respondents on this date but simply sets out that she was referred to a consultant at the Ealing Hospital. As such this cannot provide the foundation for any of the claims that have been presented. We will set out our findings about the onset of the Claimant's jaw problems.

135. We have noted above that on 22 September 2016 the Claimant had need to take time off, which was given, to attend an emergency dental appointment. The fact that the Claimant was experiencing jaw pain was known to Andrew Kemp who had authorised her time off and to Mahika Jayasena. Mahika Jayasena had a day off on 22 September 2016 but nevertheless sent the Claimant a text message asking how she was feeling. The text exchange that followed showed what appeared to be a good relationship (complete with smiley emoticons) and genuine concern about the Claimant's wellbeing.

136. Sherrie Yates was also aware of the Claimant's jaw problems. The Claimant had been chewing ribs and sucking bone marrow in the area where the employees ate their lunch. Sherrie Yates had, we find out of concern, suggested that this was unwise if the Claimant had dental issues with her jaw.

137. The Claimant did not see the specialist at the Ealing Hospital until 11 January 2017. By that time she had suffered a breakdown in her mental health. We shall return to our findings in respect of that below.

Allegation 20 – 6 October 2016

138. A further matter that arose on 6 October 2016 related to Kaye Bird. Kaye Bird had resigned and was working out her notice period. She had been due to go to a professional conference which would have assisted he in completing her CPD requirements. She says that Mahika Jayasena told Kaye Bird that the company would not fund her attendance. We are entirely unsurprised by this managerial decision which seems to us perfectly sensible although some managers may have been more generous. That said Kaye Bird was upset and spoke to the Claimant about this. The Claimant says that she advised Kaye Bird to speak to Andrew Kemp and that she told him that Kaye Bird wanted to speak to her. The Claimant categorises this as her acting as a trade union representative. This was not actually the case and any support she gave her colleague was not in any union capacity. The Claimant does not complain of any mistreatment of her on this date but speculates that her support of Kaye Bird was resented. Kaye Bird in fact was permitted to withdraw her resignation and carried on working at the Wimbledon Specsavers. Andrew Kemp Gave evidence, which we accept that he knew nothing about this matter. Kaye Bird did in fact go on the course but we find that it is more likely that she was permitted to do so having decided to stay.

Allegation 21 – 10 October 2016

139. The Claimant says that on 10 October 2016 Mahika Jayasena refused to apply a discount (from £40 to £30) on a pair of children's spectacles the Claimant was selling and told her to apply that price in the future. She says that she then went to Andrew Kemp who agreed that the spectacles ought to be sold at the discounted price. The Claimant does not say that there were any actual repercussions from this. Instead in the addendum to her first ET1 she refers to a different occasion where she had taken a minor disagreement between herself and Mahika Jayasena to Andrew Kemp (an issue about a 'golden ticket') where she says that Mahika Jayasena had said that that had made her 'look bad'. She does not say that there was a similar reaction on this occasion.

140. Andrew Kemp gave us a credible account of what had happened on this occasion. He accepted that the Claimant had come to him with a query about the price of some children's glasses. He had agreed with the Claimant about the discount to be applied. He explained to us that Specsavers runs numerous promotions and discounts and that it is very difficult to keep abreast of the pricing. He said, and we accept, that such confusion was commonplace and untoward. He thought nothing of it. He said that he had agreed with the Claimant and told Mahika Jayasena what the pricing structure was. Mahika Jayasena said nothing about this incident in her witness statement and the matter was not dealt with to any significant extent in her evidence. We are satisfied that there would be nothing surprising about Mahika Jayasena making an error about the discounts to be applied and there is nothing that would lead us to conclude that

she was being difficult towards the Claimant in relation to this issue. We accept the evidence of Andrew Kemp that nothing out of the ordinary occurred on that day.

Allegation 22 – 11 October 2016

141. Whilst couched as an allegation in the Claimant's schedule the events alleged do not form any separate complaint. It is on this date that the Claimant says Richard Sandiford breached the General Optical Council Guidelines by not being present when his trainee Anoushka Desai was dispensing. We shall revisit this matter (as far as is necessary to do so) in our discussions and conclusions in relation to the public interest disclosure claims.

Allegation 23 – 12 October 2016

142. The Claimant says that Sherrie Yates, having returned from holiday, asked her if she had a new boyfriend. When the Claimant asked her why she asked that she says that Sherrie Yates said: *'Since I came back from holiday, I noticed that you look different and happy. Have you found a new boyfriend? Maybe SEX is a happy factor for you. YOU are a miserable person. You should be miserable. I don't like YOU seeing [sic] happy. You shouldn't be happy'*. Sherrie Yates denies that she said any such thing but accepts that she might have commented on the Claimant looking well.

143. The words quoted by the Claimant are incredibly unkind. We consider that if they had been spoken they would have caused an immediate complaint. The Claimant had by that stage already raised her concerns and was able to speak to Andrew Kemp on a range of matters. We do not find that the words quoted were used. Insofar as there was any exchange we find that it was nothing out of the ordinary.

Allegation 24 – 'around 13 October 2016'

144. The Claimant says that on 13 October 2016 (or around then) she was in a conversation with Jasleen Khurana and Cherer Bano Kashmir-Ali. She says that Jasleen said that she had read the varifocal lens card that the Claimant had attempted to give her on 8 September 2016. She says that she complained about her treatment on 8 September 2016 and that Cherer Bano Kashmir-Ali said that what Sherrie Yates did was bad and that she would not throw the varifocal lens card at the Claimant. The Claimant does not appear to complain about anything said to her by either Jasleen Khurana or Cherer Bano Kashmir-Ali. As such these events do not appear to provide a foundation for any claims. It may well be the case that Jasleen Khurana told the Claimant that she had read the varifocal lens card and that this may have stirred up some resentment in the Claimant about having her assistance rebuffed by Sherrie Yates. Cherer Bano Kashmir-Ali says that there was no conversation in which the Claimant said that Sherrie Yates had thrown the varifocal lens card at her. Had she done so she says she would have taken some action. We have rejected the Claimant's account of the events of 8 September 2016. We accept Cherer Bano Kashmir-Ali's evidence that she did not use the words the Claimant attributes to her.

Allegation 25-27 – 14 October 2016

145. The events of 14 October 2016 features very significantly in the evidence before us. The Claimant's actions on this day led to disciplinary action being taken against her. In her addendum to her first ET1 she suggests that Anoushka Desai acted in a manner that amounted to discrimination, harassment and victimisation on the grounds

of race, sex, age and disability. The reality of the events was very different from that now perceived to be the case by the Claimant. The fact that the Claimant has such a distorted view of the events of this day is one of the reasons that we are unable to have a great deal of confidence in her recollection of other events.

146. On 14 October 2016 Anoushka Desai and the Claimant were both working in the Wimbledon store. Anoushka Desai was a pre-registration Optometrist and was serving a customer who had provided an NHS voucher in part payment for his spectacles. Anoushka Desai was unsure of the value of that voucher. The Claimant came over to assist. In the course of helping Anoushka Desai the Claimant addressed the customer and said, patronisingly, *'she is just a trainee'.* She started to explain to Anoushka Desai what to do and Anoushka Desai was following her instructions by entering information on the computer. The Claimant believed that Anoushka Desai was not paying her any or any sufficient attention and said loudly and aggressively '*are you listening to me'.* Anoushka Desai was so shocked at the manner in which the Claimant had spoken to her in front of a customer that she burst into tears. The event was witnessed by a number of staff members all of whom later commented at how the shop fell silent.

147. The Claimant does not dispute the account set out above. Instead she criticises Anoushka Desai for not paying her sufficient attention. We find that this is a stark example of the fact that the Claimant is oblivious to the effect her own actions can have on others. She simply does not recognise the fact that she can be unintentionally rude and aggressive. Complaints about the Claimant's behaviour were not restricted to the Claimant's colleagues but included complaints from customers. We are satisfied that on this occasion, which has many similarities with previous occasions, the Claimant was perhaps unintentionally very rude and patronising towards Anoushka Desai. We have some sympathy with Anoushka Desai when she says in her witness statement: *'Personally I am flummoxed by why Miss Kalaya is suggesting that I was the bad person in this situation when I was the victim*'.

148. On that day Richard Sandiford working in the Wimbledon store and Andrew Kemp was working at the Morden store. Richard Sandiford was told what had occurred on the shop floor and asked to see the Claimant. The Claimant says that *'fuming with anger and face of stone'* Richard Sandiford said *'You stay away from Anoushka. And leave her alone. You made her cry'.* She says that that was on the grounds of her rece sex, age, disability or religion.

149. Richard Sandiford spoke to Anoushka Desai and then asked to see the Claimant. Richard Sandiford spoke to the Claimant about her behaviour. Then he said that the Claimant should learn from the experience, apologise to Anoushka Desai and draw a line under the incident. The Claimant accepts that that was the extent of the action taken by Richard Sandiford. Had Richard Sandiford been 'fuming with anger' as the Claimant suggests it is very unlikely that he would have been prepared to draw a line under this matter.

150. The Claimant did then go and apologise to Anoushka Desai who accepted her apology with good grace. We find that the Claimant knew that she had been responsible for the upset caused and was at that stage prepared to accept it. We find that both the Claimant and Anoushka Desai believed that the apology would draw this matter to a close. Anoushka Desai said as much when she was later interviewed during the disciplinary process.

151. At 5:30pm the Claimant was leaving to go home. This was in accordance with the special arrangements that she had agreed with Andrew Kemp and which were known to Mahika Jayasena. She passed Richard Sandiford who asked where she was going. She said that she had an agreement to leave early. He asked her to wait until he checked the rota. When he found that she was leaving at the agreed time he allowed her to leave. The Claimant perceives this as sinister and a further act of discrimination. We find that the simple fact was that the Claimant was leaving earlier than would normally be expected. We accept the evidence given by Richard Sandiford that he was unaware of the arrangements that had been made of the Claimant (only a few weeks before). We consider it perfectly understandable that he would want to check the position before the Claimant left. Again the Claimant suggests that he was angry with her we do not accept that was the case.

Allegation 28 – Around 15 October 2016

152. Richard Sandiford informed Andrew Kemp about the events of 14 October 2016 the following day. We find it likely that Richard Sandiford did not draw attention or place any emphasis on the fact that he had asked the Claimant to apologise or that he had suggested that a line was drawn under the incident. Andrew Kemp had not discussed with Richard Sandiford the extent to which he had already met with the Claimant on 23 September 2016 and warned her that any future behaviour was likely to lead to more formal action. Andrew Kemp decided that in the light of the events of 14 October 2016 some formal action was required.

153. Andrew Kemp then met with the Claimant and informed her that a disciplinary investigation would be undertaken. He said that he had asked Mahika Jayasena to undertake the investigation. The Claimant says that she informed Andrew Kemp that Richard Sandiford had said that a line would be drawn under the matter. We find that is likely to be true. Andrew Kemp recalls reminding the Claimant that she had been told by him that any repetition of her previous behaviour would lead to more formal action. That gives a proper context to that remark. The Claimant sent an e-mail to her trade union representative on 18 October 2016 in which she says that she was informed by Andrew Kemp on that morning that there would be an investigation and that her trade union representative would only be able to attend if a disciplinary meeting was held. The Claimant's trade union confirmed to the Claimant that Andrew Kemp's understanding of the legal position was strictly correct.

154. We consider it very unfortunate that the Claimant was given mixed messages from her managers. She could quite reasonably have anticipated that her apology would mean the end of the matter.

Allegation 29 – 3 & 17 October 2016

155. The Claimant here is simply referring to the fact that she attended a hospital appointment on 3 October 2016 and that she was told on 17 October 2016 that she needed a blood test for diabetes. She has categorised these as being the discriminatory actions of Richard Sandiford but that is not the case. He took no action at all. The Claimant has misunderstood how the legislation might apply to the facts of her claims.

Allegations 30 & 31- 20 October 2016

156. There is no dispute that on 20 October Richard Sandiford spoke to the Claimant about her usage of the toilet. The trigger for this is that the Claimant, who had been working in the laboratory, had not arrived on the shop floor when expected. She had spent about 20 minutes on the toilet. When she arrived on the shop floor Richard Sandiford asked to speak with her in one of the consulting rooms. He asked her where she had been and the Claimant said that when she used the toilet she found it was blocked and had spent some time unblocking it. We find that Richard Sandiford accepted that explanation but he says, and we accept that he went on to suggest that he had noted that the Claimant would often visit the toilet within 10 minutes of her breaks and asked that if possible she use the toilet during break times. The Claimant says that Richard Sandiford was *'yelling and screaming in her face'* and suggested that she should have gone to the toilet in the Morrisons Supermarket before starting work. We find that the Claimant has here (as she has elsewhere) blown a reasonable management enquiry/instruction out of proportion. We do not accept that Richard Sandiford behaved as the Claimant has suggested.

157. The Claimant says that later in the day she relayed her concerns to Cheher-Bano Kashmiri-Ali. She says that she indicated that she wanted to raise this as a grievance. She then says that Cheher-Bano Kashmiri-Ali told her *'This is not the grievance. No need to submit the grievance. You have no grievances'.* Cheher-Bano Kashmiri-Ali agrees that the Claimant discussed what Richard Sandiford had said to her on that day but does not accept that the Claimant said that she was raising a grievance or wished to do so. She denied using the language attributed to her. We accept her account. The direct quotes do not sound at all natural and did not accord with Cheher-Bano Kashmiri-Ali's use of language before us. Whilst she may have expressed her opinion that the Claimant was complaining about nothing that would be the extent of it. We do not accept that Cheher-Bano Kashmiri-Ali tried to discourage the Claimant from bringing a grievance.

Allegation 32- 21 October 2016

158. The Claimant has cited as an allegation of discrimination, victimisation and harassment the date upon which her colleagues gave interviews during the investigation conducted by Mahika Jayasena. Mahika Jayasena conducted interviews with Dagmara Przada and Daniella Mann on 21 October 2016, Sherrie Yates on 25 October 2016 and the Claimant and Anoushka Desai on 1 November 2016. Those witness statements deal almost exclusively with the events of 14 October 2016 although Dagmara Przada does comment on the Claimant wanting to work from a particular desk.

159. It was not at all clear the extent to which the Claimant actually disagreed with the statements of her colleagues. We consider that their statements went no further than the account of events of 14 October 2016 that we have set out above. We find that each of the Claimant's colleagues simply set out what had happened and what they observed. Whilst there are minor differences that is to be expected. We do not find that there is anything either in the statements or in the process of taking them that the Claimant could reasonably object to. Other than not acknowledging that Anoushka Desai was offended by the phrase *'are you listening to me'* the Claimant's own account is entirely consistent with the others although perhaps also failing to recognise that she had used an inappropriate tone and volume.

Allegation 33 – 22 October 2016

160. The Claimant says that on 22 October 2016 She was on the shop floor and observed Mahika Jayasena viewing an inappropriate video on her mobile telephone. She gave the most comprehensive description of that in the chronology attached to her grievance. It is mentioned only briefly in the addendum to her first ET1. What she said in her grievance was that she was told to go away by Mahika Jayasena who was watching something on her mobile telephone on the shop floor. The Claimant says that she was nosey and looked and saw a naked man and woman dancing on the screen. Mahika Jayasena accepts that she uses her mobile telephone on the shop floor but denies ever watching anything inappropriate.

161. We considered the Claimant's description of what she says she saw to be too vague for us to conclude that Mahika Jayasena was watching anything that could fairly be described as pornography. Certainly not all nakedness fits that description. We are not satisfied that it is more likely than not that Mahika Jayasena was watching anything that was inappropriate.

Allegation 34 – 22 October 2016

162. The Claimant says that on 22 October 2016 she witnessed a disagreement between Mahika Jayasena and Anoushka Desai in relation to the price that goods were to be sold for that took place with a customer present. As we have said above the level of discounts and promotions available did mean that there was some uncertainty over what price goods should be sold for. We accept that the Claimant may well have witnessed a discussion as she suggests. She does not say that she was involved other than as an observer. Whilst the Claimant lists this as an allegation of discrimination, harassment and victimisation we understand the Claimant is really suggesting that this event provides a comparison to her own treatment. We do not find that the Claimant was subjected to any treatment on this day. In contrast to some of the incidents involving the Claimant we note that such disagreement as there was did not give rise to any complaint from Anoushka Desai or any customer.

Allegation 35 – 23 October 2016

163. The Claimant includes this allegation in her schedule where she makes reference to 'Ansia Patel (the Optical Assistant)' interfering in a transaction between herself and a customer. She describes this as bullying and harassment and says that it is discrimination, harassment and victimisation on the grounds of race sex and age. The Respondents deny that there was an employee of that name but acknowledge that there was an Optical Assistant called Anisa Shah who worked with the Claimant. All the Claimant says about this in her addendum to her first ET1 is that Anisa (Patel/Shah) *'got involved'*. There is the suggestion that she ordered an incorrect lens.

164. There is simply insufficient detail in the evidence before us to permit us to form any conclusion about this incident. No further detail was given in the Claimant's substantial letter of grievance where she provided a long chronology of events. The fact that one person interfered in another's transaction is not, in itself, a matter of any note. We did not have any evidence to support the conclusion that the Claimant had suffered any detriment because of this.

Allegation 36 – 'In Summer 2016'

165. The Claimant says that when she was dealing with a customer Richard Sandiford pulled the tips of the Claimant's left ear and said *'listen with your ears'*. In the addendum

to her first ET1 the Claimant suggests that this took place on the same occasion as the allegation above. The schedule identifies it as a different occasion. Richard Sandiford denies ever touching the Claimant's ear tips but accepts that on occasions he may have said *'listen to the customer'* or words to that effect. There was not said to be any witness to these events. Taking into account our general concerns about the Claimant's reaction to managerial instruction we are not satisfied that it is more likely than not the Richard Sandiford went any further than to remind the Claimant of the need to listen to customers. Such a managerial instruction would have been entirely appropriate.

Allegation 37 – 25 October 2016

166. The Claimant complains that Sherrie Yates was interviewed on 25 October 2016. We have made findings in respect of this when dealing with allegation 32 above. There was no substantial dispute between the Claimant and what Sherrie Yates said in her statement. The only point of note is that Sherrie Yates completed the transaction and says that the customer commented on the Claimant's conduct. That is consistent with pervious customer complaints and given that Anoushka Desai had rushed away it is unsurprising that the customer commented. The Claimant has no reasonable basis for complaining that Sherrie Yates gave a truthful account of what she saw and heard.

Allegation 38 – 1 November 2016

167. The Claimant was interviewed by Mahika Jayasena on 1 November 2016 about the incident that took place on 14 October 2016.The Claimant describes this in graphic terms in her Addendum to her first ET1 she uses language like *'more like interrogation in a torture camp'* and suggests that Mahika Jayasena was intimidating and threatening. She goes on to make the rather petty complaint that Mahika Jayasena ran out of paper. Mahika Jayasena described the interview as being very straightforward. She took handwritten notes of what was said and later typed the up. She suggested that the Claimant did not really dispute what had happened. We accept Mahika Jayasena's account of this meeting. Her account was entirely consistent with the notes of the meeting. We deal with the Claimant's suggestion below that she was *'forced to sign'* them without checking them and reject it. The notes disclose a series of open questions and the Claimant essentially relating what are undisputed facts. There is no sign of any interrogation or hostility in the way the questions are framed. The Claimant's grievance chronology includes her complaint that she was not asked to sign the notes of the meeting but says nothing about it being hostile. We conclude that the questioning was concluded fairly and properly although no doubt the Claimant did not enjoy the experience as she was the person being investigated.

Allegation 39 – 1 November 2016

168. Again this allegation relates to the fact that Anoushka Desai was interviewed on this date. The Claimant refers to her as acting maliciously. We consider this to be unfounded and unfair. We have found that the Claimant did behave loudly and aggressively towards Anoushka Desai sufficient to reduce her to tears. The Claimant cannot complain that Anoushka Desai, when asked, related that account. Anoushka Desai does relate that this was not the first time that she had felt patronised by the Claimant (those incidents were captured by Sherrie Yates and were ones for which the Claimant apologised to Andrew Kemp). The Claimant can have no reasonable complaint when her colleagues truthfully relate how her own behaviour appeared to them. The Claimant considers it significant that she was interviewed before Anoushka Desai. We do not consider this to be of any importance at all. Mahika Jayasena knew what the reported

allegation was and asked each person about it. The order she did so had no significance in this particular case.

Allegation 40 – 4 November 2016

169. In the course of the hearing the Claimant tended to suggest that there was some improper behaviour in relation to the interview records that had been made by Mahika Jayasena. She says in her addendum to her first ET1 that Cheher-Bano Kashmir Ali came in to the shop wearing casual clothes on her day off and was seen with Jayasena typing up the statements. She suggests that was to *'cook the witness statements as the way they like'*. The Claimant thought it significant that she had dated her interview record and nobody else had. We completely reject such a theory. Cheher-Bano Kashmir Ali came in to work on her day off because Mahika Jayasena had asked for her assistance preparing her investigation report and as they were not working on the same day it was convenient for Cheher-Bano Kashmir Ali to come in for a handover. The Claimant made complaints about Cheher-Bano Kashmir Ali being in casual dress. Cheher-Bano Kashmir Ali was not attending work to serve customers but to receive a handover from Mahika Jayasena and help her prepare her report. She had no need to be in uniform.

170. We are confident that there was no 'cooking' of the statements because there was nothing controversial in them. They were true and accurate accounts of what had actually happened. We find that neither Mahika Jayasena or Cheher-Bano Kashmir Ali had a great deal of experience dealing with formal disciplinary processes and they were simply trying to complete the task that had been set for them by Andrew Kemp.

Allegation 41 – 6 November 2016

171. The Claimant complains that Dagmara Przada arrived 10 minutes late for work and says that she was not required to fill in a late form. As set out above filling in late forms was the standard and accepted process and was applied to all employees (below director level). In her schedule the Claimant levels the allegation that this was a 'cheap reward' for making a statement. Again we would repeat that there can be little reasonable complaint about the content of these statements as there was so little that was in dispute. We note that the Claimant had been late on quite a number of occasions with no sanction. We do not think it likely that any 'reward' was given to Dagmara Przada as the Claimant suggests. As such we do not find that the Claimant has anything to reasonably complain of in relation to this allegation.

Allegation 42 – 6 November 2016

172. On 6 November 2016 the Claimant had a routine appraisal meeting with Mahika Jayasena. This took place in one of the consulting rooms. The Claimant says that she was set unrealistic sales targets and that this was a further act of discrimination. This meeting illustrates the up and down nature of the Claimant's relationship with Mahika Jayasena. What she told us about the meeting, which the Claimant accepted was true, was that the Claimant became very upset in the course of the meeting and was very tearful. The background to the Claimant's concerns starts with an e-mail sent by Andrew Kemp on 3 November 2016 in which he reminded the Claimant that she had not taken any holiday or made any request to carry it over. The Claimant had responded on 5 November 2016 thanking him for his reminder and asking to carry forward her holiday entitlement so that she could have a 'once in a lifetime' holiday in Australia and New Zealand which would include visiting old friends and relatives. That request was very graciously accepted by Andrew Kemp and Richard Sandiford. During her meeting with

Mahika Jayasena the Claimant discussed the fact that her conversion from Buddhism to Catholicism had caused a rift between her and her family. She revealed that her relatives in Australia wanted nothing to do with her. We find that, in relation to none work matters, the Claimant had sufficient trust and confidence in Mahika Jayasena to discuss such personal concerns with her.

173. The Claimant was set a target for sales by Mahika Jayasena. It was higher than what she had previously attained. Mahika Jayasena told us and we accept that this was simply the way in which targets were ordinarily set. The bar would be moved higher in order to incentivise the employee to go a little further. Mahika Jayasena was able to refer to targets set for other individuals and we are satisfied that her treatment of the Claimant was nothing out of the ordinary. The Claimant says that Mahika Jayasena said: *'You do what we tell you to do. If you don't do what we tell you to do we will take everything away from you. We will take everything back from you'.* We do not accept that Mahika Jayasena used that phrase or one anything like it. It is entirely inconsistent with a meeting at which the Claimant was prepared to confide in Mahika Jayasena.

174. The Claimant goes on to say that Mahika Jayasena said: *'I have known many people with Buddhist religion. It is strange (to me) that you are the only one who changed (converted) from Buddhism to Christianity'.* The Claimant's conversion to Christianity was raised by her. Mahika Jayasena denies the suggestion that she suggested that there was anything 'strange' about such a conversion. We find it unlikely that the Claimant would have opened up to Mahika Jayasena in the way that she did had there been any hostility or adverse treatment during that meeting. Even if Mahika Jayasena had said that the Claimant was the first convert that she had met there would be nothing that the Claimant could reasonably complain about in the context of the conversation that she had initiated.

Allegation 43 – 8 November 2016

175. The Claimant says that on 8 November 2016 she was *'forced to sign'* the record of her interview with Mahika Jayasena by Cheher-Bano Kashmir-Ali. Cheher-Bano Kashmir-Ali accepts that she asked the Claimant to sign the typed up record of interview on that day. She does not accept that she 'forced' the Claimant to do so. We reject the suggestion that the Claimant was forced to sign anything. The Claimant does not suggest that any part of the interview record is inaccurate. Indeed it is entirely consistent with what she told us and differs from the other interview records only by not acknowledging the effect of the *'are you listening'* comment. We would accept that there may have been a short exchange where the Claimant asked if she could raise the accuracy of the record and was told that she could raise that later if necessary. We conclude that there was nothing that the Claimant could reasonably complain about in the manner in which she was asked to sign the record of interview.

Allegation 44 – 8 November 2016

176. The Claimant complains that Kaye Bird was asked by Cheher-Bano Kashmir-Ali to check the Children's prescriptions and that unlike her she was not put under pressure to finish that task. It seems that the Claimant is actually using this incident to identify a comparator rather than making a separate allegation of wrongdoing. We do not accept that the Claimant is comparing like with like. When the Claimant was telephoned in the laboratory it was because she was taking longer than expected to do the task. We accept the evidence that we heard from a number of witnesses that the Claimant was thorough and meticulous at undertaking this job but was very slow. It was her slowness that prompted any telephone calls to hurry her up.

Allegation 45 – 8 November 2016

177. As we say above on 8 November 2016 the Claimant was told by e-mail that her request to carry over a whole year's holiday had been granted. Andrew Kemp wrote: *'As this is a once in a lifetime trip we are happy to make an exception for you'.* The Claimant says that when she saw this she decided to thank Andrew Kemp. We accept that is what happened. What she then says is that he then laughed until his face went red. She describes this as harassment and victimisation. When the Claimant cross examined Andrew Kemp she accused him of having a red face and being angry. In fact Andrew Kemp remained entirely calm throughout his evidence and did not have a red face. We cannot find that there was anything untoward about this exchange.

178. What we do take from the fact that Andrew Kemp and Richard Sandiforth authorised the Claimant's holiday was that they expected her to remain an employee despite the fact that there was a disciplinary investigation on foot. Andrew Kemp and Mahika Jayasena told us in evidence that they did not expect there to be any sanction beyond a formal warning if the allegation was made out.

Allegation 46 – 8 November 2016

179. At the end of the day on 8 November 2016 Andrew Kemp asked to speak with the Claimant. He handed her a letter which invited her to a disciplinary hearing on 15 November 2016 and enclosed the records of interview and the investigatory report compiled by Mahika Jayasena. That investigatory report was we find entirely fair. Mahika Jayasena had recently been on a training course and understood that her role was limited to an investigation. Mahika Jayasena was careful not to express any concluded view. She wrote:

> *'It is my view that Hla Kalaya may have come across belittling [sic] from her actions towards Anoushka Desai on this occasion. However there is no evidence to show that she was attempting to take over the dispense. Based upon the evidence/witness statements that has been collected, it is my view that there is a disciplinary case to answer by Hla'*

180. The invitation letter had been adapted from a standard precedent. It very clearly set out the allegation that was made. It described the allegation as being one of 'misconduct' rather than 'gross -misconduct'. It quite properly informed the Claimant of her right to be accompanied at any disciplinary meeting by a colleague or trade union representative. However a standard paragraph was left in the letter in the following terms:

> *The hearing will follow the disciplinary process. If you are found guilty of misconduct we may decide to issue a written warning or a final written warning or dismiss you with notice or pay in lieu of notice. If you are found guilty of gross misconduct you may be dismissed without notice or pay in lieu of notice.*

181. Andrew Kemp says, and we accept, that he did mention to the Claimant that the allegation was considered to be misconduct rather than gross misconduct. That said, on the face of the letter the reference to gross misconduct remained as did the possibility of dismissal even if the matter was considered only to amount to misconduct.

182. The Claimant says that Andrew Kemp 'forced her' to give the name of any representative. We find that what actually occurred was that Andrew Kemp was at pains to explain the right to be accompanied. The letter itself contains a fair summary of the

legislation. It does ask that the Claimant inform Andrew Kemp of the name of any representative but we consider that entirely reasonable and in no sense unusual. The Claimant says that she said that she would attend only with her trade union representative. She says that Andrew Kemp told her that she had plenty of time to contact her union. If he did then we consider that to be a perfectly reasonable response. The Claimant was given 1 weeks' notice of the meeting.

183. We consider it unfortunate that the letter that was given to the Claimant was not amended to reflect the actual intentions of Andrew Kemp that at worst the Claimant would be given a warning of some description. Instead it left open the possibility of dismissal. Whilst what was said orally might have provided some reassurance we accept that the Claimant was very stressed by the prospect of a disciplinary process and that not unreasonably she was not taking everything in. When she read the letter at home certainly she could reasonably have felt that there was a possibility that she would be dismissed.

184. We find that the effect of being asked to attend a disciplinary meeting coincided with a profound deterioration in the Claimant's mental health. She sent an e-mail to her trade union at 3:49am describing herself as suffering from an *'enormous amount of stress and unequal treatment as consequences of unfair/biased investigation'*. She said that she had telephoned a crisis line. The following day she went to see her GP and was signed off as unfit to work from 9 November 2016 to 7 December 2016. The Claimant e-mailed Andrew Kemp and informed him that she was unwell and that she would not attend the disciplinary meeting until she was fit for work. Andrew Kemp replied in a sympathetic e-mail and agreed to rearrange the meeting without any question.

Allegations 47 and 48 – 9 December 2016

185. The Claimant decided that she wished to raise a grievance she telephoned Specsavers Human Resources department. When she did so she was told that it was the function of that department to support the managers/owners of the stores and that no general assistance was given to employees. The Claimant suggests that is discriminatory on the grounds of her Race, Sex, Age, Religion/belief and disability. We find that what the Claimant was told was perfectly correct. Under the commercial arrangements individual stores have access to Specsavers HR in order to seek advice. The HR department is not available as a resource for employees. Given the nature of the arrangements we find this unsurprising.

186. After her attempt to telephone Specsavers HR the Claimant wrote to Linda Weaver in that department. Her letter focusses on the fact that disciplinary proceedings had been commenced against her although there is some reference to past events (which would have not been apparent to any stranger to the events. The letter continues to complain that the HR department is not available to employees. The Claimant suggests that the fact that she wrote this letter amounted to an allegation under the Equality Act 2010.

187. We find that the Claimant's attempt to use the Specsavers HR department as the appropriate place to present her grievances was misguided but do not criticise her for attempting to do so. She did not understand what she needed to do or the structure of the Specsavers commercial arrangements under which each store is a separate business.

Allegation 49 – 15 November 2016

188. On 13 November 2016 the Claimant sent herself an e-mail to provide a backup to notes that she had made about what she says happened at work. That note indicates that her concerns started on 17 January 2016 as did her first ET1. We note that there is no mention of the extremely serious allegations that she made much later against Peter McCrory.

189. On 15 November 2016 Abi Dowling, Employment Counsel retained by Specsavers wrote to the Claimant by e-mail. We find that this correspondence was sensible, polite and appropriate given the nature of the Claimant's letter of 9 November 2016. Abi Dowling wrote:

> *'Thank you for your e-mail, sent to Linda Weaver, in which you raise various concerns many of which appear to relate to an ongoing disciplinary investigation concerning you.*
>
> *Given that your concerns appear to relate to the investigation/disciplinary itself, it would not be appropriate for a separate investigation to be opened into these matters at this stage. Rather you will have the opportunity throughout the disciplinary process….to raise any concerns you have….*
>
> *It is of course open to you to raise separate concerns, should you wish to do so, about other matters…….If you wish to do so please set out your clear grounds for your grievance to allow the matter(s) to be investigated'*

190. The Claimant suggests that this response was discriminatory, victimisation and harassment. We find that the response was entirely appropriate and takes the Claimant's concerns seriously. The Claimant's letter did focus on the disciplinary proceedings and her references to other matters were not at all clear. The Claimant could not reasonably complain about this response to her letter. She was expressly invited to set out her grievances if she wished to do so.

Allegation 50 – 29 November 2016

191. Guided by the Claimant's fit note and believing that she would be returning to work, Andrew Kemp wrote to her suggesting that the disciplinary meeting should take place on 9 December 2016. We cannot see that there is anything that the Claimant could reasonably complain of in respect of these actions. As it turned out the Claimant was again signed off sick and the meeting was once again postponed. We can find no fault whatsoever with the approach of Andrew Kemp. His e-mail postponing the proposed hearing was sympathetic and polite.

First Allegation of the Second ET1 – 5 December 2016

192. The Claimant obtained a further fitness for work certificate which certified that she would be unfit for work for 3 months until 7 March 2016. The had been some correspondence between the Claimant and Allyson Walker of the payroll team about whether the end date given in her first statement of fitness for work was inclusive or exclusive of 7 December 2016. We consider this to have been a minor misunderstanding that was swiftly resolved.

193. On 14 December 2016 the Claimant sent a grievance letter to Linda Weaver copying it in to Abi Dowling. The covering letter was just 2 pages but she attached a 'chronology of events' which ran to 40 pages. This document later formed the basis for

the addendum to the Claimant's first ET1. It makes express reference to discrimination and victimisation and to the possibility of employment tribunal proceedings. It does not place any emphasis on any particular protected characteristic. The first grievance mentioned refers to events of 17 January 2016 and it makes no mention of the serious allegations later raised against Peter McCrory. Very promptly, on the same day, Abi Dowling responded and asked the Claimant whether she was fit enough to attend a grievance meeting either at work or at some convenient location. The Claimant responded saying that she would revert to Abi Dowling about a convenient date for the meeting towards the end of the period she had been signed off.

Allegation 51 – 30 December 2016

194. On 30 December 2016 Sherrie Yates left the Wimbledon store to work elsewhere. This cannot be the basis for any of the Claimant's complaints. The Claimant speculates that she was moved because she had done something wrong. We find that that is not the case. Sherrie Yates had been persuaded to stay after her earlier resignation but ultimately decided to leave. She had been a valued employee. She has multiple sclerosis and found dealing with the Claimant very stressful. This was a material factor in her ultimate decision to leave.

Allegation 52 – 3 February 2017

195. On 3 February 2017 the Claimant wrote to the ultimate owners of the parent company and requested that reasonable adjustments were made for her. She referred to a diagnosis of PTSD. She asked for a transfer to the Specsavers store at Ealing.

Allegation 53 – 6 February 2017

196. Abi Dowling replied to the Claimant sent an e-mail to the Claimant on 6 February 2017 in which she informed her that her grievance was progressing and that it had been arranged that Matt Rising a Regional Relationship Manager to hear the grievance. She said that the request for reasonable adjustments would be considered by the Claimant's Employer Wimbledon Broadway Specsavers Limited *'as appropriate with reference to your potential return to work'*. There is certainly no refusal to consider a 'transfer' to the Ealing store as the Claimant suggests. In the Claimant's Schedule she complains that her request was 'not implemented'. In terms of the timeframe it is pertinent to note that the request was first made on Friday 3 February 2017. If the Claimant is suggesting that an instant transfer should have been offered she is being somewhat unrealistic.

Allegation 54 – 7 February 2017

197. On 7 February 2017 the Claimant sent a further request to the ultimate owners of Specsavers asking that she be offered a job at the Specsavers store in Ealing. She took issue with the suggestion that making such an adjustment was the responsibility of Wimbledon Broadway Specsavers Limited.

198. On 27 February 2017 the Claimant presented her first claim to the Employment tribunal.

199. Whilst waiting for the Claimant to be fit enough to attend a grievance meeting Matt Rising started to investigate her grievances. He conducted interviews with Andrew Kemp Richard Sandiford, Daniella Mann and Mahika Jayasena. We note that at the start of Andrew Kemp's interview he was warned by Matt Rising that the allegations made in the

grievance were of a serious nature and that if upheld disciplinary proceedings might follow. We are satisfied that Matt Rising approached the matter with an entirely open mind. He was not employed by Wimbledon Broadway Specsavers Limited and was truly independent.

200. In an interview on 10 February 2017 Matt Rising asked Andrew Kemp about the events and Andrew Kemp told him about the meeting of 29 September 2016. His account is consistent with our findings above. He is prepared to be complementary about some aspects of the Claimant's work and his responses in interview show no animosity towards her to speak of. In particular Andrew Kemp acknowledged that the Claimant has said to him that Mahika Jayasena had sworn at her. Matt Rising asked for an explanation as to why Andrew Kemp had believed Mahika Jayasena and he explained that he felt that the Claimant was *'trying to use diversionary tactics'.* The context of this is that the Claimant was herself dealing with criticism about her behaviour. Andrew Kemp also commented that the Claimant was slow in completing some tasks. We find that she was and that this is an entirely fair comment that could not provide the foundation for any claim that the Claimant has presented.

201. Richard Sandiford was interviewed on 6 March 2017. We consider that he too was prepared to be balanced and fair. He was prepared to describe Mahika Jayasena's management style as having *'some rough edges'* He also gave the Claimant credit for her work.

202. Daniella Mann was asked about her relationship with the Claimant she said *'challenging, she is quite opinionated and lacks empathy. She has made me cry. I don't think she means it but is sharp with other members of the team. Generally I end up keeping the peace'.* We consider that an entirely fair and balanced assessment.

203. When Mahika Jayasena was interviewed on 6 March 2017 she was asked about her relationship with the Claimant. She said:

> *'It is good. I was her supervisor when she was going through her DO course. She used to message me regularly to stay in contact asking about how you are, weekends etc. She has confided in [me] a few times about her family and how she was disowned. During our 121s we used to talk about her family and she would cry a lot as she had a fight with her sister. I am surprised it has come to this. Regarding money she used to do extra days to get more money. She would work extra days on Sunday and not go to Church'*

204. Looking at the content of these interviews we find that each of these managers was prepared to give the Claimant credit where it was due. That said, each of them also referred to the Claimant as being a person who could be difficult if she did not get her own way. Our own findings are that that is a very fair assessment.

205. On 7 March 2017 the Claimant sent an e-mail to Abi Dowling indicating that she was well enough to attend a grievance meeting not to take place before 23 March 2017. Abi Dowling replied promptly saying that she would speak to Matt Rising about finding a convenient date and location. On 10 March 2017 the Claimant sent an e-mail to Matt Rising complaining that she had not heard from him she said *'Please feel free to let me know and confirm to me in writing if you have no genuine intention/no interest in hearing my Grievances'.* We consider this to be very unfair. The Claimant had asked that the Grievance process be put off for some months. She could not reasonably expect a senior manager to drop everything and respond to her at the drop of a hat. We note that the

Claimant had apparently lost confidence in the process even before it had started. We take this into account when assessing her evidence of the grievance meeting that followed. On 13 March 2017 Matt Rising sent a polite and appropriate e-mail to the Claimant saying that he was available on 24 March 2017.

The second complaint in the second ET1 – relating to 23 March 2017

206. The Claimant says that on 23 March 2017 she telephones Specsavers central recruiting office to enquire about the vacancy at the Ealing Broadway branch that had prompted her request for a transfer. She says that her CV was not 'accepted'. We accept that she made such a telephone call and that she was told that the vacancy still existed. We find that the central recruiting office is not operated by the Claimant's employer Wimbledon Broadway Specsavers Limited nor in these particular circumstances was it acting as an agent or that company. We shall deal with the legal consequences of this below. However in short we see no basis for attributing any action of the recruitment office to any of the Respondents in these proceedings. There was no evidence that they knew anything about it.

207. The question of the Claimant being offered work at Ealing Broadway became an issue only in the Second ET1. Richard Sandiford wanted to know if the Claimant had been interviewed. He sent an e-mail enquiring about that and received a response from a director which said *'I can confirm that we did interview Hla Kalaya, for the position of dispensing optician on or around 21/05/15 and we did not find her suitable for the business'.* That e-mail was disclosed during the proceedings. In response the Claimant provided an e-mail exchange between herself and another of the Directors. That e-mail exchange showed that the Claimant had been offered a position but that she had rejected the salary offered. Her e-mail invites the business to negotiate a higher salary. We were not shown any response.

208. The Claimant believed that this e-mail was sufficient to show that all of the Respondents were dishonest. We do not read this exchange in that way. Richard Sandiford cannot be criticised for his query or indeed for taking the response at face value. We accept that that response would tend to suggest that the business had rejected the Claimant and not the other way around. The reason that the Claimant was not employed was that no agreement could be reached about salary. Whether the e-mail provided to was as accurate as it could have been is one thing but we do not find that there was any dishonesty by Richard Sandiford or anything in this exchange that casts any light on the actions of any of the Respondents. The point does not have any forensic weight at all.

<u>The 3 complaints made in the Second ET1 relating to 24 March 2017</u>

209. The grievance meeting was arranged to take place in a hired meeting room. The Claimant was accompanied by her trade union representative Bryan Kee. What occurred at the meeting is the subject of complaints made in the Claimant's second ET1

210. The Claimant complains that: *'There was a catastrophic questioning about 'etc'. Re-living, re-visiting and recurring of the past traumas…'.* She goes on to criticise the notes of the meeting and makes allegations that there had been a cover up.

211. We find that the Claimant's criticisms of conduct of the meeting of 24 March 2017 have no substance to them. At the outset of the meeting the Claimant was asked what her desired outcome was and she indicated that she wanted a transfer to the Ealing store.

She indicated that she was aware that there was a vacancy at that store. She had already provided a letter from her Psychologist dated 3 March 2017 who supported such a move. Matt Rising, who we find had commenced a comprehensive and fair investigation into the Claimant's grievance, gave evidence that he started to work through the grievances in chronological order. That is supported by the notes. When there was an issue of how the Claimant put her discrimination allegations the Claimant was unable to articulate what she was complaining about. This has been a feature of the Claimant's case before us. She was afforded a number of opportunities during the meeting to confer with her trade union representative. The matter became no clearer. The Claimant has disclosed correspondence between herself and her trade union representative after the meeting and it is clear that she still required assistance to clarify her complaints. Ultimately the meeting was adjourned. Whilst there had been agreement to discuss the transfer of the Claimant to the Ealing Broadway store that had not been dealt with before the meeting ended and was plainly something that Matt Rising intended to return to.

212. We would accept that for the Claimant being asked about her allegations was difficult. Indeed before us she struggled with any questions put to her by Mr Holloway. Given that a grievance had been presented it was Matt Rising's role to ask questions. We do not consider that he did anything other than attempt to explore what the Claimant was saying. We note that at no stage did the Claimant's trade union representative suggest that anything untoward was occurring.

213. The Claimant makes reference in her second ET1 to 29 March 2017. This was the day that the Prime Minister triggered Article 50. We could not understand the relevance of this to any claim that the Claimant has brought.

214. The Claimant was sent the notes that had been taken of the meeting. She was invited to attend a further meeting to take place on 6 April 2017. On 4 April 2017 the Claimant sent Matt rising an e-mail with an attachment which she said amounted to amendments to the minutes. We find that that document does not seek to correct the minutes in any conventional way. What it is, is a long further commentary on the various incidents. Whilst the original minutes were not verbatim we consider that they were of good quality.

215. In her e-mail of 4 April 2017 the Claimant repeats her request for a 'transfer' to the Ealing Broadway Specsavers store that e-mail has an unfortunate tome and the Claimant described Matt Rising as 'ignorant'. On the same day Matt Rising responded to the Claimant. He pointed out that the grievance process was not complete and suggested that it was sensible to complete that process before turning to the issue of reasonable adjustments. He said that he was aware that the Claimant was still signed off as unfit for work and suggested that the way forward was to have an occupational health assessment. Finally he said that the Claimants request for a transfer was not straightforward. He pointed out that each Specsavers store was a separate legal entity each one responsible for its own recruitment and staff. He said that he considered that completing the grievance and obtaining an occupational health report would be the first step.

<u>The Claimant's resignation 4 April 2017</u>

216. The Claimant resigned by e-mail sent at 16:49 on 4 April 2017. In her grievance letter she refers to the conduct of the grievance meeting and the failure to transfer her to the Ealing store as being the reasons for her resignation however he also refers to the 'discrimination' at the Wimbledon Broadway store. Matt Rising responded almost

immediately and reassured the Claimant that he would continue to take her grievances seriously. The Claimant asked that the grievance meeting be postponed. The Claimant indicated that she would like the matter to proceed in writing.

217. The Claimant had in fact by that date sought and obtained the offer of employment elsewhere. She started that job as soon as she left the employment of Wimbledon Broadway Specsavers Limited. It follows that she must have accepted that job offer prior to 4 April 2017.

218. On 25 April 2017 Matt Rising sent an e-mail to the Claimant asking her if she wanted to attend a grievance meeting. The Claimant responded asking Matt Rising to be patient with her. Her e-mail makes reference to the then ongoing tribunal proceedings and suggests that the fact there were some case management hearings provided a reason not to progress the grievance.

219. On 23 June 2017 the Claimant sent the Respondent a copy of the document that would later form the basis of her second ET1. As it contained the allegations we have set out above against Matt Rising a decision was taken to appoint Sophie Hicking, an Employee Relations Consultant, to complete the grievance process. We consider that to have been an entirely sensible decision.

220. Sophie Hicking wrote to the Claimant on 21 September 2017 and asked her to expand upon various points in her grievance and in particular her use of 'etc' when she had claimed discrimination on the grounds of a protected characteristic. The Claimant responded saying that she would provide her response within 28 days. That e-mail gives the strong impression that the Claimant is deliberately pushing back at the suggestion made in Sophie Hicking's letter that she should explain her claims of discrimination reasonably promptly. On 19 October 2017 she provided 4 files. Those documents did not address the points that Sophie Hicking had quite reasonably requested which were directed towards clarifying the discrimination claims.

221. As part of her investigation Sophie Hicking interviewed Matt Rising, Peter McCrory, Cheher-Bano Kashmir Ali, Sherrie Yates, Daniella Mann, Peter Boele van Hensbroek (who had taken notes in the grievance meeting), Zuzana Bird, Jasleen Khurana, Anouska Desai and Dagmare Przada. It was a thorough and comprehensive attempt to gather all of the relevant evidence. We note that much of the questioning focussed on the allegations of discrimination that had been made by the Claimant. None of the Claimant's colleagues thought that there had been any difference on treatment of the Claimant because of any protected characteristic.

222. Sophie Hicking completed her report into the Claimant's grievances on 19 December 2017. The Claimant has complained about the time that this took but we find that considerable delay was caused by the Claimant's illness. That was compounded by the Claimant's (ill founded) complaints against Matt Rising, she needlessly delayed in responding to Sophie Hicking and finally, there was as we have also discovered a very large volume of material and allegations.

223. Sophie Hicking did not uphold the Claimant's grievances. In many respects she reached the same conclusions in respect of the facts that we have done ourselves. We do not agree with every conclusion but are satisfied that Sophie Hicking tried her best to ascertain the facts of the matter. Her investigation and report were thorough and comprehensive. In her third ET1 the Claimant suggests that this is a further instance of

discrimination on the grounds of race, sex and disability as well as saying that it was bullying.

224. When the investigation report was sent to the Claimant she discovered the comments that had been made by Mahika Jayasena (about working on Sundays), by Peter McCrory (about the Claimant speaking English as a second language), by Andrew Kemp ('diversionary tactics') and Sherrie Yates (who had said that the Claimant's behaviour contributed to her decision to resign). In her third ET1 she suggests that these are further instances of discrimination.

225. The Claimant was informed by Sophie Hicking that is she wanted to appeal she should do so within 14 days. The Claimant takes exception to this but we consider that that is a perfectly reasonable request. The matter had already dragged on for far too long and it was reasonable and proportionate to set a fairly short deadline for an appeal. The Claimant has appealed but that process and its outcome did not form the basis of any complaints before us.

Some general conclusions on the facts

226. We have considered a great deal of evidence relating to the Claimant's employment. In addition to the witnesses we heard from we have seen interview records and statements from a large number of the Claimant's fellow employees. What emerges is that the Claimant was thorough to the point of being a perfectionist. As a consequence she could be slow at undertaking various tasks but that was generally tolerated. The Claimant had some supportive relationships amongst her colleagues including Mahika Jayasena who was often kind and supportive of her. Whether she recognises it or not, the Claimant can come across to others as being patronising and unkind. She had particular difficulties with employees that she perceived as being junior to her. Her behaviour at times went beyond that which could be tolerated on the shop floor and caused comments from colleagues and customers. We do not criticise the Respondents for thinking that some formal disciplinary action was required.

227. We find that the Claimant could be (but was not always) very difficult to manage. Her questioning of instructions was exasperating. Sherrie Yates found this very stressful and we find that Mahika Jayasena did on two occasions allow her exasperation to spill over. On the findings of the majority, on one occasion swearing in front of the Claimant.

228. When the Claimant raised her complaints with Andrew Kemp they were not taken seriously because the Claimant was thought to be the person causing problems. Whilst Andrew Kemp has some basis for his actions that is not to say that the Claimant's concerns ought to have been sept aside.

229. We find that as the events unfolded the Claimant's perceptions of the actions of others has become distorted and her ability to give an accurate account without exaggeration has diminished. Her third ET1 contains serious allegations that she had never raised before against Peter McCrory. That ET1 contains other material which suggests that the Claimant had by that stage lost all perspective. For example criticisms of Matt Rising and Sophie Hickling are baseless and she includes a lot of irrelevant material in that ET1.

UNFAIR DISMISAL CONTRARY TO SECTION 94 OF THE EMPLOYMENT RIGHTS ACT 1996

The legal framework – unfair dismissal

230. Section 94 of the Employment Rights Act 1996 (hereafter 'the ERA 1996') sets out the right of an employee not to be unfairly dismissed by her or her employer.

231. For the Claimant to be able to establish her claim of unfair dismissal she must show that she has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1006 and includes in Sub-section 95(1)(c) *'the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct'.*

232. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

233. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

234. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **1985 IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **2005 IRLR 35**. In ***Omilaju*** it was said:

> *'19. … The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which*

cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'

235. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

236. There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination ***Doherty v British Midland Airways*** **[2006] IRLR 90, EAT**. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see ***Green v Barnsley MBC*** **[2006] IRLR 98**.

237. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - ***Bournemouth University Higher Education Corpn v Buckland***.

238. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council and Meikle*** **[2004] IRLR 703**.The employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**.

239. The proper approach, in the main distilled from the cases set out above has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ 978** per Underhill LJ at paragraph 55.

'it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

240. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.

241. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

'*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

242. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

'any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'

243. The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Discussion and Conclusions

244. The first issue that we need to decide is whether, applying the law set out above the Wimbledon Broadway Specsavers Limited was in serious breach of contract. In our general findings of fact we have rejected a considerable number of allegations that the Claimant has made. We have found the following matters made out:

244.1. The fact that Mahika Jayasena was overheard saying *'who the fuck does she think she is'* on 17 January 2016; and

244.2. (by a majority) the fact that Mahika Jayasena said *'next time fucking listen to me'* on 16 September 2016; and

244.3. the fact that after the meeting of 29 September 2016 Andrew Kemp did not take any action in response to the Claimant's allegation that Mahika Jayasena swore at her other than taking her word for it; and

244.4. the fact that disciplinary proceedings were instigated against the Claimant after Richard Sandiford had given the Claimant the impression that a line would be drawn under the events of 14 October 2016; and

244.5. the fact that the letter of invitation to a disciplinary meeting of 8 November 2016 warned of a possibility of dismissal.

245. We ask ourselves first whether these matters individually or cumulatively are sufficient to amount to a breach of the implied term recognised in ***Mahmood v BCCI.*** Are they of a sufficiently serious nature to seriously damage the relationship of trust and confidence? We have found above that the Claimant could be very exasperating to deal with. That formed part of our reasoning when we accepted that that might have caused Mahika Jayasena to say *'who the fuck does she think she is'* when she believed the Claimant was out of earshot. That said the fact that an employee is difficult to deal with does not excuse a manager who behaves unprofessionally in response. As such we reject any suggestion that there was any 'reasonable cause' for this conduct. On the findings of the majority that exasperation caused Mahika Jayasena to use a swear word directly to the Claimant on one occasion. Given the context we would not have concluded that these instances alone or together would seriously damage the employment relationship.

246. We have found that it was unfortunate that Richard Sandiford indicated that if the Claimant apologised to Anouska Desai a line would be drawn under the matter. Because of a lack of communication he was unaware of the previous concerns raised by Andrew Kemp. That meant that the Claimant was sent mixed messages having apologised as she was asked to do. An apology accepted by Anoushka Desai. Again by itself this would not have done serious damage to the employment relationship.

247. The failure of Andrew Kemp to treat the Claimant's complaint about Mahika Jayasena is in our view a much more serious matter. For the avoidance of doubt the minority (the Employment Judge) considers that on the findings of the majority this was a particularly serious error. Putting the matter into context the Claimant had just been admonished for her own behaviour. The behaviour that she complained of was arguably worse. Andrew Kemp's reaction was to dismiss the complaint almost out of hand. He did ask Mahika Jayasena if she had acted as alleged but then took her word for it. In contrast the Claimant faced a formal procedure when she upset a colleague. Andrew Kemp during the grievance procedure, we find honestly, said that he had thought the Claimant was using 'diversionary tactics'. We have regard for where that left the Claimant. She had raised a serious allegation which was just brushed aside. Whatever the Claimant's failings in order to have trust and confidence in her employer the Claimant was entitled to have her grievances addressed. We find that the failure to take the complaint seriously likely to seriously damage the employment relationship.

248. The letter inviting the Claimant to a disciplinary meeting was unfortunately worded. We accept that the Claimant was told that the allegations were considered 'misconduct' but unsurprisingly she did not take that in. On its face the letter raised dismissal as a possibility in circumstances where no reasonable employer would have contemplated that as an outcome (nor did any of the Respondents). By itself this may not have been enough to seriously damage the employment relationship.

249. If we take these matters together (on the findings of the majority) we find that the cumulative effect of these lapses of professionalism or thoughtfulness were likely to lead the Claimant to believe that there was one rule for her and another for Mahika Jayasena. Cumulatively (on the findings of the majority) we find that there was a breach of the implied term explained in ***Mahmood v BCCI.***

250. The next issue that we need to address is whether the Claimant has by not resigning until 4 April 2017, some 5 months later, affirmed the contract and lost the right to treat herself as having been dismissed. The Claimant's letter of resignation suggests that she relies on the March 2017 are being the matters which prompted her resignation. As such she appears to argue that these events amounted to a 'final straw' entitling her to resign and treat herself as dismissed. That said she also refers to the 'discrimination' which is a clear reference to the events predating her sickness absence and including the matters we have set out above (which the claimant has categorised as discrimination). We therefore ask firstly whether the Claimant has affirmed the contract between 8 November 2016 and 4 April 2016 and if she has look at the events the Claimant relies upon as final straws in March to see whether there is anything that would 'revive' the right to treat herself as dismissed.

251. Between 8 November 2017 and her resignation the Claimant was off sick. She did not perform any work because of that reason. She was paid contractual sick pay and indeed pressed for this. Has she then lost the right to treat herself as being dismissed? From the outset of her sickness absences the Claimant raised a series of grievances about her treatment including the treatment we have found amounted to a serious breach of contract. In ***W E Cox Toner (International) Ltd v. Crook*** **[1981] IRLR 443** held that: *'if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation'*.

252. We do not consider that the Claimant had affirmed her contract of employment between 8 November 2016 and the date she resigned. We find that insofar as she was well enough to do so she protested at her treatment and was asking for it to be remedied. Acceptance of sick pay is clearly a factor. The period is long by many standards but that is related to the time taken to deal with the grievance. On balance we do not thing that any act or omission by the Claimant amounted to an affirmation of the contract.

253. If we are wrong about that it is necessary to look at the events in March 2017 and ask whether any of those matters revived the breach (we realise that we are taking these questions in a different order than identified in ***Kaur v Leeds Teaching Hospitals NHS Trust***). The issue is whether any of the matters complained of contributed to any breach of the implied duty of trust and confidence in the sense explained in ***Omilaju***.

254. We have not found any error in the manner in which Matt Rising conducted the meeting of 24 March 2017. We accept that there were some minor discrepancies in the notes but do not consider that there was anything which could possibly be said to contribute to a picture of an employer breaching the terms of the contract of employment.

255. On and after 24 March 2017 the Claimant was told that any question of her being moved to Ealing Broadway Specsavers would have to await both the grievance process and an Occupational Health assessment. We deal with this below when we consider this complaint under Sections 20 and 21 of the Equality Act 2010. We have held that there was no breach of that act. That said, the Claimant was told that any consideration of moving her from the place where she had lost trust and confidence in her managers would have to wait. ***Omilaju*** makes it clear that any final straw need not be unreasonable in itself (although making it clear that exceptions might be rare). We find that being told that consideration of a transfer would have to wait was a matter that contributed to the breach we have identified. As such on either basis the Claimant had the right to treat herself as dismissed.

256. We must ask whether the Claimant resigned in response to the breach. In her resignation letter the Claimant puts the focus on more recent events but clearly includes the earlier matters. A matter that has troubled us is that the Claimant clearly had looked for and probably accepted another job before she resigned. Mr Holloway asked the Claimant about this and she indicated that she was always on the look out for a better position. We consider it necessary to ask why the Claimant looked for work at that point? We find that a material reason for her doing so was because of what had occurred at work and that she would have reconsidered her position if she had had a positive response to her request to move. It is not necessary for the Claimant to show that the breach was the only factor in her decision to resign just that it was a material factor – see ***Nottinghamshire County Council and Meikle***. We find that it was the Claimant had looked for work because of what was happening at work not simply because she wished to move on for other reasons.

257. We therefore conclude that the Claimant was dismissed for the purposes of Section 95 of the Employment Rights Act 1996.

258. Whilst accepting as we have that the matters we have found amounted to a breach of contract had as their background the fact that the Claimant was an exasperating and occasionally difficult employee we do not find that these matters give rise to a potentially fair reason for the dismissal. If we were wrong about that we would have no hesitation in finding that the dismissal was unfair. We would readily accept that the Claimant's conduct called out for a series of warnings but there was nothing that could have justified a dismissal at that stage.

259. We have not dealt with any issue in respect of remedy and it will be open to the Respondent to take such points if the issue of remedy is dealt with at a further hearing. As the Claimant moved directly into new employment her remedies may be very limited if her new employment pays the same or more than her old job. We accept that the Claimant acknowledged that she might have moved on in any event. As such there are questions that need to be addressed as to whether the employment would have continued regardless of the dismissal. The Tribunal will make a case management order for the orderly conduct of any further hearing.

THE EQUALITY ACT 2010 (hereafter EA 2010) CLAIMS

260. The Claimant brings claims on the basis of disability. Before considering the substance of those claims it is necessary to identify the point in time that (1) the Claimant satisfied the definition of disability contained in Section 6 of the EA 2010 and (2) the point that the Respondents had sufficient knowledge of that for the purposes of the legislation.

Disability – From what date did the Claimant satisfy the definition of disability

261. The Respondent has conceded that the Claimant's illness that commenced on 9 November 2016 amounted to a disability. The Claimant has said that she is suffering from PTSD because of the shock of the events of 8 November 2016. As such there is no dispute between the parties as to when the Claimant satisfied the definition set out in Section 6 of the EA 2010.

262. The Claimant was referred to the Ealing Hospital to see a consultant in respect of Temporo mandibular joint discomfort in September 2016. When she was examined in January 2017 the conclusion was that the joint discomfort was secondary to her bruxism habit which was thought to be nocturnal (grinding of the teeth). A recommendation was made that she wore a mouthguard. In his report the consultant suggests that this *'coincided with unfortunate episodes of bullying at work'*.

263. The medical evidence that we saw supported the suggestion that the Claimant's mental health took a significant downturn in early November 2016 and continued for at least 12 months.

264. We consider that the Respondent's concession that the Claimant satisfied the definition of disability from 9 November 2016 was probably rightly made. The Claimant's symptoms were of a degree that she was unable to carry out her work. Perhaps the more troubling issue is whether the Claimant could show that she could satisfy the 'long term' requirement of Section 6. In order to so she would have to have shown that, on the state of the evidence at the time, her condition was 'likely' to last for 12 months. In this context 'likely' means that it could well happen. We see no reason to go behind the Respondent's concession that on the evidence the Claimant could satisfy that requirement.

265. We do not take the Respondent's concession that the Claimant had PTSD to be a concession that there were any particularly shocking incidents at work. We did note that Sister Gabriala Gasz included in her witness statement the fact that she knew that the Claimant had been a victim of crime and had suffered from depression and PTSD in the past. The Claimant did not invite the Tribunal to find that her disability predated 8 November 2016 nor did she provide any evidence upon which we could come to that conclusion. As such whilst we consider that the matter of the Claimant's health may well be more complex than presented or argued before us we accept the joint position that the Claimant was disabled from 9 November 2016.

266. We will deal with the issue of knowledge insofar as we have to when considering the claims.

Consequences of that finding

267. **The Claimant has or appears to have brought claims under Sections 13 and 15 of the EA 2010 and also made claims that reasonable adjustments should have been made for her under Sections 20 & 21 of the EA 2010 she may be making claims of harassment related to disability under Section 26 EA 2010. She makes those claims from the outset of her employment.**

268. **We note that EJ Tsamados did not record the Claimant as bringing claims of direct discrimination because of disability. This must have been an error as the Claimant's schedule which formed the basis of the discussion does indicate that this is the case. It is not an essential element of a claim under Section 13 (a direct discrimination claim) that the person complaining has themselves got a disability. As such, in theory, our conclusion that the Claimant satisfied the definition of disability found in Section 6 of the EA 2010 is not fatal to the Claimant's claims. The Claimant did not address us on quite how she put her claims but she most certainly did not suggest that any of her allegations of direct discrimination were because of the disability of another or because of her association with any such person neither did she say that the allegation was connected more generally with disability. Her case was entirely focused on her own disability. As that did not arise until 9 December 2016 no allegation predating that can succeed. Accordingly Allegations 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 3738, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50 and the 'background allegations' 55 - 61 together with the allegations against Peter McCrory in the third ET1 must all fail insofar as they are brought under Section 13 EA 2010 on the basis of disability.**

269. **A claim under Section 15 of the EA 2010 requires unfavourable treatment because of *'something arising in consequence of B's disability'*. There might be an interesting question about whether that section should be interpreted as including the consequences of another's disability but what is certainly a requirement is that the treatment complained of is because of *something arising in consequence of disability*. In the present case nothing could arise in consequence of the Claimant's disability until she met the definition of disability she does not rely upon the disability of anybody else. Accordingly it is simply not possible for any of her claims under Section 15 EA 2010 to succeed if they predate 9 December 2016. Accordingly Allegations 6, 8, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 42, 43, 46, 47, 48, 49,50, and the 'background allegations' 55 - 61 together with the allegations against Peter McCrory in the third ET1 must all fail insofar as they are brought under Section 15 EA 2010.**

270. **A claim brought under sections 20 and 21 of the EA 2010 also requires the person bringing the complaint to suffer a substantial disadvantage compared to a person without their disability. As such a person without a disability is unable to bring a claim under these provisions. Even if that is wrong then it is plainly necessary to show that disability (perhaps of somebody else) gives rise to a substantial disadvantage. The Claimant has not pointed to anybody else who might have had a disability and on any fair reading of her claim she is relying on her own disability. As such there could be no obligation to make reasonable adjustments unless and until that disability arose. Accordingly Allegations 3, 4, 6, 8, 16, 17, 18, 19, 21, 23, 24, 25, 26, 28, 29, 30, 31, 33, 34, 38, 42, 46, 47 and the 'background allegations' 55 - 61 together with the**

allegations against Peter McCrory in the third ET1 must all fail insofar as they are brought under Section 20 & 21 of the EA 2010.

271. **It is not at all clear that the Claimant is making claims under Section 26 of the EA 2010 for harassment related to disability in her first two claims. EJ Tsamados has not recorded that as an issue. We include the following for completeness. Under Section 26 of the EA 2010 the treatment amounting to harassment must 'relate to' disability. This need not be any disability the complainant has but must relate to disability generally. We repeat what we have said in respect of the claims of direct discrimination because of disability. The Claimant did not put any case that her allegations of harassment related to the disability of any other person of disability more generally. Having put her case that way the Claimant's claims under Section 26 EA 2010 cannot succeed insofar as they predate 9 December 2016. Accordingly Allegations 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 , 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and the 'background allegations' 55 - 61 together with the allegations against Peter McCrory in the third ET1 must all fail insofar as they are brought under Section 26 of the EA 2010.**

The Claimant's claims of direct discrimination and victimisation contrary to sections 13, 27 and 30 of the EA 2010

272. It is convenient to deal initially with the Claimant's claims of direct discrimination and of victimisation together. We take that step because claims under Section 13 and section 27 require the Claimant to establish 'a detriment' for the purposes of Section 39 EA 2010 before they can make out any claim. The term detriment has a wide meaning. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285** the House of Lords dealt with the question of what might amount to a detriment at paragraphs 34 and 35:

> *' the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.*'

273. It is clear that an 'unjustified sense of grievance cannot amount to a detriment see ***Deer v University of Oxford*** **[2015] IRLR 481**.

274. In order to deal with these claims we shall set out which of the Claimant's allegations we find that she has suffered a detriment in the sense set out above. The question of whether a person has suffered a detriment is a question of fact and our reasons for our conclusions are set out above. What follows is a summary of those conclusions.

The first claim – what detriments have been established

275. Given the number of matters where we have not accepted that the Claimant has shown that her version of events is more likely than not it is simpler for us to say where we agree with the Claimant that something occurred that a reasonable employee could complain about. The purpose of this section is to identify which claims we do not need to consider any further because we find that no detriment has been established.

276. As we have said above we shall describe each incident by its number in the Scott Schedule as completed by both parties (the Respondent added the numbers) together with the 'background matters' which appear only in the first version but which we gave numbers following on from the Respondents numbering.

277. Our findings mirror our conclusions in respect of the claim of unfair dismissal. The only matters referred to in the first claim where we find that the Claimant has suffered a detriment are the matters which we have set out as cumulatively amounting to a breach of contract. These were:

277.1. The fact that Mahika Jayasena was overheard saying *'who the fuck does she think she is'* on 17 January 2016; [Allegation 1 – in part] and

277.2. (by a majority) the fact that Mahika Jayasena said *'next time fucking listen to me'* on 16 September 2016; [Allegation 14] and

277.3. the fact that after the meeting of 29 September 2016 Andrew Kemp did not take any action in response to the Claimant's allegation that Mahika Jayasena swore at her other than taking her word for it; [Allegation 18 – in part] and

277.4. the fact that disciplinary proceedings were instigated against the Claimant after Richard Sandiford had given the Claimant the impression that a line would be drawn under the events of 14 October 2016; [Allegation 26- in part] and

277.5. the fact that the letter of invitation to a disciplinary meeting of 8 November 2016 warned of a possibility of dismissal [Allegation 46 – in part].

278. The corollary of those conclusions is that we do not find that the Claimant was subjected to any other conduct that she relies upon in her first claim that a reasonable employee would consider to be a detriment.

<u>The Second Claim – detriments</u>

279. We have found above that the Claimant's resignation amounted to a dismissal. That is legally distinct from a detriment and we will consider that separately.

280. The Claimant has listed 8 matters in her schedule that she says are acts of direct discrimination and victimisation.

281. The first is the issue about whether the Claimant's fitness for work certificate was inclusive of its final date or not. We accept that the Claimant had to take steps to deal with this and are prepared to accept that this might amount to a detriment.

282. The second issue is the Claimant's allegation that she was not put forward for work at Ealing Broadway Specsavers – we accept that is a detriment and will deal with the legal consequences below.

283. We do not accept that the conduct by Matt Rising of the grievance meeting or the notes that were taken gave the Claimant any reasonable grounds to consider that she had suffered a disadvantage. Those are the third to fifth allegations.

284. The final 3 allegations are in essence the same complaint and are the failure to permit the Claimant to work at the Ealing Broadway store. We accept that the Claimant wanted a transfer and that she could reasonably consider the failure to permit that to be a detriment.

The Claimant's third ET1 - detriments

285. The Claimant lists a further 8 complaints in her ET1 and one further complaint in a document she says was left off her original complaint.

286. The first two allegations that are made are the historic allegations against Peter McCrory. We have rejected the Claimant's account and have found that he did not use the words attributed to him by the Claimant. As such she has not suffered a detriment.

287. The next allegation is not put as an allegation of discrimination being identified as a complain of 'whistleblowing'.

288. The next 5 allegations relate to the grievance outcome and what was said by 4 of the Respondents when interviewed during the process. We have not come to the same conclusions as Sophie Hicking in relation to some limited matters and would accept that it is possible to regard a factually incorrect conclusion of a grievance process to be a detriment.

289. We would accept that Mahika Jayasena's statement that the Claimant worked on Sundays and did not go to Church could be taken as suggesting that she was not as devout as she may regard herself and as such could be regarded as a detriment.

290. We would accept that Andrew Kemp's statement that he believed that the Claimant was using diversionary tactics when she complained about Mahika Jayasena would be something a reasonable employee could regard as a detriment. We do not accept that his comments about the Claimant being slow could be viewed as a detriment. A reasonable employee would have recognised that remark as true and fair.

291. We have some difficulty in accepting that the Claimant could consider the remarks made by Peter McCrory in the Grievance process about her speaking English as a second language were such that she could reasonably consider them to be a detriment. The Claimant does speak English as a second language and her usage has caused difficulties. Nevertheless we consider that hearing that another person had commented upon this might (perhaps just) be considered a disadvantage and for completeness we will deal with this allegation.

292. Sherrie Yates had said that her interaction with the Claimant was a factor in her decision to resign. What was said was true. Nevertheless as it was hurtful to the Claimant we consider that it is capable of amounting to a detriment.

Consequences of those findings

293. **Where there is no detriment for the purposes of Section 39 of the Equality Act 2010 then a claim either of direct discrimination or of victimisation cannot succeed. As such the following claims of victimisation and/or discrimination cannot succeed:**

293.1. **In the first claim: Allegations 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52 plus allegations 55 – 61 'the background allegations' all of which are said to be direct discrimination (on various grounds) all fail.**

293.2. **In the first claim Allegations 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 47, 48, 50, 52 and 54 plus allegations 55 – 61 'the background allegations' all of which are said to be victimisation could not succeed even if there had been a protected act (see below).**

293.3. **In the second claim we have rejected the Claimant's contentions that the third to fifth allegations she made which concern the conduct of the grievance process by Matt Rising amounted to a detriment.**

293.4. **In the third claim we have rejected the Claimant's first two allegations which were historic allegations levelled against Peter McCrory.**

Harassment contrary to sections 26 and 38 of the Equality Act 2010

The legal framework – harassment

294. A claim for harassment under the Equality Act 2010 is made under section 26 and 39. The material parts of Section 26 reads as follows:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct…...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

295. Guidance as to the proper approach to claims of harassment was given in ***Richmond Pharmacology v Dhaliwal*** **[2009] IRLR 336**. At paragraph 10 of that report the EAT identify the 3 elements that must established in order to make out a claim of harassment. These are (1) whether the alleged conduct took place (2) whether it had the proscribed purpose or effect and (3) whether it related to the protected characteristic. There is also a reminder of the need to take a realistic view of conduct said to be harassment. At paragraph 22 it is said:

> *'Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

296. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss ***Timothy James Consulting Ltd v Wilton*** **UKEAT/0082/14/DXA**.

Discussion and conclusions

297. There are differences between the approach requirement to show a detriment for the purposes of a claim under Section 13 EA 2010 and the requirement to

demonstrate unwanted conduct that creates the prescribed environment under section 26 EA 2010 but in either case there is plainly a need to establish that the unwanted conduct occurred. Quoting from the agreed list of issues the Claimant says that 'paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 , 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 54 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incident set out in her second Claim Form' amounted to unlawful harassment'. She makes further claims of harassment in her third ET1.

The harassment claims in the first ET1

298. Of these claims we have accepted the Claimant's version of events only in respect of allegations 1, 14, 18, 26 and 46 in respect of her first claim (some in part only). We shall deal with those below.

299. We make it clear that in respect of the remaining allegations we find that there was no conduct that the Claimant could reasonably complain of. Section 26 does not require a detriment but only 'unwanted conduct'. If we were prepared to assume that even on our findings the conduct on those occasions was unwanted the Claimant would have to demonstrate a prima facie case that the conduct related to a protected characteristic and that it violated the Claimant's dignity or created the prescribed environment.

300. Applying the burden of proof applicable in claims under the EA 2010 we do not accept that any of the matters where we have rejected the Claimant's account of events there was any evidence at all from which we might conclude that any conduct at all related to any of the protected characteristics the Claimant relies upon.

301. Additionally, even if we were wrong about that conclusion we are not satisfied that anything said and done on our findings was such that it had the purpose or effect of violating the Claimant's dignity or that it had the purpose or effect of creating the proscribed environment. In particular we do not find that it would have been reasonable for the Claimant to regard any treatment as having that effect. On our findings all of the treatment was entirely reasonable and where it amounted to criticism or action against the Claimant it was justified by her own behaviour.

302. Turning to the allegations (or parts of them) that we find have been made out we would accept that each of them amounted to unwanted conduct. The next question is whether that conduct 'related to' any particular protected characteristic. We shall deal with each in turn:

302.1. We have accepted that in exasperation, believing that the Claimant could not hear Mahika Jayasena used the expression 'who the fuck does she think she is'. We have accepted that she did this because she was exasperated with managing the Claimant. There is no basis for us to infer that the remark related to race, religion, age or disability (we shall return to gender below). The reason why this was said related to the Claimant's behaviour and not any protected characteristic she held. As such any claim of harassment on those basis must fail. We would accept that it is reasonable to regard this conduct as creating a humiliating environment.

302.2. The majority have accepted that, in a further moment of exasperation, Mahika Jayasena used the expression 'next time fucking listen'. Again there is no basis for us to infer that the remark related to race, religion, age or disability. As such any claim of harassment on those basis must fail. We would accept that it is reasonable to regard this conduct as creating a humiliating environment.

302.3. We have considered whether the use of the words 'fuck' and 'fucking' should be taken to relate to sex for the purposes of Section 26(1) simply because taken literally they relate to a sexual act. We find that these words, when used as here to add emphasis, are often used in a context where any connection with the sexual act is lost. Many swear words used in English relate to genitalia or other body parts or sexual acts. Some older phrases 'Cor blimey' (God Blind me) have origins that relate to religion. Whether such words would relate to a protected characteristic must depend on the context and circumstances in which they were used. In the present context we do not find that what was said related to sex. Whilst the Claimant did not raise any alternative case we have considered whether the use of these two swear words would amount to 'conduct of a sexual nature'. We reach the same conclusion. Whilst in some contexts that might be the case but when the words are used as simple swear words to add emphasis in a vulgar manner we are not persuaded that that would be conduct of a sexual nature. As such these two claims must fail.

302.4. We have found that Andrew Kemp did not take any sufficient action when the Claimant reported that Mahika Jayasena had sworn at her. We have found that he did so because he thought the Claimant was trying to divert attention from herself. Assuming in the Claimant's favour that such an omission might amount to unwanted conduct the issue is whether it relates to any protected characteristic. There is simply no evidence that it did. As such the claim must fail.

302.5. We have criticised the lack of communication between the Richard Sandiford and Andrew Kemp that gave rise to mixed messages about whether a line would be drawn under the incident of 14 October 2016. We would accept that the later decision to proceed with a disciplinary investigation was unwanted conduct. There is no evidence at all that that conduct related to any protected characteristic. For that reason that claim too must fail.

302.6. Finally we accepted that the letter inviting the Claimant to a disciplinary meeting was inappropriately worded in the circumstances. We had no evidence to suggest that that conduct related to any protected characteristic. It was simply a clumsily amended precedent. As such the claim fails.

<u>The harassment claims in the Second ET1</u>

303. The first matter in the Claimant's second ET1 is the disagreement that the Claimant had with Ms Allyson Walker of Specsavers payroll about whether the Claimant's certificate of fitness for work covered her for the last day named on that certificate. We are prepared to assume for these purposes that Allyson Walker acted as an agent of Wimbledon Broadway Specsavers Limited. We are prepared to assume

that the conduct was unwanted. There was no evidence whatsoever that this conduct related to sex, gender, age or religion. We are prepared to accept that it was capable of relating to disability as it concerned a sickness absence related to the Claimant's disability. However we do not find that it violated the Claimant's dignity or that it had the purpose or effect of creating the proscribed environment. In particular we do not find that it would have been reasonable for the Claimant to regard any treatment as having that effect. The reality was that this was a trivial matter where Allyson Walker simply took a different view to that of the Claimant. Elevating this to harassment would be to fall into the trap of trivialising the legislation.

304. The second incident is the actions of Specsavers Recruitment Service. The Claimant said that she was not put forward for an interview at the Ealing Broadway branch. There was no evidence that any of the Respondents to these claims had any part in that decision. The provisions relating to secondary liability are at Section 109 of the EA 2010. Mr Holloway argues, rightly we find, that there is no basis for finding any of the Respondents liable for the actions of Specsavers Recruitment Services. In this particular transaction they were not acting as an agent of Wimbledon Broadway Specsavers Limited. The fact that they were a connected company does not change that. The Claimant's remedy would to have brought a separate claim. Had she done so we would not have been satisfied that any act or omission by those individuals related to any protected characteristic.

305. The third to fifth allegations in the Second ET1 concern Matt Rising. We have not found any fault with the conduct of the grievance procedure by Matt Rising the Claimant's complaints of unwanted conduct are not made out. As such this allegation must fail.

306. The 6th allegation is simply a reference to 'brexit day' and could not amount to harassment (by the Respondents at least).

307. The final three allegations relate to the fact that Matt Rising did not immediately accommodate the Claimant's request for a transfer to the Ealing Broadway store. Insofar as this is said to be harassment related to disability we deal with it when dealing with the same allegation as a reasonable adjustments complaint. Our conclusions were that it was perfectly reasonable not to act on the Claimant's request. As such we find that the conduct had neither the purpose or effect of violating the Claimant's dignity or creating the proscribed environment. Insofar as it is said to relate to any other protected characteristic we find that there was no evidence that would allow us to infer that the decision/omission was made in a manner which related to the Claimant's race, gender, age or religion. As such those claims must fail.

<u>The harassment claims in the third ET1</u>

308. The first two allegations made in the Claimant's third ET1 are her allegations made against Peter McCrory. We have not accepted that Peter McCrory acted as the Claimant alleged and that finding is sufficient to dispose of the claim of harassment.

309. The third allegation in the third ET1 is a claim of 'whistleblowing' and not harassment.

310. The fourth allegation relates to the outcome of the grievance. It is not at all clear that the Claimant puts this forward as an allegation of harassment as she has not specified the basis of her claims and the third claim was not the subject of any case

management hearing at which the issues were determined. For completeness we shall assume that such a claim has been brought. We would accept that an outcome to a grievance process with which the complainant disagrees could amount to unwanted conduct. We would further accept that where the content of the complaint included allegations of discrimination the outcome could be said to 'relate to' the protected characteristics referred to in the complaint.

311. We have found that Matt Rising and Sophie Hicking both undertook a thorough, fair and comprehensive investigation. We accept that Sophie Hicking's conclusions amounted to her honest assessment of the evidence. Many of her conclusions matched our own although there are some small areas of disagreement. We utterly reject any suggestion (not pursued by the Claimant with either witness) that Matt Rising or Sophie Hicking acted as they did for the purpose of violating the Claimant's dignity or creating the proscribed environment. In assessing whether any such treatment had that effect we must consider (amongst the other factors set out in sub section 26(4)) whether it was reasonable for the treatment to have that effect.

312. We do not accept that the receipt of a careful and considered grievance outcome compiled as we have found with honesty is capable of amounting to harassment. It would be wholly unreasonable to regard the grievance outcome as having that effect. On that basis this claim fails.

313. The fifth allegation of the third ET1 concerns what Mahika Jayasena said when interviewed in relation to the Claimant's grievance. Mahika Jayasena had said in her interview with Matt Rising on 6 March 2017: *'Regarding money she would do extra days to get more money. She would work extra days on Sunday and not go to church'.* The context for this was a general discussion about the Claimant's relationship with Mahika Jayasena which Mahika Jayasena described as 'good'. The manner in which the Claimant has read this comment is that it contains a suggestion that she put money ahead of her attendance at church. She says that that is offensive to her religious views.

314. We consider that it is important to look at the context. The Claimant was complaining that she had been treated extremely badly at work. It was relevant (but not decisive) that the Claimant did voluntary overtime. Mahika Jayasena was correct that the Claimant did agree to work on Sundays (having originally asked not to do so). The Claimant said in evidence that she would attend an evening service. She suggested that that would make the statement of Mahika Jayasena untrue. A reasonable reader of Mahika Jayasena's comment would recognise that it might have been based on an assumption that there was only a daytime service. That is a fair assumption given that the Claimant had originally asked not to work on Sundays so she could attend church. Whilst we accept that the Claimant might have been subjectively offended by learning what Mahika Jayasena said about her we reject entirely any suggestion that the remark was made with that purpose. Putting the remark in context we do not accept that the remark had the effect of violating the Claimant's dignity or of creating the proscribed environment. As such this claim cannot succeed.

315. The sixth allegation relates to what Peter McCrory said when interviewed by Sophie Hicking. The Claimant makes the general complaint that he said that the Claimant spoke English as a second language. She refers to that as 'criticising her'. In fact the only reference to speaking English as a second language in what Peter McCrory said was:

…I hired her and in the interview she said she was in witness protection due to some issues and was living in a woman's refuge in Ealing. She said she had no family support and had learnt English off her own back. I thought that when I interviewed her there was something about her; she had some drive to do what she had done. I did give her more chances on occasions as she needed to adapt more to the way she spoke to people'

316. The passage above does not criticise the Claimant for speaking English as a second language in complement's the Claimant on learning to do so. Insofar as there is any criticism it relates to the 'way' the Claimant spoke to people. Our findings above are such that we consider it entirely fair and reasonable to criticise the Claimant for the manner in which she would (sometimes) address people.

317. We do not think that any reference made by Peter McCrory either had the purpose or effect of violating the Claimant's dignity or of creating the proscribed environment. A reasonable person would certainly not have regarded what he said as having that effect. On that basis the claim fails.

318. The seventh allegation of the Third ET1 is a complaint about what Andrew Kemp said in his interview with Matt Rising during the grievance process. In particular that he said that he believed that the Claimant was using 'diversionary tactics' when asked why he had simply taken Mahika Jayasena's word for it when the Claimant accused her of swearing at her. Again, it is unclear whether the Claimant intended this to be a complaint under Section 26 EA 2010. The Claimant simply puts 'race' as the grounds of ant treatment.

319. Whilst we would accept that this was both unwanted and was potentially humiliating we do not accept that the treatment related to race. In particular we do not find that the treatment was motivated in any way by the Claimant's race. The reason for the treatment is spelt out by the language used. The Claimant was herself being criticised and it was only in the context of that criticism that she raised her own complaint. We have found that Andrew Kemp was incorrect in his conclusion that this was a diversionary tactic but he had some reasons for believing this to be the case. We find that this was his honest belief and that it was nothing to do with the Claimant's race. There is nothing in the words complained of that related to race. As such an essential ingredient of the claim of harassment is missing and the claim must fail.

320. The eight and final allegation relates to the fact that Sherrie Yates revealed in her interview during the grievance process that her difficulties managing the Claimant were a material factor in her decision to leave. The Claimant only identifies 'race' as a protected characteristic in her ET1. We find that Sherrie Yates was simply telling the truth. We have found above that Sherrie Yates did not at any time subject the Claimant to a detriment. We have no basis for inferring that she acted in any way because of the Claimant's race. There is simply no foundation for any such case. There is no evidence that what Sherrie Yates said in the grievance interview 'related to' race. On that basis the case must fail.

Direct Discrimination Contrary to sections 13 and 39 of the Equality Act 2010

The legal framework – direct discrimination

321. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

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

322. In order to establish less favourable treatment, it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances.

323. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572**.

324. Section 39(2)(d) of the Equality Act 2010 makes it unlawful to discriminate against an employee by subjecting her to a 'detriment'.

Discussion and conclusions

325. The Claimant presented a large number of complaints of direct discrimination relying on the protected characteristics of age, race, gender, religious belief and disability. We have set out above that (for the claims made) any complaint made under Section 13 requires either a detriment or a dismissal. We have set out above our findings as to whether or not the Claimant has established that she suffered from a detriment. We deal with the remaining claims in this section and look at the reason for the treatment afforded to the Claimant.

326. Lest we have omitted to deal with any aspect of the case, and in case any of our conclusions as to what is or is not a detriment are the subject of any further challenge, we should set out our general conclusions in respect of the reason that the Claimant was treated as she was. We have found that whilst the Claimant was regarded as highly competent her colleagues believed that her meticulous nature could make her slow at undertaking certain tasks. We accept the evidence given by the Respondents that the Claimant could at times be very abrasive speaking in a manner that upset her colleagues. This manifested itself most frequently when the Claimant was given instruction or when she was dealing with colleagues she perceived as her junior. This could be sufficiently extreme as to cause customers to comment or colleagues to fall silent. As will appear below we reject all of the Claimant's allegations of direct discrimination on the basis that the reason for the Claimant's treatment was not any protected characteristic. In respect of the allegations where we have not accepted the Claimant's account we consider that in many instances it was the Claimant's own conduct or attitude that has given rise to her perception that she has been treated less favourably.

327. As we have done in respect of the claims for harassment we shall address each claim where we have accepted that the Claimant has suffered a detriment. The claims identified in the first and second ET1 in the list of issues were as follows: *'1, 2, 3, 4, 6,*

7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51 and 52 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incidents set out in her second Claim Form'. To these must be added the claims set out in the third ET1.

328. Whilst we deal with all of the claims that have been advanced we have concluded that there is no evidence at all in respect of any of the Claimants claims that any of the treatment she complains of was because of any protected characteristic. The Claimant's colleagues had diverse racial origins and had a wide variety of religious beliefs (and none). Other than the fact that the Claimant was able to demonstrate that there was some treatment which she could reasonably regard as a detriment and the fact that she did have some protected characteristics there was no further evidence from which we could infer that any of the treatment complained of was because of any protected characteristic.

Claims in the first ET1

329. As we have set out above we have decided that in respect of Allegations 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52 plus allegations 55 – 61 'the background allegations' the Claimant has not suffered any detriment. That leaves only allegation 1, 14, 18, 26 and 46 where we have upheld some or all of the allegations made by the Claimant.

330. The issues are whether the Claimant can establish (1) 'less favourable' treatment (2) because of any of the protected characteristics she has identified. We shall deal with each in turn:

330.1. We have accepted that in exasperation, believing that the Claimant could not hear Mahika Jayasena used the expression *'who the fuck does she think she is'*. We have accepted that she did this because she was exasperated with managing the Claimant. Mahika Jayasena did not accept that she used this phrase. We do not believe that she was attempting to mislead us but find that she had no recollection of swearing (perhaps using swear words more often that she realises). On that basis the failure to accept that she had used this expression provides little foundation for an inference of discrimination. We are able to deal with the 'reason why' question without recourse to the burden of proof provisions on the assumption that it was for the Respondents (to this claim) to prove the reason for the treatment. We have regard to the evidence as a whole and we find that the reason why this was said related to the Claimant's behaviour and not any protected characteristic she held. Simply put the reason for the treatment was the manner in which the Claimant had behaved earlier that morning. We find that Mahika Jayasena would have behaved in exactly the same way towards a person who did not share each of the protected characteristics relied upon by the Claimant. As such the claim must fail.

330.2. The majority have accepted that, in a further moment of exasperation, Mahika Jayasena used the expression 'next time fucking listen'. We repeat our findings and observations in the paragraph above. We are satisfied of two things. Firstly, on the finding of the majority Mahika Jayasena swears

more than she might realise and secondly that the resistance of the Claimant to take instruction was a point of friction. The reason for the treatment was again that Mahika Jayasena had become exasperated at the behaviour of the Claimant. The protected characteristics of the Claimant played no part in her conscious or subconscious reasoning. As such this claim too fails. In this instance and in the paragraph above we have assumed that the burden of proof shifted to the Respondents. We took that approach because the allegations were denied (not we find dishonestly). Nevertheless, the totality of the evidence was sufficient to satisfy us of the reasons for the treatment.

330.3. We have found that Andrew Kemp did not take any sufficient action when the Claimant reported that Mahika Jayasena had sworn at her. He said he did so because he thought the Claimant was trying to divert attention from herself. As such he reached an incorrect conclusion which operated to the Claimant's detriment. We find that the Claimant has failed to prove facts from which the Tribunal could infer that there has been any discrimination. Whilst the Claimant has established that she has suffered detriment and that she has protected characteristics there is nothing more. We accept that Andrew Kemp was unduly dismissive of the Claimant's complaint. That said he was entitled to have regard for the timing of that complaint and there were matters that could have given rise to a suspicion that the Claimant was diverting attention from herself. The fact that he got this wrong was not so surprising that it called out for an explanation. If we are incorrect about this we go on to consider whether Andrew Kemp has satisfied us that his treatment of the Claimant was in no sense whatsoever because of any protected characteristic she held. We are so satisfied. Andrew Kemp honestly believed that the Claimant had been responsible for some difficulties between colleagues. We find that he honestly believed that when the Claimant raised her complaint about Mahika Jayasena (and Sherrie Yates) that she did so to divert attention away from herself. We are satisfied that that reasoning was in no sense whatsoever because of any protected characteristic held by the Claimant but was because of what he had heard observed and had inferred from that.

330.4. We have criticised the lack of communication between the Richard Sandiford and Andrew Kemp that gave rise to mixed messages about whether a line would be drawn under the incident of 14 October 2016. We proceed on the basis that it is for the Respondent to show the reason for the treatment and that it was in no sense whatsoever on the basis of any protected characteristic. The reason for the treatment was, as we have said, a lack of communication. Richard Sandiford would have been prepared to let matters rest with a ticking off and an apology. He was unaware that Andrew Kemp had, only a few days before, warned the Claimant that any further friction could lead to disciplinary action. Andrew Kemp was unaware of the degree to which Richard Sandiford had indicated that a line would be drawn under the event. We are satisfied that the decisions of the Directors had nothing whatsoever to do with the Claimant's protected characteristics.

330.5. Finally, we accepted that the letter inviting the Claimant to a disciplinary meeting was inappropriately worded in the circumstances. Again, we are

able to move directly to the reason for the treatment. In this case it was the failure to amend a standard HR Template to make it clear that dismissal was not contemplated. We are entirely satisfied that the reason for this treatment was inadvertence and that it had nothing whatsoever to do with any protected characteristic of the Claimant.

The direct discrimination claims in the Second ET1

331. The first matter in the Claimant's second ET1 is the disagreement that the Claimant had with Ms Allyson Walker of Specsavers payroll about whether the Claimant's certificate of fitness for work covered her for the last day named on that certificate. We are prepared to assume for these purposes that Allyson Walker acted as an agent of Wimbledon Broadway Specsavers Limited. The Claimant does not suggest that she ever met Allyson Walker. In her second ET1 the Claimant refers only to disability as the protected characteristic she relies upon. We are not satisfied that the Claimant has established facts from which we could infer discrimination because of disability (and for completeness any other protected characteristic). The fact that but for the Claimant's ill health the disagreement over the fitness for work certificate would not have arisen does not assist us. The question is whether we can infer that disability was the reason for the treatment. The proper comparator being a person presenting a fitness for work certificate who was not disabled. There is no basis for an inference that such a person would have been treated any differently. The Claimant has not established facts from which we could infer discrimination. On that basis the claim fails.

332. The second incident is the actions of Specsavers Recruitment Service. The claim fails for the same reason as the claim for harassment arising out of the same facts.

333. The third to fifth allegations in the Second ET1 concern Matt Rising. We have not found any fault with the conduct of the grievance procedure by Matt Rising. As such we have held above that there was no detriment and, as such this allegation must fail.

334. The 6th allegation is simply a reference to 'brexit day' and could not amount to direct discrimination.

335. The final three allegations relate to the fact that Matt Rising did not immediately accommodate the Claimant's request for a transfer to the Ealing Broadway store. It appears that the Claimant relies on all of the protected characteristics she has referred to. We accept that the Claimant could consider this to her disadvantage. We have dealt with these three allegations by assuming that the (relevant) Respondent Wimbledon Broadway Specsavers Limited bears the burden of showing that the reason for the treatment was in no sense because of any protected characteristic.

336. We are satisfied that the reason why Matt Rising did not immediately agree to transfer the Claimant to the Ealing Store were (as he said):

336.1. The grievance process was incomplete; and

336.2. There was no occupational health report dealing with the need or efficacy of such a change; and

336.3. The 'transfer' of the Claimant would require a third party to offer her a job and this could not be imposed by her employer.

337. We deal with the reasonableness of these decisions below when considering the same facts as part of our consideration of the claim that there has been a failure to make reasonable adjustments. However, we are entirely satisfied that the reasons given to the Claimant were the actual reasons for the treatment. The Claimant would have been treated the same whether or not she had any of the protected characteristics she relies upon. As such we are satisfied that the Claimant's protected characteristics in no sense whatsoever informed Matt Rising's treatment of her.

The direct discrimination claims in the third ET1

338. The first two allegations made in the Claimant's third ET1 are her allegations made against Peter McCrory. We have not accepted that Peter McCrory acted as the Claimant alleged and that finding is sufficient to dispose of the claim of direct discrimination.

339. The third allegation in the third ET1 is a claim of 'whistleblowing' and not discrimination.

340. The fourth allegation relates to the outcome of the grievance. It does appear that the Claimant has categorised this as a claim for direct discrimination relying on the protected characteristics of race, sex and disability. As above we would accept that an outcome to a grievance process with which the complainant disagrees could amount to a detriment.

341. We have found that Matt Rising and Sophie Hicking both undertook a thorough, fair and comprehensive investigation. We accept that Sophie Hicking's conclusions amounted to her honest assessment of the evidence. Many of her conclusions matched our own although there are some small areas of disagreement. That finding is sufficient to dispose of any claim of direct discrimination. We are satisfied that in making a thorough and honest assessment of the evidence Sophie Hicking acted in no sense whatsoever because of the Claimant's race, sex or disability.

342. The fifth allegation of the third ET1 concerns what Mahika Jayasena said when interviewed in relation to the Claimant's grievance. Mahika Jayasena had said in her interview with Matt Rising on 6 March 2017: *'Regarding money she would do extra days to get more money. She would work extra days on Sunday and not go to church'.* The Claimant says that this was discrimination because of race and/or religion. We repeat what we have said when considering this as an allegation of harassment. Mahika Jayasena could reasonably have thought that the Claimant did miss a church service in order to have come to work. We do not consider that there is any basis upon which we could infer that Mahika Jayasena made this statement because the Claimant was a catholic or because she was Burmese. We find that Mahika Jayasena was giving an honest account of her dealings with the Claimant and emphasising that she worked voluntary overtime apparently (to her) at the expense of attending a church service (the context being a belief that this was inconsistent with poor working conditions). We find that she would have done so whatever religion or race the Claimant was. As such, assuming it fell to Mahika Jayasena to establish the reason for any treatment we are satisfied that it was not because of race or religion.

343. The sixth allegation relates to what Peter McCrory said when interviewed by Sophie Hicking. This is said to be an allegation of discrimination because of race. The Claimant makes the general complaint that he said that the Claimant spoke English as a second language. We repeat the findings that we made in respect of the harassment claim. Peter McCrory's comments are complimentary. We do not accept in those circumstances the Claimant has established any detriment. If we are wrong about that then the context was that Peter McCrory was being asked about the Claimant's communication skills. Communication and language skills do not equate to race. We are satisfied that Peter McCrory has shown that the reason for any treatment was his wish to explain his admiration for the Claimant teaching herself English and his separate concerns about how she spoke to others. That reason is not because of race.

344. The seventh allegation of the Third ET1 is a complaint about what Andrew Kemp said in his interview with Matt Rising during the grievance process. In particular that he said that he believed that the Claimant was using 'diversionary tactics'. We repeat our findings made above when considering his failure to take any action in response to the complaint and our findings when considering the complaint as one of harassment. We find that he honestly believed what he said. Given that finding we are satisfied that he would have behaved exactly the same has any hypothetical comparator behaved in the same way. We are satisfied that his treatment of the Claimant is was in no sense whatsoever by reason of the Claimant's race.

345. The eighth and final allegation relates to the fact that Sherrie Yates revealed in her interview during the grievance process that her difficulties managing the Claimant were a material factor in her decision to leave. The Claimant only identifies 'race' as a protected characteristic in her ET1. We find that Sherrie Yates was simply telling the truth. We have found above that Sherrie Yates did not at any time subject the Claimant to a detriment. We have no basis for inferring that she acted in any way because of the Claimant's race. There is simply no foundation for any such case. We are satisfied that Sherrie Yates would have said the same had any hypothetical comparator, who she had experienced the same difficulties, contributed to her decision to resign. On that basis the case must fail.

Discrimination because of something arising in consequence of disability

Section 15 & 39– Equality Act 2010

The legal framework – Section 15

346. Section 15 of the EA 2010 provides as follows:

15. Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

347. Guidance as to the proper approach to be taken to applying Section 15 EA 2010 was given in ***Pnaiser v NHS England*** **[2016] IRLR 170, EAT** that guidance suggests that a tribunal should ask:

347.1. Was there unfavourable treatment and by whom?

347.2. What caused the impugned treatment, or what was the reason for it?

347.3. Motive is irrelevant.

347.4. Was the cause/reason 'something' arising in consequence of the claimant's disability?

347.5. The more links in the chain of causation, the harder it will be to establish the necessary connection.

347.6. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

347.7. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

347.8. It does not matter in which order these matters are considered by the tribunal.

Discussion and conclusions – Section 15 EA 2010

348. In the list of issues prepared by EJ Tsamados the Claimant had labelled a large number of her claims brought in her first ET1 as being claims brought under Section 15 EA 2010. The Claimant had not recognised that to succeed in such a claim there must be 'something that arises as a consequence of disability'. Given that the Claimant focused on her own disability only it is simply not possible for any of the Claimant's Section 15 claims to succeed until the point that she was disabled for the purposes of Section 6 of the Equality Act 2010. At the very earliest this was 9 November 2016. We have set out above the consequences of this which are that any claim pre-dating 9 November 2016 must inevitably fail.

349. The Claimant had not been asked to identify the 'something' that arose as a consequence of her disability. The Claimant had already left the workplace by 9 November 2016 and did not return. An employment tribunal is not inquisitorial and it was not our role to try and squeeze the facts into a claim on behalf of the Claimant. That should not prevent us from dealing with obvious points and it is clear that the Claimant's absence of work was a consequence of her disability. It was equally clear that it was not the Claimant's case that her perception of events or her relationships with her colleagues arose as a consequence of her disability. We had no or at least no sufficient evidence that that was the case. We therefore proceed only by asking whether the Claimant was treated unfavourably because she was absent from work. Once again we will deal with the claims that arise under each ET1.

The Claimant's first ET1

350. In the Claimant's schedule and the list of issues only allegations 47, 48, 49, 50, 52, 53 & 54 are said to be allegations brought under Section 15 and which post-date 9 November 2016 when the Claimant's disability arose. We shall deal with each in

turn. Before we do so we shall address the issue of knowledge of the Respondent that the Claimant had a disability.

351. In order for the Respondents to have knowledge of the Claimant's disability of the purposes of Section 15 they need not know as a matter of law that the Claimant was disabled it is sufficient that they have actual or constructive knowledge of the facts that show that the Claimant was disabled see ***Gallop v Newport City Council*** **[2013] EWCA Civ 1583**. Those facts include those necessary to establish that any impairment is 'long term'. If the impairment has not lasted for 12 months then the Employer would have to have actual or constructive knowledge that the impairment was 'likely' to last 12 months. In this context 'likely' means that it could well happen see ***SCA Packaging Limited v Boyle*** **[2009] UKHL 37 HL**. Actual or constructive knowledge cannot be established with the benefit of hindsight but must look at the information available at the time ***McDougall v Richmond Adult Community College*** **[2008] IRLR 227**.

352. The burden of proof as to any lack of knowledge falls on the Respondent(s). We had very little evidence to assist us with the question of when, had they made reasonable enquiries the Respondent(s) ought to have known that the Claimant's condition was likely to last 12 months. We are satisfied that there was not sufficient information reasonably available to the Respondent until the expiry of the Claimant's first fitness for work on 8 December 2016. Prior to that date we are satisfied that the Respondent(s) have shown that they did not have the requisite knowledge that the Claimant was disabled.

353. Allegation 47 concerns the Claimant being told that Specsavers HR department exists for the benefit of the store managers and not their employees on 9 November 2016. As such the Respondents did not have the requisite knowledge to give rise to liability under Section 15 EA. In any event assuming that to be unfavourable treatment it is clear to us that the reason for that treatment is that it was true. That is the manner in which Specsavers operate their business. The cause of the treatment was not that the Claimant was off work. As such this claim does not succeed.

354. Allegation 48 simply recites the fact that the Claimant first raised a grievance on 9 November 2016. The Respondent(s) would have had no knowledge of disability and in any event the Claimant has not established any unfavourable treatment.

355. Allegation 49 alleges that on 15 November 2016 Abi Dowling swept the Claimant's grievance under a carpet. We have found that that was not the case at all and find that there was no unfavourable treatment. The Respondent(s) would have had no knowledge of disability on that date.

356. Allegation 50 complains that on 30 November 2016 Andrew Kemp sent her a further invitation to a disciplinary meeting. The Respondent(s) would have had no knowledge of disability on that date. However, if they had the Claimant has not demonstrated that that action was taken because of something arising in consequence of her disability. The decision to proceed with disciplinary action was taken before the Claimant fell ill and the decision to pursue that, when the Claimant's fitness for work certificate was due to expire was we find for exactly the same reasons and the cause of the treatment was not because of something arising in consequence of disability.

357. Allegations 52 to 54 can be dealt with together and all concern the Claimant's request to move to the Ealing Broadway store. At this stage we find that the Respondent had constructive knowledge that the Claimant met the definition of disability in Section 6 EA 2010. We have set out above when considering these allegations as claims of direct discrimination and victimisation what we find were the reasons why the Claimant was not 'transferred'. We are satisfied that those are the only reasons. We do not consider that cause of the Claimant's treatment (effectively telling her that any consideration of a transfer would be considered at the conclusion of the grievance process) was anything that arose in consequence of her disability.

358. It is strictly unnecessary for us to consider the justification defence and the Respondent(s) did not address us specifically on it. That said we consider that an employer dealing with a grievance which amongst other matters challenges a disciplinary process would have a legitimate aim of completing that process before taking any decisions that may be contingent on the outcome. The Respondent(s) were proceeding reasonably quickly with the grievance in all of the circumstances. As we set out below Matt Rising was correct to say that a transfer was not a simple matter. Whilst the Claimant has indicated, supported by her GP that her return to work would be assisted by a 'transfer' and the delay caused some disadvantage we believe that it was entirely proportionate to resolve the Claimant's grievance one way or the other before moving to the complex question of whether the Ealing Broadway store could have been prevailed upon to accept her. As such we would have accepted that the treatment was justified.

<u>The Claimant's second ET1 – Section 15 claims</u>

359. The first Allegation in the Claimant's second ET1 relates to the disagreement about the end date of the Claimant's first Fitness for work certificate. That took place on 5 December 2016 at a time when we have held that the Respondent had no knowledge of disability. If we are wrong about that then we find that the cause of the treatment was an honest misunderstanding about the issue of whether the dates on the certificate were inclusive or exclusive. We accept that there is a connection to the Claimant's absence but consider that too remote as to provide the cause of the misunderstanding.

360. The second incident is the actions of Specsavers Recruitment Service. The claim fails for the same reason as the claim for harassment arising out of the same facts. The Respondent(s) have no legal responsibility for the actions of those third parties.

361. The third to fifth allegations in the Second ET1 concern Matt Rising. We have not found any fault with the conduct of the grievance procedure by Matt Rising. We conclude that there was no unfavourable treatment and the claims must fail on that basis.

362. The 6th allegation is simply a reference to 'brexit day' and could not amount to discrimination contrary to Section 15 of the EA 2010.

363. The final three allegations relate to the fact that Matt Rising did not immediately accommodate the Claimant's request for a transfer to the Ealing Broadway store. We have dealt with this allegation above in respect of the earlier request. We make the same findings here. Putting off consideration of the request was not because of anything arising in consequence of disability but as a consequence of the three

matters we accept were the reasons for the decision. If we are wrong about that we would have come to the same conclusion in respect of justification as we have set out above.

The Claimant's third ET1 – Section 15 claims

364. The Claimant lists only one claim in her third ET1 where she refers to her disability. That is that on 19 December 2017 she was given the outcome of her grievance. She says that this amounted to a 'cover up'.

365. We would accept that the conclusions of the grievance report compiled, with great care, by Sophie Hicking could amount to unfavourable treatment as we have found that she reached incorrect conclusions on some matters. We have found that the conclusions that she reached were honestly held.

366. There is no evidence at all that the conclusions were because of anything arising in consequence of the Claimant's disability. The fact that the Claimant had been unwell had slowed the process down mainly because Matt Rising and Sophie Hicking made every reasonable effort to accommodate the Claimant. We do not understand the Claimant to be complaining of the process but only the outcome. We do not find that the outcome was affected in any way by the fact that the Claimant had been ill or that she was not at work.

Victimisation contrary to Sections 27 and 39 of the Equality Act 2010

The Legal Framework - victimisation

367. A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section read as follows:

> *27 Victimisation*
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> > *(a) B does a protected act, or*
> >
> > *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> > *(a) bringing proceedings under this Act;*
> >
> > *(b) giving evidence or information in connection with proceedings under this Act;*
> >
> > *(c) doing any other thing for the purposes of or in connection with this Act;*
> >
> > *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is*

made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

368. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. That sub section provides, amongst other things, that it will be unlawful to victimise an employee by subjecting him to a detriment. The meaning of 'detriment' is the same as we have set out above when considering the claims of direct discrimination.

369. No comparator is required to establish victimisation ***Woodhouse v West North West Homes Leeds Ltd*** **[2013] IRLR 733**. What is necessary is that the employee establishes that they did a protected act and that they have suffered a detriment. Thereafter the examination turns to the reason why the detriment was suffered and is subject to the burden of proof provisions which we have set out above.

370. The test of causation 'because' is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment ***Greater Manchester Police v Bailey*** **[2017] EWCA Civ 425**

Discussion and conclusions – victimisation claims

Was there a protected act and if so when?

371. Section 27 EA 2010 provides protection for a person who has done a protected act but not against victimisation in its more general sense. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. We have set out our findings as to whether the Claimant suffered any detriment above.

372. The Claimant, as noted by EJ Tsamados, has not understood the difference between the protection afforded by Section 27 EA 2010 and the colloquial use of the expression victimisation. In the list of issues she has included events going right back to the start of her employment and she has not identified any protected act. We were somewhat concerned by the 'it will all come out in the hearing' approach that has been taken but the reality was that conventional case management had proved very difficult indeed. The approach that we took was to have regard for all of the evidence and to identify the occasions upon which the Claimant did any protected act.

373. The Respondent's position, set out in Mr Holloway's written submissions is that the first occasion that the Claimant did any protected act that would satisfy the definition in Section 27(1) EA 2010 was when she sent her formal written grievance to Linda Weaver by post on 14 December 2016. We agree that is correct. In her first grievance of 9 November 2016 the claimant refers to unequal treatment but the wording of her letter makes it clear she is comparing her treatment with the behaviour of managers. The Claimant used the words discrimination and victimisation in her earlier grievance of 2 December 2016 but she did not use them in any context that would suggest she was making an allegation of an infringement of the Equality Act

2010. The Respondents did not invite us to make a finding of 'bad faith' and so we shall not consider that issue. We would simply note that if a person has honestly convinced themselves of facts or belief that have no grounding in reality that would not necessarily amount to acting in bad faith.

374. We are satisfied that on none of the earlier occasions where the Claimant raised her concerns with any of the Respondents did the Claimant make any allegation of discrimination in its technical sense. We are satisfied that she did not intimate that she would bring proceedings under the EA 2010 at any time before that date and that the Respondents did not believe that she was going to do so.

375. After the Claimant presented her full grievance on 14 December 2016 she constantly and repeatedly made allegations of discrimination and alluded to bringing proceedings. We consider that each time she did so she did a protected act. Quite clearly instigating and pursuing the three claims that we have dealt with also amounted to doing protected acts.

376. The effect of these conclusions is that any claim of victimisation that relates to an alleged detriment predating 14 December 2016 must fail as any alleged conduct could not as a matter of logic be 'because of' an event that had not yet occurred or a belief that had not yet arisen.

Consequences of those findings

377. **As a consequence (assuming we had found them all to be made out and amount to a detriment) allegations 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 50 and then 55 – 61 (the background claims) together with the first incident referred to in the Second ET1 and the allegations against Peter McCrory in the Third ET1 must all fail insofar as they amount to claims of victimisation contrary to Section 27 of the EA 2010 as the acts complained of predate any protected act.**

378. Having eliminated any claim that predated the first protected act we shall address each of the Claimant's ET1s in turn.

The first ET1 - victimisation

379. Only allegations 51 to 54 in the Claimant's first ET1 post-date the first protected act. We have rejected the suggestion that allegation 51 (Sherrie Yates last day of work) and allegation 54 (raising a further grievance on 7 February 2017) amounted to subjecting the Claimant to a detriment. On that basis neither claim can succeed as a claim for victimisation under Section 27 of the EA 2010.

380. Allegations 52 and 53 can be taken together. These relate to the Claimant's request to be transferred to the Ealing Broadway store. This is a matter that the Claimant also says is a failure to make reasonable adjustments.

381. We repeat our findings in respect of these two allegations when put as claims of direct discrimination. To succeed in a claim of victimisation no comparator is required but, to succeed, the tribunal would have to accept that the fact that the Claimant had done one or more protected acts was a materially influenced the

decision maker (here Matt Rising). If we are satisfied that the fact that there had been a protected act played no part in Matt Rising's reasons then the claim must fail.

382. We have found above that Matt Rising considered the request for a transfer to be premature because the grievance was unresolved, that he thought it appropriate to get advice from Occupational Health in advance of any decision and he considered that simply transferring the Claimant was not a matter within his gift. We are satisfied that those were the entirety of his reasons.

383. We do not accept that saying that consideration of a 'transfer' should await the outcome of the grievance process is to be equated with a finding that the delay is because of the fact that the Claimant brought a grievance. We find that properly understood Matt Rising was saying that until the issue of the grievance was resolved it was too early to determine whether the Claimant would want to, or could be expected to, return to work at Wimbledon. That was a proper consideration and distinct from the protected act itself.

384. We are satisfied that the fact that the Claimant had by then done protected acts was not in any sense the reason for not immediately 'transferring' her to Ealing Broadway. On that basis the claim must fail.

385. <u>The Claimant's second ET1 - victimisation</u>

386. The first allegation in the Claimant second ET1 relates to the correspondence with Allyson Walker about the whether the expiry date on the Claimant's certificate of fitness for work was or was not inclusive. Allyson Walker's assertion that it was exclusive was made on 5 December 2016 prior to the Claimant doing any protected act. As such the claim cannot succeed. In any event there was no evidence that Allyson Walker knew anything about the Claimant's grievance.

387. The second allegation is that on 13 March 2017 Specsavers Recruitment Service declined to forward the Claimant's CV to the Ealing Broadway store. We repeat our findings above in respect of this matter. On the evidence before us Recruitment Service was not acting as an agent or employee of any of the Respondents in this claim. As such none of the respondents are liable for their acts or omissions.

388. The third and fifth allegations relate to the conduct of the grievance meeting by Matt Rising. We have found above that his conduct was such that the Claimant has failed to establish that she was subjected to any detriment. As such this allegation must fail.

389. The sixth allegation which refers to 29 March 2017 as Article 50 makes no allegation that the Claimant has suffered a detriment at the hands of any of the Respondents.

390. The remaining allegations all relate to the fact that Matt Rising did not immediately transfer the Claimant to the Ealing Broadway store. The issue is the reason for that omission. We have set out our reasons for concluding that the reason for that was not the fact that the Claimant had done a protected act when dealing with the same point raised in the first ET1. We rely on the same reasons when dealing with these later allegations. The fact that the Claimant had done protected acts was part of the background but in no sense, was it the reason for the decision.

The Claimant's third ET1 - victimisation

391. The first two incidents mentioned in the third ET1 (those relating to Mr McCrory) predate the first protected act and, even if we had accepted the Claimant's factual case, could not succeed as claims under Section 27 EA 2010.

392. The third allegation is put as a 'whistleblowing' claim and not a victimisation claim.

393. The fourth allegation is a complaint about the outcome of the grievance and whilst it is not expressly stated as such it must be an allegation levelled at Sophie Hicking. To succeed in this claim, it would be necessary to show that the fact that the Claimant had done protected acts was a material influence on the mind of the decision maker.

394. We have found above that Sophie Hicking carried out a thorough and comprehensive investigation and that her conclusions reflected her honest opinions. The issue is whether those conclusions were materially influenced by the fact that the Claimant had done protected acts. We find that they were not. Where a person makes a conscientious effort to arrive at the truth of allegations of discrimination the fact that they do not uphold the complaint provides no support for the suggestion that they did so because the complaint was a protected act. We reject the Claimant's claim of victimisation in respect of this allegation.

395. It is possible for us to deal with the last four allegations together. Each concerns what the Claimant's colleagues said when they were interviewed as part of the grievance process. We repeat our findings that we have set out above when considering the same facts as allegations of direct discrimination. In particular we repeat our finding that each person interviewed gave an honest account of their dealings with the Claimant. We are not asking whether 'but for' the protected act would they have spoken as they did but looking for the 'reason why' they did. The answer is that each of them was giving an honest response to the questions they were asked. There is no evidence in any of the 4 cases from which we could infer that the reasons for making the comments attributed to them was because the Claimant had done a protected act. We are satisfied that the reason the comments were made was that they were honest answers to relevant questions. As such the claims must fail.

Failure to make reasonable adjustments contrary to Sections 20, 21 and 39 of the Equality Act 2010

396. Of all the Claimant's claims these claims were perhaps those to have suffered most from a lack of understanding as to what would need to be established to succeed. We were wary about adopting a wholly inquisitorial approach as to do so might be unfair to the Respondent.

397. As we have set out above on the basis of the case presented to us no claim under Section 20 EA 2010 could arise until the Claimant had a disability. For that reason any claim that predated 9 November 2016 could not succeed. We shall therefore look only at claims which postdate that.

The legal framework – reasonable adjustments

398. The material parts of Section 20 of the Equality Act read as follows:

Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4)…..

399. Substantial is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

400. The proper approach to a reasonable adjustments claim remains that suggested in ***Environment Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

a) the provision, criterion or practice applied by or on behalf of the employer; or

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

401. Once again we will deal with the claims that arise under each ET1. We use the shorthand PCP to refer to a 'provision, criterion or practice'.

The Claimant's first ET1

402. In the Claimant's schedule and the list of issues only allegations 47, 52, 53 & 54 are said to be allegations brought under Section 20/21 and which post-date 9 November 2016 when the Claimant's disability arose.

403. The duty to make reasonable adjustments does not arise until the employer has both knowledge that the employee has a disability (the same as in S15) and knowledge that the employee is placed at a substantial disadvantage See Paragraph 20 of Schedule 8 to the EA 2010 see ***Wilcox v Birmingham Citizens Advice Bureau Services Limited*** **UKEAT/0293/10/DM**. We repeat our findings in relation to the knowledge of the Respondent which we have set out when discussing the Section 15 claims. It follows that there was no duty to make any reasonable adjustments that predated 8 December 2010.

404. Allegation 47 concerns the Claimant being told that Specsavers HR department exists for the benefit of the store managers and not their employees on 9 November 2016. As such the Respondents did not have the requisite knowledge to give rise to

liability under Section 15 EA. In any event if the failure to have an HR department accessible to employees is seen as a PCP we had no evidence that it put the Claimant at any greater disadvantage than other employees attempting to resolve issues at work. Section 20 requires such a comparison to be made and as a consequence this claim must fail.

405. Allegations 52 to 54 can be dealt with together and all concern the Claimant's request to move to the Ealing Broadway store. It is also convenient to deal with the same claims that are set out in the Second ET1. At this stage we find that the Respondent had constructive knowledge that the Claimant met the definition of disability in Section 6 EA 2010.

406. In February 2016 when the matter was first raised by the Claimant there was no indication that the Claimant was well enough to work anywhere. Abi Dowling responded to the Claimant informing her that any question of reasonable adjustments would be considered by her employer as a part of any return to work.

407. By 3 March 2017 the Claimant had obtained letters from her psychologist and from her GP on that both supported her contention that a move to Ealing Broadway would improve her mental health and allow her to work sooner than if she was required to work at Wimbledon. It appears that she sent both letters to Matt Rising before the grievance meeting on 24 March 2016.

408. Following the grievance meeting the Claimant again raised the issue of a transfer to Ealing Broadway in an e-mail that we would suggest was unnecessarily combative unkindly referring to Matt Rising as 'ignorant'. In response to that e-mail Matt rising sent his e-mail of 4 April 2017 in which he explained his reasons for not immediately acting upon the Claimant's suggestion.

409. The Claimant has not specifically identified a PCP. It seems to us that the matter that gave her difficulty was working with the managers of the Wimbledon Broadway store who she believed had behaved badly towards her. It is quite difficult to see this as a PCP but we would accept that the legislation should be wide enough to accommodate this complaint.

410. Turning to the issue of a comparator we consider that the Claimant is able to show a substantial disadvantage. A person without the Claimant's disability may have been reluctant to work with the managers she or he had complained about but in this case the Claimant has provided evidence that doing so would impede her recovery. That puts her in a comparatively worse position that an employee without her disability.

411. The issue then becomes whether it was reasonable to agree to make the adjustment contended for. That is an objective question that the Tribunal must answer for itself.

412. The evidence before us showed that each store operated as a separate limited company with the two working Directors in charge of all staffing decisions. We would accept that it was theoretically possible for the founding directors to use their power to remove the board of directors. As such it is theoretically possible that a working director who declined to accept an employee could be removed from the board. Powers aside we accept that it was open to Wimbledon Broadway Specsavers Limited to ask whether or not the Ealing Broadway company would employ the Claimant.

Wimbledon Broadway Specsavers Limited certainly could not direct that company to do so. We entirely agree with what Matt Rising wrote to the Claimant that it was not as simple as transferring her to Ealing Broadway.

413. Had Wimbledon Broadway Specsavers Limited taken steps to persuade the Ealing Broadway store to accept the Claimant it would have had to explain its reasons. We find it unlikely that the Directors of the Ealing Broadway store would have been willing to simply accept the Claimant in circumstances where there were pending disciplinary proceedings and a half completed grievance process.

414. At no stage was the Claimant told that the possibility of a 'transfer' would not be investigated. She was told that the grievance process should be completed first and then at that stage adjustments considered. We consider it important to consider whether it was reasonable to 'transfer' the Claimant at the various times that she asked.

415. The Claimant had brought a grievance and that was being properly and thoroughly investigated. We think it reasonable that Matt Rising believed that that process should be completed ahead of looking at the question of where the Claimant might work. The whole purpose of a grievance procedure is to see whether workplace problems could be resolved. It was reasonable to see whether matters could be resolved though that procedure as a first attempt to overcome the substantial disadvantage that we have identified. In other words it was reasonable to try and follow a less complex solution to the problem before embarking on the far more complex solution of seeking to move the Claimant.

416. We do not think that it would necessarily have been reasonable to await an Occupational Physician's report before moving matters forward if that had been the only reason for the delay.

417. We would accept that if the grievance process had not resolved matters (which hindsight would suggest is the case) at some point it might have been incumbent on Wimbledon Broadway Specsavers Limited to ask if the Ealing Broadway store would offer her employment. In reality that was all her employer could do. We find that that point had not arisen by the time that the Claimant resigned. No duty subsisted after her resignation as the problem did not persist.

418. To conclude we find that there had not been a failure to make reasonable adjustments by either transferring or supporting a transfer of the Claimant to the Ealing Broadway store.

<u>The Claimant's second ET1 – Section 20 claims</u>

419. The first Allegation in the Claimant's second ET1 relates to the disagreement about the end date of the Claimant's first Fitness for work certificate. That took place on 5 December 2016 at a time when we have held that the Respondent had no knowledge of disability. We do not consider that a one off misunderstanding about the dates on a fitness for work certificate put the Claimant at any comparative disadvantage. An employer without any disability would suffer the same minor inconvenience. For both these reasons the reasonable adjustment claim must fail.

420. The second incident is the actions of Specsavers Recruitment Service. The claim fails for the same reason as the claim for harassment direct discrimination and

victimisation arising out of the same facts. The Respondent(s) have no legal responsibility for the actions of those third parties.

421. The third to fifth allegations in the Second ET1 concern Matt Rising. We have not found any fault with the conduct of the grievance procedure by Matt Rising. The Claimant has not identified any PCP in these proceedings. We note that Matt Rising agreed to meet the Claimant on 'neutral territory'. We find that he adjusted the timescale of the meetings with the Claimant to accommodate her ill health. The Claimant complains about the notes of the first grievance meetings and in the second (which did not take place) asked if she could record the meeting. Given that the Claimant had a trade union representative we do not find that the Claimant was at any substantial disadvantage by the fact that the earlier meeting was not recorded. As such we do not find that there was any further adjustment that Wimbledon Broadway Specsavers Limited were required to do.

422. The 6th allegation is simply a reference to 'brexit day' and could not amount to a failure to make reasonable adjustments.

423. The final three allegations relate to the fact that Matt Rising did not immediately accommodate the Claimant's request for a transfer to the Ealing Broadway store. We have dealt with this allegation above.

The Claimant's third ET1 – Section 20 claims

424. The Claimant lists only one claim in her third ET1 where she refers to her disability. That is that on 19 December 2017 she was given the outcome of her grievance. She says that this amounted to a 'cover up'.

425. We struggle to see what the PCP could possibly be. The Claimant was unhappy at the outcome of the grievance. An employee without the Claimant's disability is just as likely to be disappointed that the grievance was not resolved in their favour. Furthermore, the only adjustment that would have resolved this was to put in place a hearing officer who accepted the Claimant's case. There was no way for Wimbledon Broadway Specsavers Limited to do that. It did what it could possibly do by selecting two independent employees to do a thorough job of investigating the grievances. It could not ensure that those people would make the same findings of fact that we have done. We conclude that there was no failure to make reasonable adjustments in regards to this process.

Detriment on grounds related to union membership or activities

The legal framework

426. The right to join and participate in the activities of a trade union is protected by Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TURALA 1992'). The material parts of that section are as follows:

> *(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—*
>
> > *(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,*

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …

[(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or]

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

427. The right to complain to an employment tribunal in respect of any infringement of Section 146 is provided by Section 146(5) subject to Section 147 which provides a time limit within which any such proceedings must be brought.

Discussion and conclusions

428. The final event that the Claimant complains of in respect of her trade union took place on 8 November 2016 when she says Andrew Kemp asked her for the name of her trade union representative. We have set out our findings above. We have concluded that all Andrew Kemp has done is to ask the name of any representative and to say that one week's notice is sufficient for a disciplinary meeting.

429. This claim could only succeed if the Tribunal accepted that Andrew Kemp's sole or main purpose in acting as he did was to preventing or deterring the Claimant from making use of trade union services at an appropriate time, or penalising her for doing so. We do not find that that was his sole or main purpose for acting as he did or indeed that that formed any part of his purpose. It could not be reasonably foreseen that asking for the name of a trade union representative would deter an employee from exercising the right to be accompanied and we have no hesitation in rejecting the suggestion that that was Andrew Kemp's purpose. Equally we do not accept that any reference to one week's notice being sufficient was intended to prevent or deter the Claimant from being represented. The Claimant's stance appears to equate to a suggestion that no date should be set for a disciplinary meeting before the trade union representative is consulted as to her or his diary. We find that there was nothing said or done by Andrew Kemp on this day for the purpose of discouraging the Claimant from approaching or being represented by her trade union representative.

430. The other occasion where the Claimant suggests that there was any mention of her trade union membership was 29 September 2016. We have set out our findings above. Other than the fact that there was mention of the Claimant's trade union we have not accepted the Claimant's version of events. We are not satisfied that Andrew Kemp did anything for the purpose of discouraging the Claimant from trade union membership or from participating in trade union activities or availing herself of any trade union services.

431. For the reasons set out above the Claimant's claims in these respects must fail.

Claims under Section 47B and 48 of the Employment Rights Act 1996 'whistleblowing'

432. On 22 June 2017 the Claimant informed her regulator the General Optical Council (hereafter 'the GOC') that Anoushka Desai had been dispensing children's

prescriptions without the necessary supervision. She included the grievance that she had sent the Respondent(s) before submitting her second ET1. On 24 November 2016 the Claimant met with Hilda Williams a Case Progression Officer at the GOC. On 13 February 2018 the Claimant was informed that an investigation was being opened into her complaint. On 12 June 2018 the Claimant gave a witness statement as a part of that investigation. The principle matter set out in that witness statement was that Anoushka Desai had dispensed a child's glasses when Richard Sandiford was 'not present'. Richard Sandiford and Anoushka Desai are of the view that it is sufficient that the supervisor or a supervisior was in a position to intervene. We have seen the GOC guidelines and would accept that this is a matter of interpretation. We do not have to decide who is right or wrong.

The legal framework – public interest disclosures

433. What follows is a very brief outline of the relevant law as our conclusions are do not turn on some of the more complex legal questions in this area.

434. Section 43B of the Employment Rights Act sets out what is required for a 'qualifying disclosure' in all cases. The material parts read as follows:

43B Disclosures qualifying for protection.

(1) In this Part a ' qualifying disclosure ' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) …

(4) ….

(5) In this Part ' the relevant failure ', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

435. Where a disclosure is made to a 'prescribed person' it is protected if the conditions in Section 43F are satisfied. The General Optical Council is a prescribed person for these purposes. The material parts of Section 43F are as follows:

> *43F Disclosure to prescribed person.*
>
> *(1) A qualifying disclosure is made in accordance with this section if the worker—*
>
> > *(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and*
> >
> > *(b) reasonably believes—*
> >
> > > *(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and*
> > >
> > > *(ii) that the information disclosed, and any allegation contained in it, are substantially true.*
>
> *(2) ……*

436. Where there has been a qualifying disclosure Section 47B of the Employment Rights Act 1996 makes it unlawful to subject the employee to any detriment on the ground that they have made such a disclosure. The burden of showing the grounds for any treatment is placed upon the employer. An action will be on the ground of making a protected disclosure if it is established that the making of a protected disclosure had a material influence on the employer's actions.

Discussions and conclusions

437. We will proceed on the basis that the Claimant made at least one protected disclosure to the GOC. The GOC guidelines suggest that the supervisor of a trainee must be in a position to intervene. Whether that means that the named supervisor must be in the same room or the same part of a building is a matter of debate that will no doubt be resolved by the GOC. We accept that the Claimant could reasonably believe that the required level of supervision required the named supervisor to be in the same room and that she disclosed information that tended to show that there had been a breach of that obligation. We would accept that the Claimant reasonably believed that her disclosures were in the public interest.

438. To succeed in this claim the Claimant would have to show that she had suffered a detriment on the ground that she had made a protected disclosure. In the schedule to her third ET1 the Claimant says that on 24 November 2017 Richard Sandiford gave *'the wrong information about the GOC guidelines'.* That reference in the Claimant's schedule is explained in the text of her ET1 at paragraph 13 where she says (with original emphasis):

> *'The Claimant had a meeting with Hilda Williams at the GOC Office on 24 November 2017. And, the GOC* ***had confirmed*** *about Anoushka Desai. On that 24 November 2017 it all came to light that the Claimant was given the wrong information at work by Mr Richard Sandiford. As a result the Claimant believed she has a further grievance against him, too'*

439. The Claimant's case appears to be that being given Richard Sandiford's interpretation of the GOC guidelines was the detriment. Whilst we would accept that being incorrect guidance might amount to a detriment what is clear is that any detriment suffered whilst the Claimant was at work cannot have been on the ground of making a protected disclosure to the GOC as the Claimant did not do that until she had left the Respondent's employment.

440. This claim is an unfortunate example of the Claimant misunderstanding the purpose and effect of the legislation. For the reasons set out above the claim brought under Section 47B and 48 of the Employment Rights Act 1996 must be dismissed.

The claim for pension contributions

441. The final matter which we have to deal with is the Claim noted in EJ Tsamados' list of issues in which the Claimant claims that she is entitled to payment of employer's pension contributions on the sums paid to her in respect of accrued but untaken holiday.

442. The Claimant did not address us about this claim at all nor did she lead any evidence in support of it.

443. We would accept that if there was a failure to make a pension contribution lawfully due then the Claimant may be able to bring such a claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. It is a nice point as to whether such a claim could be brought under the Part II of the Employment Rights Act but there too the Claimant would have to show that there was an obligation to make pension contributions.

444. What counts as pensionable income is the subject of the rules of the pension scheme. Not all sums paid by an employer necessarily trigger an obligation to make an employer's pension contribution.

445. It was for the Claimant to demonstrate that a payment in lieu of holiday accrued but untaken was pensionable. We have had no evidence that that was the case. In the circumstances the claim must fail.

Outcome

446. For the reasons set out above we find that the Claimant's claim for unfair dismissal is well founded but that all of her other claims fail and are dismissed.

Employment Judge John Crosfill

Date 31 May 2019

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Schedule of issues in the first and second claims Prepared by EJ Tsamados and agreed

The issues

1. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

2. **Unfair dismissal**

   2.1. The claimant relies on a constructive dismissal by which she resigned from her employment with the First Respondent on 4th April 2017 with immediate effect. The particulars of this complaint are set out in her second Claim Form. The issues arising are as follows:

   2.2. Was the claimant dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996 ('ERA 1996')?

   2.3. If she was not, the complaint fails.

   2.4. If she was, what is the potentially fair reason for her dismissal with section 98(1) & (2) ERA 1996?

   2.5. If no potentially fair reason is show, the complaint succeeds.

   2.6. If found, is that reason a sufficient reason for her dismissal within section 98(4) ERA 1996?

   2.7. If the test in section 98(4) is met, the complaint fails.

   2.8. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

   2.9. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

3. **Disability**

   3.1. Does the claimant have a physical or mental impairment, namely Post Traumatic Stress Disorder ('PTSD') and Temporomandibular Joint and Muscle Disorder ('TMJD')?

   3.2. If so, does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

   3.3. If so, is that effect long term? In particular, when did it start and:

      3.3.1. has the impairment lasted for at least 12 months?

      3.3.2. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

   N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

3.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

3.5. The relevant time for assessing whether the claimant has a disability (namely, when the discrimination is alleged to have occurred) is during from 18th December 2012 until her resignation on 4th April 2017.

4. **Section 26: Harassment related to age, sex, religion/belief and race**

4.1. Did the respondents engage in unwanted conduct as set out at paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 , 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 54 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incident set out in her second Claim Form.

4.2. Was the conduct related to the claimant's protected characteristic?

4.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. **Section 13: Direct discrimination because of age, religion/belief, disability and sex**

5.1. Have the respondents subjected the claimant to the following treatment falling within section 39 Equality Act, as set out in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 3738, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51 and 52 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incidents set out in her second Claim Form.

5.2. Have the respondents treated the claimant as alleged less favourably than it treated or would have treated the comparators?

5.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

5.5. As to age discrimination, additionally, do the respondents show that the treatment was a proportionate means of achieving a legitimate aim?

6. **Section 15: Discrimination arising from disability**

6.1. The allegation of unfavourable treatment as 'something arising in consequence of the claimant's disability' falling within section 39 Equality Act is as set out at paragraphs 6, 8, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 42, 43, 46, 47, 48, 49,50, 52, 53, 54 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incidents set out in her second Claim Form. No comparator is needed.

6.2. Does the claimant prove that the respondents treated the claimant as set out one or more of the above identified paragraphs and incidents?

6.3. Did the respondents treat the claimant as aforesaid because of the 'something arising' in consequence of the disability?

6.4. Do the respondents show that the treatment was a proportionate means of achieving a legitimate aim?

6.5. Alternatively, have the respondents shown that they did not know, and could not reasonably have been expected to know, that the claimant had a disability?

7. **Section 27: Victimisation**

7.1. Has the claimant carried out a protected act and/or did the respondents believe that the claimant had done or may do a protected act?

7.2. The claimant relies on those matters set out at paragraphs 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 50, 52 and 54 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incidents set out in her second Claim Form.

7.3. If there was a protected act, have the respondents carried out any of the treatment set out in the above identified paragraphs and incidents because the claimant had done a protected act?

8. **Reasonable adjustments: section 20 and section 21**

8.1. Did the respondents apply the following provision, criteria and/or practice ('the provision') as set out in paragraphs 3, 4, 6, 8, 16, 17, 18, 19, 21, 23, 24, 25, 26, 28, 29, 30, 31, 33, 34, 38, 42, 46, 47, 52, 53 and 54 of the Respondent's reply to the Scott Schedule, those incidents headed 'Other Background incidents' of the Claimant's Scott Schedule and those incidents set out in her second Claim Form.

8.2. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

8.3. Did the respondents take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required.

8.4. Did the respondents not know, or could the respondents not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

9. **Trade Union and Labour Relations (Consolidation) Act 1992: section 146**

9.1. At paragraph 11 and 20 of the respondent's reply to the Scott Schedule, the claimant appears to raise complaints under section 146. If so, the issues to be decided are as follows:

9.2. Did the first respondent subject the claimant to any detriment for the sole or main purpose of preventing or deterring her from being or seeking to become a member of an independent trade union, or penalising her for doing so; or preventing or deterring her from taking part in the activities of an independent trade union at an appropriate time, or penalising her for doing so; or preventing or deterring her from making use of trade union services at an appropriate time, or penalising her for doing?

10. **Unauthorised deductions from wages/damages for breach of contract**

10.1. The claimant seeks to recover the amount of the first respondent's contributions to her occupational pension (5% of her salary) as part of her entitlement to accrued holiday pay.

10.2. The First Respondent avers that contributions are not payable as part of the entitlement to holiday pay under the rules of the scheme.

10.3. This complaint arises either as an unauthorised deduction from wages complaint under section 13 of the Employment Rights Act 1996, in as far is it falls within the definition of wages under section 27 or as a complaint of damages for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1993.

11. **Time/limitation issues**

11.1. The first claim form was presented on 20th February 2017. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 15th September 2016 is potentially out of time, so that the tribunal may not have jurisdiction.

11.2. The second claim form was presented on 5th July 2017. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 24th March 2017 is potentially out of time, so that the tribunal may not have jurisdiction.

11.3. In respect of the discrimination complaints, does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

11.4. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

12. **Remedies**

12.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

12.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.