Case Number**: 1311052/2020**

EMPLOYMENT TRIBUNALS

Claimant | Respondent

A | **v Boots Opticians Professional Services Limited**

Heard at: **Birmingham** (by video)
On: **15, 16, 18, 19, 22 May 2023, 12 July 2023, 13 July 2023 (in chambers), 14 July 2023**

Before: **Employment Judge Kenward**
Mrs D Hill
Mr C Ledbury

Appearances
For the Claimant: **in person**
For the Respondent **Ms P Leonard, Counsel**

WRITTEN REASONS

JUDGMENT and oral reasons having been given at the hearing on 14 July 2023, with Judgment having been sent to the parties on 16 April 2024, and written reasons having been requested on 27 April 2024 in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

Judgment

1. The Judgment of the Tribunal was that the complaints of the Claimant were not well-founded and were dismissed, namely her complaints set out below.
   (1) Unfair dismissal (Employment Rights Act 1996 sections 98 and 111).
   (2) Wrongful dismissal (breach of contractual entitlement to notice of dismissal).
   (3) Automatically unfair dismissal by reason of having made a protected disclosure (Employment Rights Act 1996 sections 94, 103A and 111).
   (4) Victimisation by being subjected to detriment by reason of having made protected disclosure (Employment Rights Act 1996 section 47B).
   (5) Direct disability discrimination (Equality Act 2010 section 13).
   (6) Discrimination arising from disability (Equality Act 2010 section 15).
   (7) Failure to make reasonable adjustments (Equality Act 2010 sections 20 and 21).
   (8) Victimisation (Equality Act 2010 section 27).

(9) Non-payment of redundancy payment (Employment Rights Act 1996 sections 135 and 164).
(10) Unauthorised deductions from wages (including statutory sick pay) (Employment Rights Act 1996 sections 13 and 23).
(11) Unpaid holiday pay (Working Time Regulations 1996 regulations 13, 13A and 30).

Introduction

2. The Claimant was employed by the Respondent as a pre-registration optometrist from 28 September 2015 until her employment came to an end on 30 August 2020 as a result of the Claimant's dismissal by the Respondent which was stated to be on the grounds of redundancy. The case concerns the Claimant's various complaints arising out of the termination of her employment and in relation to her treatment over the course of her employment.

Proceedings

3. An ACAS certificate was issued on 11 November 2020 in respect of early conciliation which began with ACAS being notified of the prospective Claim on 11 October 2020. This means that complaints about matters which occurred on or before 11 July 2020 would potentially be outside the time limit of three months for taking the first step for bringing proceedings, namely notifying ACAS of the prospective Claim. Proceedings were commenced on 4 December 2021 by an ET1 Form of Claim in which the complaints which remained as live complaints were those of unfair dismissal, victimisation through being dismissed and subjected to detriment on the grounds of having made a protected disclosure, disability discrimination contrary to sections 13, 15, 20 and 27 of the Equality Act 2010, as well as complaints in respect of unlawful deductions from wages, breach of contract, notice pay, holiday pay and redundancy pay.

4. The details or particulars of the Claim were set out in a typed document which the Claimant filed with the ET1 Form of Claim (the "Particulars of Claim"). The Response of the Respondent set out, in a separate document, detailed Grounds of Resistance, which were dated 27 January 2021.

5. A preliminary hearing took place on 23 March 2021 before Employment Judge Algazy QC resulting in Case Management Orders dated 24 March 2021 and a provisional List of Issues which was subsequently finalised, as dealt with below.

6. The final hearing was originally listed for six days from 28 March 2022 but was ultimately adjourned as a result of the Claimant's application to adjourn the hearing due to medical reasons. A further preliminary hearing then took place before Employment Battisby for the purpose of considering the Claimant's request for adjustments to be made for the final hearing. The issue of adjustments is also dealt with below.

7. A final hearing as to liability and remedy was listed for six days from 15 May 2023 to 22 May 2023. The Tribunal was unable to sit on 17 May 2023. The hearing went part heard on 22 May 2023 and was listed to continue on 12, 13 and 14 July 2023 (with 13 July 2023 set aside for the Tribunal to deliberate in chambers).

8. At the end of the hearing on Friday 14 July 2023, Judgment was given orally dismissing all of the complaints of the Claimant. Detailed oral reasons were given for the Judgment.

9. On Monday 17 July 2023, before any written Judgment had been issued, the Claimant e-mailed the Tribunal by way of making an application asking the Tribunal to order that her name be redacted from the final Judgment that would be made public.

10. This was treated by the Tribunal as being an application under rule 50 of the Employment Tribunals Rules of Procedure 2013 (the "Tribunal Rules") for the Claimant's name to be anonymised in any written decision of the Tribunal entered on the Register of Judgments (or published online) in respect of her Claim.

11. On 18 July 2023, the Respondent e-mailed the Tribunal indicating its objections to the application. On 19 July 2023, the Tribunal directed that the Claimant should provide any reasons in support of the application within seven days and the Respondent should provide any representations in respect of those reasons within seven days of receiving the Claimant's reasons. On 25 July 2023, the Claimant e-mailed the Tribunal setting out the grounds relied upon for her application. No further representations were subsequently made of the Respondent.

12. A preliminary hearing was subsequently listed for 13 June 2024 for the purposes of determining the Claimant's application for her name to be anonymised. In the meantime, on 16 April 2024, a copy of the written Judgment was sent to the parties, but not, at this stage, entered on the Employment Tribunal's Register of Judgments, pending determination of the Claimant's application for her name to be anonymised.

13. The parties subsequently consented to the Claimant's application being determined on the papers, although the case remains listed on this basis.

14. In the meantime, having received a copy of the Judgment, the Claimant made a request for written reasons on 27 April 2024 although that request was not forwarded to me until 27 June 2024. I apologise to the parties for the delay in dealing with the matter which has been caused by pressure of work.

15. The Claimant's application under rule 50 of the Tribunal Rules has now been determined with the decision of the Tribunal being that the Claimant's name should be anonymised, by use of the initial "A" in any decision entered on the Employment Tribunal's Register of Judgments. This decision, and the written reasons for the decision, have been separately provided.

Issues

16. The live complaints and issues to be determined by the Tribunal were considered in a Preliminary Hearing on 23 March 2021 as confirmed in the Record of Preliminary Hearing and Case Management Orders made by Employment Judge Algazy QC on 24 March 2021. which provided for the List of Issues attached to the Order to be augmented, as directed in the Order, and then to stand as the List of Issues to be determined at the final hearing. For the purposes of augmenting the List of Issues, the Claimant was to provide the further information ordered on the basis that this was not an opportunity to expand the Claim beyond the case as then pleaded. The Claimant subsequently provided the further information ordered in a document which only appears at pages 51 to 52 of the core bundle (the "Further Particulars") and the List of Issues was duly updated (see page 49 in the main bundle).

17. When proceedings were commenced, the Claimant was also bringing complaints of indirect disability discrimination contrary to Equality Act 2010 section 19 and harassment contrary to Equality Act 2010 section 26, but it was subsequently confirmed that she was withdrawing these complaints (see the Further Particulars provided by the Claimant at pages 51 and 52 of the core bundle), and accordingly, as provided for in rule 52 of the Employment Tribunals Rules of Procedure 2013 (the "Tribunal Rules"), these complaints will be dismissed on the basis of having been withdrawn by the Claimant.

18. The complaints as summarised in the List of Issues, or otherwise clarified in the Claimant's Further Particulars, were as set out below.

    (1) **Unfair dismissal**. The Respondent contended that the Claimant was dismissed for a potentially fair reason, namely redundancy, or alternatively, some other substantial reason. The List of Issues specifically identified issues to be determined as to whether the Respondent's decision to place the Claimant at risk of redundancy was fair, whether the Respondent followed a fair and reasonable process prior to confirming the Claimant's dismissal by reason of redundancy, and whether the Respondent considered suitable alternative vacancies for the Claimant (and acted reasonably in doing so). More generally, the issue for the Tribunal is whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for redundancy (or alternatively, some other substantial reason) which would involve considering whether the Claimant's dismissal was within the band of reasonable responses. In the event that the Claimant's dismissal was found to be unfair, the Respondent's position was that the Tribunal should consider whether the Claimant would have been dismissed in any event.

    (2) **Wrongful dismissal** (breach of contractual entitlement to notice of dismissal or pay in lieu of notice).

    (3) **Automatically unfair dismissal** by reason of having made a protected disclosure. For these purposes, the Claimant relied upon a text message sent on

4 November 2017 (although the date was incorrectly given as 4 November 2019 in the List of Issues, to Opinder Malhi, the Respondent's Clinical Governance Optometrist, as amounting to a qualifying protected disclosure. It was her belief that the disclosure tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation.

(4) **Victimisation by being subjected to detriment** by reason of having made protected disclosure, namely the text message sent on 4 November 2017. The alleged treatment claimed to amount to victimisation was as set out below:
(a) commencing disciplinary proceedings against the Claimant on 13 April 2018;
(b) failing to follow up on the occupational health recommendations of Colleague Health (see paragraphs 12 to 14 of the Particulars of Claim);
(c) telling prospective employers that the Claimant had stolen patient records.

(5) **Victimisation (contrary to Equality Act 2010 section 27)**. The Claimant alleges that she was subjected to detriments by reason of having done protected acts. The protected acts relied upon were the submission of her first and second grievances (both in 2017). The detrimental treatment that she was alleging she had been subjected to because of having done these protected acts was the same alleged treatment (including her dismissal), as that complained about in her complaints of having been victimised by reason of having made protected disclosures.

(6) **Direct disability discrimination**. For these purposes, the Claimant identified a number of actual comparators on the basis that she was claiming that she had been treated less favourably than these comparators. The comparators relied upon by the Claimant, as identified in her Further Particulars, were the other members of staff, namely the Optometrists, who the Claimant says had the same role as her, namely David Semp, Furyal Mahmood, and Sammy Arif, and the other staff members who the Claimant says conducted many of the same duties as her, namely Ganeyu Yusuf, Bethany Morris, Lauren Baker, Kim Cockbill, Tony Maguire, Emily Temple, Heather Nye, Naila Abid, Selina Khan and Leanne Bird. In the alternative, she claimed that she had been treated less favourably than a hypothetical comparator would have been treated. The alleged treatment that the Claimant relied upon as amounting to direct disability discrimination was that of:
(a) commencing disciplinary proceedings against the Claimant on 13 April 2018;
(b) dismissing the Claimant.

(7) **Discrimination arising from disability**. The Case Management Order of Employment Judge Algazy QC had ordered the Claimant to provide further information as to her complaint of discrimination arising from disability, namely "*the something arising that the Claimant advances*". In her Further Particulars the Claimant set out, in some detail, various ways in which she was affected by her disabilities, which she relied upon for these purposes. This was summarised in the subsequent List of Issues as (i) being unable to climb stairs or stand for long periods of time; (ii) being unable to handwrite quickly and hold certain equipment;

(iii) having poor vision in her left eye, a pupil defect, a visual field defect and decreased depth and perception, as well as susceptibility to falls.

The alleged treatment that the Claimant relied upon as amounting to discrimination arising from disability was that of:
(a) commencing disciplinary proceedings against the Claimant on 13 April 2018;
(b) failing to follow up on the occupational health recommendations of Colleague Health (see paragraphs 12 to 14 of the Particulars of Claim);
(c) denying the Claimant the opportunity to work between two other stores to complete her training;
(d) dismissing the Claimant.

(8) **Failure to make reasonable adjustments**. The Case Management Order had directed that the Claimant should provide further information as to the provision, criterion or practice ("PCP") relied upon for each complaint and the adjustments which she was saying should be made. The Further Particulars stated that with "*regards to failures to make reasonable adjustments, I am also claiming that there were physical features that put me at a substantial disadvantage compared to staff who are not disabled and auxiliary aids that were not provided either at all or in a timely fashion*". Five bullet points were then set out by the Claimant.

One of the bullet points is alleging that a piece of equipment called the Steady Mount was delivered to the wrong store, so that the Claimant did not receive it in a timely manner, and without which the Claimant could not use the Volk lens to view the back of patients' eyes.

Two of the bullet points clearly related to the complaints with regards to the physical features of the premises concerned, namely complaints that (i) the toilets and staff room were located on the first floor, which put the Claimant at a substantial disadvantage as she could not use the stairs and so had to use the goods lift, which left her in pain, especially when reliant on crutches; and (ii) a locker was only provided to the Claimant in April 2018, and as the lockers were also located on the first floor, she did not have a secure lockable space in which to store her belongings and often resorted to storing her belongings in her testing room.

The remaining two bullet points seem to have been seeking to identify the relevant PCPs, namely (i) there was "*a nineteen-day consultation period for redundancy*" and (ii) "*I was dismissed for redundancy*". Simply referring to the Claimant's dismissal on the grounds of redundancy does not, arguably, identify a PCP. As such, any PCP relating to the Claimant's dismissal might more precisely be identified as that of considering making redundant members of staff who worked in stores which were due to close (or who were otherwise considered to be at risk of redundancy). This effectively describes a neutral practice which,

on the Claimant's case, put her at a substantial disadvantage compared to someone who was not disabled.

Neither the Case Management Order, nor the List of Issues, nor the Further Particulars, specifically identified the substantial disadvantage arising from the PCPs in respect of redundancy consultation and redundancy dismissal. However, the Particulars of Claim effectively alleged that the length of the consultation period and the Respondent's refusal to extend the consultation period placed the Claimant at a disadvantage "*due to the nature of my disability, the length of my sickness absence, and the fact that I was halfway through my training period and therefore the impact that this would have on me, not only losing my employment but also bring my training to an end*". Clearly this is alleging a disadvantage which would not just have potentially arisen from the Respondent's position in relation to the length of any consultation period but also from the Respondent's position in considering making redundant members of staff who worked in stores which were due to close (or who were otherwise considered to be at risk of redundancy).

The Further Particulars of the Claimant identified the adjustments which she was claiming the Respondent should have been made as being the following:
(a) obtaining a targeted report from the Claimant's GP and specialist, as recommended in the occupational health report;
(b) allowing a period of paid disability leave from November 2019 whilst adjustments were made;
(c) undertaking a stress risk assessment, as recommended in the occupational health report;
(d) appointing a point of contact other than the Claimant's line manager, as recommended in the occupational health report;
(e) assigning the Claimant to a different store with a phased return to work as recommended by the occupational health report;
(f) acquiring neutral density filters;
(g) extending the redundancy consultation period;
(h) transferring the Claimant to an alternative role to enable her to return to work and complete her pre-registration training;
(i) creating a new pre-registration role for the Claimant following the closure of the Erdington Fort store
(j) granting a six-month abeyance in respect of the Claimant's redundancy.

(9) **Non-payment of redundancy payment**. The Particulars of Claim make it clear that the issue being raised is that of the deductions made from the Claimant's severance package which would have included a sum in respect of her entitlement to a redundancy payment.

(10) **Unauthorised deductions from wages**. From the Schedule of Loss and Further Particulars the heads of claim set out below can be identified.

(a) £10,891.35 claimed as sick pay for the period between 1 June 2018 and 30 August 2020 consisting of (i) 43 weeks x £92.50 = £3,977.50; (ii) 52 weeks x £94.25 = £4,901.00; and (iii) 21 weeks x £95.85 = £2,012.85;
(b) £750.00 as commission or bonus for 2020. It was not entirely clear whether this was an amount which the Claimant was claiming that she was entitled to be paid or was claiming as a loss flowing from the dismissal and / or other complaints, but the Particulars of Claim complained of not having received bonuses due in November 2019, January 2020 and April 2020 which appeared on her payslip and were not paid into her account, with the payslips, in fact, showing credits of £120.00 by way of a Christmas gift in November 2019, £200.00 by way of bonus in January 2020 and £500.00 by way of bonus in April 2020.
(c) £454.00 as loss of pension benefit for 2020 (it was not entirely clear whether this was an amount which the Claimant was claiming that she was entitled to be paid or was claimed as a loss flowing from the dismissal and / or other complaints),
(d) £1,821.19 in respect of unpaid expenses consisting of (i) £783.00 travel fares to training courses, (ii) £500.00 cost of hotels for training courses and living expenses, and (iii) £538.18 loss of equipment (it was not entirely clear whether this was an expense which was alleged to have been recoverable prior to the dismissal or a loss claimed as flowing from the dismissal and / or other complaints);
(e) £9,705.00 described as an unauthorised deduction from wages in respect of "*overpayments*";
(f) £1,466 described as *""Backpay pensionable" deducted from wage*s".

(11) **Unpaid holiday pay**. The Claimant was claiming the sum of £2,500.00 for 2016 / 2017 and the sum 0f £5,335.02 for 2017 / / 2018 / 2019 / 2020.

Adjustments

19. The final hearing was listed for six days and was originally due to commence on Monday 28 March 2022. The Claimant had applied for the adjournment of the six-day hearing late (after 5 pm) on Friday 25 March 2022. She submitted a photograph of a positive Covid test and a fit note from her GP which stated that she was unfit for work for one month and gave the reason as "*poor mobility, cerebral palsy with left hemiparesis, hydrocephalus, optic neuritis, optic nerve atrophy, diabetes*". The Tribunal hearing the case was initially "*not satisfied on the medical evidence presented by the Claimant that she is unable to participate in a hearing either in person or remotely*". It was pointed out that the fit note "*only refers to fitness to work and does not reference any inability to litigate a case*". The case was adjourned until the following day to give the Claimant the opportunity to get medical evidence which "*should set out the medical condition the Claimant is suffering from which she says prevents her from participating in the hearing, whether she is unable to participate in the hearing in person and/or*

remotely within the trial window listed for this case and if and when she is likely to be able to attend the hearing either remotely or in person".

20. On the following day, the Claimant's application to adjourn the hearing was granted. In adjourning the case, directions were given by Employment judge Wedderspoon for the Claimant to provide updated medical evidence indicating if and when the Claimant would be able to participate in a six-day hearing and if any further reasonable adjustments were required to accommodate this.

21. The case was subsequently relisted for six days to commence on 15 May 2023. Before then, a further preliminary hearing was listed before Employment Judge Battisby on 23 March 2023 to consider the Claimant's request for reasonable adjustments for the final hearing. The Claimant's letter making the request was in the terms set out below.

"*I have consulted the Equal Treatment Bench Book for reasonable adjustments, and I list these below. Should any further reasonable adjustments be required, I will inform the Tribunal immediately.*

My conditions and disabilities are listed as follows: Cerebral palsy, poor mobility and muscle wastage, hydrocephalus, optic neuritis, along with severe anxiety and post-traumatic stress disorder.

The reasonable adjustments that are required are listed as follows, and I would humbly request that the Tribunal permits these:

I am not able to sit down for long periods of time, so I would request rest breaks during proceedings, the provision of leg rests and an adapted chair so I can sit comfortably.

As I have poor mobility, it would take me time to travel to and from the Tribunal offices. As such, I request that the times of the hearing are modified so that the hearing starts later and finishes earlier, or that a venue close to my home is chosen for the hearing.

I would also request that there is an accessible route to the room where the hearing is held. I would like to request that copies of the Bundle are provided in a large print format, along with assistance in manoeuvring the Bundle.

The provision of adapted lighting to stop glare.

When I am giving evidence, I would request that I am allowed sufficient time in order to process information and respond.

I would also request that I am seated in a position where I can see the Employment Judge and any witnesses without twisting my body.

As I am a litigant in person, I would request that frequent summing up of the current stage of the process occurs, along with outlining what is expected next.

I would also request that the Tribunal take a more hands on approach to case management as opposed to leaving it to both parties to work together, which has not led to fruition in the past".

22. The discussion and decisions made regarding the Claimant's request for adjustments were recorded by Employment Judge Battisby as set out below.

"*2. I suggested, and the Claimant agreed, that most of the problems could be resolved by converting the final hearing to one held remotely by video. The respondent agreed to this and I made an order.*

3. As for the Claimant's difficulties with the bundle of documents and reading generally, it was agreed she would be provided with both a hard copy bundle of documents on whatever colour paper she elects. As the bundle runs to over 900 pages, the respondent will agree with the Claimant a core bundle which they hope should be no more than 200 pages and this will also be provided for the Tribunal to read on the first morning. The respondent will provide the Claimant with a list of those documents to which their counsel is likely to refer her in their questioning of the Claimant at the final hearing, so she can make sure she is familiar with them and put them into whatever form she prefers.

4. The Claimant will also be provided with an electronic version of the documents and statements. She has a second computer monitor and will be able to view them and magnify them as far as she needs.

5. I indicated that the Tribunal will be willing to let her have such assistance as may be reasonable from a family member or other support person in terms of reading documents and managing paperwork e.g. quickly finding documents and extracts within them.

6. The Claimant stated she has problems with sleep and requested a later start than 10am on the basis she would carry on the hearing till later. She was suggesting a start of 12 noon. I indicated this would be a matter for discussion with the Tribunal on the first day, but it would be very unusual to continue after 5pm as others will also have commitments to fulfil. I ordered the hearing on the first day should start at 12 noon as the Tribunal will have preliminary reading. At that point, this issue and any other matter or adjustment can be discussed and resolved.

7. I explained the Tribunal will be sympathetic to the Claimant's request for breaks and the frequency and length of these, and how the need may be communicated can be discussed and determined at the hearing.

8. I explained the likely order of the hearing and referred the Claimant to the online resources mentioned in the notice of hearing and also how she could observe a public hearing remotely by video, so she will have a better idea of what to expect in her case.

9. I reassured the Claimant that the Tribunal is aware that the need for reasonable adjustments is fluid and the necessary adjustments can change. If that happens in her case, she can have the adjustments reviewed and/or modified on making a request in advance or on the day. Obviously, if notice of any such request can be given, that is always preferable.

10. As far as case management is concerned, I explained how going through the Tribunal can cause delay and that it is preferable if the parties can co-operate. There seems no reason why that will not be possible here".

23. There was a discussion as to adjustments at the beginning of the final hearing on 15 May 2023. It was noted that regular breaks would need to be accommodated as the Claimant could not sit for long periods, that she would need sufficient time to process information and respond, that lengthy questions needed to be avoided so questions should be broken down if necessary (or else questions would be clarified by the Judge), and that the Claimant would be assisted by frequent summations as to what was due to happen in the course of the hearing. It was agreed that the Claimant's mother could provide her with assistance with the navigating the bundle during the hearing. The Tribunal also agreed to the Claimant's request that the Tribunal should hear from the Respondent's witnesses first.

24. It was further agreed, as requested by the Claimant, that the Tribunal would allow time at the end of the evidence of each witness for the Claimant to check that she had asked everything that she had been intending to ask, and if a request was made to ask a further question at a later stage, the request would be considered on its merits depending on the question and the stage of the proceedings.

25. The Respondent's barrister, Ms Leonard, had provided a document described as an Opening Note which was 20 pages in length. Ms Leonard explained that the document was essentially setting out what she was intending to say at the end of the hearing, albeit there would be likely to be some additions to the document by the end of the hearing, but as the Claimant had indicated that she had difficulties with processing, it had been thought that it might be helpful for the Claimant to have the document at the beginning of the hearing. The Claimant requested extra time to read the document so that the start of the hearing was put back by the amount of time that she had requested.

26. At the end of the first day, the Claimant confirmed that she was content for the hearing to commence at 10 am on the following day. The Tribunal made it clear that it was happy to review the daily starting time for the hearing if starting at 10 am was causing any issues for her.

27. When it came to the Claimant's evidence, it was agreed that, if the need arose, any questions asked would be clarified by the Judge.

28. The questioning of the Claimant by the Respondent's barrister and then by the members of the Tribunal had finished by the end of Friday, 19 May 2022. At that point it was agreed that, by way of re-examination, the Claimant should have the opportunity of making a note as to any of her evidence that she wished to clarify and could then provide this clarification when the hearing resumed on Monday, 22 May 2022. Effectively, as a form of re-examination, the Claimant was given the opportunity to give further evidence by way of clarification, from prepared notes.

The hearing

29. At the beginning of the final hearing, it was decided that the Tribunal would deal with the issue of liability first, and then deal with the issue of remedy, if necessary, in the light of any decision made on the issue of liability. Should the Tribunal decide that the Claimant was unfairly dismissed, the Respondent was relying on the case of *Polkey v AE Dayton Services Limited [1988] AC 344, HL* ("Polkey") so as to argue, if necessary, that the Claimant might have been fairly dismissed, in any event. It was agreed that this issue would need to be considered at the same time as the liability issue (but ultimately a decision on this issue was not required). It was also agreed that, in considering liability, the Tribunal would also consider, in so far as it was necessary or applicable, whether there had been relevant non-compliance, by either the Claimant or the Respondent, with the applicable ACAS Code of Practice on Disciplinary and Grievance Procedures (again, ultimately, a decision on this issue was not required). Finally, it was also identified that some of the events being relied upon had occurred outside the primary three-month time limit for bringing proceedings. As such, there was a jurisdictional issue which would potentially need to be considered as to whether the acts concerned were part of conduct extending over a period with the end of that period being within time, and / or part of a series of similar acts or failures in respect of which the last act or failure in the series was in time, or, if not, whether there was any basis on which the Tribunal should extend the time limit in respect of any complaints which were otherwise out of time.

30. The Tribunal was provided with a bundle of documents consisting of 1102 pages. There was also a core reading bundle of 273 pages. The original bundle prepared for the hearing in April 2022 had been 962 pages. Pages 963 to 1065 consisted of supplementary pages added by the Respondent. Pages 1066 to 1102 consisted of supplementary pages added by the Claimant. The Claimant also provided a further supplementary bundle consisting of 25 pages for the beginning of the hearing on 15 May 2023. There were also some further documents added, upon request, in responding to issues which arose in the course of the evidence, for example documentation regarding the Respondent's change of occupational health provider. The Claimant also provided a set of payslips.

31. The hearing had originally been listed for six days. The Tribunal was unable to sit on Wednesday 17 May 2023. The evidence of the Claimant had concluded by

the end of Friday 19 May 2023, which was effectively the fourth day, save that, as stated above, it had been agreed that, by way of re-examination, the Claimant could seek to clarify any matters arising out of the evidence that she had given, and could do so by reference to notes made for these purposes. This was to take place at the beginning of the final day, which was Monday 22nd May 2023, following which it was agreed that the parties would make their closing submissions. It was made clear that, once the evidence had been concluded, any closing submissions were not an opportunity to introduce new evidence.

32. The Claimant's evidence by way of re-examination concluded at about 11.00 am on Monday 22 May 2023, following which, as both parties had chosen to provide written closing submissions, it was decided that the hearing would resume at 2.00 pm which would allow the Tribunal to read the closing submissions, and each party to read the closing submissions of the other party. The Tribunal was then going to give each party the opportunity to make any further submissions that they wished to do so orally.

33. The Respondent's counsel provided closing written submissions which were an expanded and amended version of her Opening Note which had been 20 pages in length when provided at the beginning of the hearing, and now ran to some 38 pages. In the event, when the Tribunal resumed at 2.00 pm, the Claimant indicated that she had only got as far as page 19 of the Respondent's closing submissions. On this basis, and given the rate of progress made to that point, it was agreed that it would not be possible to conclude submissions on that day as there would be insufficient time for any further oral submissions once the Claimant had finished reading the Respondent submissions. In the circumstances, the hearing was adjourned so that the Claimant could take the remainder of the day reading the Respondent's closing submissions and any further oral submissions would then be given when the Tribunal resumed on 12 July 2023. A further day was then set aside for deliberation on 13 July 2023 on the basis that the Tribunal would hope to give its decision orally on 14 July 2023.

34. On 12 June 2023, the Claimant wrote to the Tribunal in the terms set out below.

"*I write regarding the hearing which started on 15th May 2023. Please accept my apologies for the delay in sending this email to you, I needed to rest and recuperate after the hearing due to my conditions.*

I would humbly request the following as reasonable adjustments in the interests of justice and in the interest of a fair trial;

1) Permission to amend my witness statement to include page numbers corresponding to the Bundle. I note that all of the Respondents witness statements included this, mine did not. I would like to state that no factual information will be altered.

2) Permission to have a copy of Judge's notes/ panel members notes as an aide memoire, as I did not get the opportunity to write questions or answers down when I was being cross questioned. I appreciate that this may not be possible at this stage in the Tribunal.

3) As I mentioned during the hearing, a lot of my evidence was omitted by the Respondents solicitor, thus I seek permission to include these documents. I have included these redacted emails below, and seek to include the unredacted versions of these and the following page numbers of the Bundle; 98, 102, 176, 177, 178, 179, 264, 291, 302, 303, 304, 305, 467, 469, 475, 479, 480, 481, 482, 469, 592, 593, 594, 853, 854.

Please note; these documents will not attach to this email, so I will send these in a separate WeTransfer link".

35. In fact, no documents were sent to the Tribunal at this stage. At this point it was understood that the documents that the Claimant was suggesting had been omitted from the bundle were the unredacted versions of e-mails which had been included in a redacted form. On 6 July 2023, the Tribunal wrote to the Claimant in the terms set out below.

"*Further to the Claimant's e-mail to the Tribunal, copied to the Respondent, dated 12 June 2023, and in the absence of any representations from the Respondent, Employment Judge Kenward makes the directions set out below.*

(1) The Claimant has permission to send to the Tribunal (copied to the Respondent) a copy of her witness statement with page references only to the bundle added on the basis that no other information or evidence will be added and the content of the statement will not otherwise be altered.

(2) The Claimant has permission to send to the Tribunal (copied to the Respondent) unredacted versions of the documents which appear in the bundle at pages 98, 102, 176, 177, 178, 179, 264, 291, 302, 303, 304, 305, 467, 469, 475, 479, 480, 481, 482, 469, 592, 593, 594, 853, 854.

(3) It is not appropriate for any notes of the proceedings which have been taken by the Members of the Tribunal to be provided to the parties. Adjustments have been made both before and during the hearing in relation to the arrangements for the hearing, and the issue of having a note or record of the evidence was not raised before the hearing went part heard. It would, in any event, have been open to the Claimant to have made her own arrangements in respect of note taking, had she so wished. It is noted that the stage reached in the hearing was that both parties had provided their closing submissions in writing, so that these could be read by the Tribunal and the other party, with the Tribunal having indicated that, once the submissions of each party had been read, each party would have the opportunity to make any further submissions that they wished to make orally. At the stage at which the Tribunal had completed its reading of the written

submissions, and was ready to hear any additional oral submissions, the Claimant requested more time to read the Respondent's written submissions, which was granted, so that there was insufficient time to hear any further oral submissions. Having already prepared detailed written submissions it had not been indicated at that stage that there was any difficulty dealing with any further oral submissions that the Claimant wished to make, save that she wanted more time to finish reading the Respondent's written submissions. If any issue does arise in terms of the accuracy of any reference made to the oral evidence in the written submissions of the Respondent, then this can be dealt with in the course of the hearing on 12 July 2023".

36. The Claimant sent a further e-mail on 6 July 2023 as set out below.

"*Thank you for granting permission to amend my witness statement to include Bundle page numbers.*

I apologise as some of the terms that I had used in my previous email were incorrect, as a litigant in person I don't fully understand the terms used.

I would like to clarify what I wrote in my previous email;

1) I humbly seek permission to include the documents that were missed out from the Bundle by the Respondents solicitor.

2) I humbly seek Judge's orders for the Respondent to provide the unredacted versions of the emails contained in the Bundle at pages 98, 102, 176, 177, 178, 179, 264, 291, 302, 303, 304, 305, 467, 469, 475, 479, 480, 481, 482, 469, 592, 593, 594, 853, 854, and for these unredacted emails to be included in the Bundle at the corresponding pages. This will greatly help in my submissions".

37. It transpired that the Claimant was, in fact, requesting that the Respondent provide unredacted copies of the pages in the bundle to which she had referred.

38. The Respondent sent its response objecting to the Claimant's applications in an email sent on 11 July 2023 in the terms set out below.

"*Application to include additional documents in the bundle that were not previously included in the bundle.*

The Claimant has not provided copies of the documents she wishes to add to the bundle, nor has she provided any details about what these documents are or how many documents there are. The Claimant has also not explained why this application has been made so late in proceedings. Moreover, the evidence in this case has now been concluded. It would be prejudicial to the Respondent to allow new documents to be added to the bundle on which the Respondent has not had an opportunity to lead evidence or cross-examine the Claimant.

For the avoidance of doubt, the Respondent does not accept that its representative missed out documents from the bundle. The Claimant has made

this allegation on numerous occasions since early 2022 and at no stage has the Claimant ever provided details or copies of the documents that have allegedly been omitted.

Application for the Respondent to be ordered to provide unredacted copies of the documents at pages 98, 102, 176, 177, 178, 179, 264, 291, 302, 303, 304, 305, 467, 469, 475, 479, 480, 481, 482, 469, 592, 593, 594, 853 and 854 of the bundle.

Again this request has been made very late. The Claimant indicated in her email of 12 June 2023 that she would provide unredacted copies of documents and specifically mentioned sending them by We Transfer. The Claimant's position is now that she did not understand the terms she was using in that email. The Respondent is surprised the Claimant referred to sending the documents by We Transfer when she was not in possession of the documents.

The hearing in this case is due to resume tomorrow (12 July) at 10am. The Respondent is carrying out a search for unredacted versions of the documents listed in the Claimants email, but from a practical perspective this task is unlikely to have been completed by 10am tomorrow".

39. In the event, by the start of the hearing, the Respondent had been able to locate and e-mail unredacted versions of the requested pages (with the exception of one page).

40. 26 minutes before the hearing was due to start on 12 July 2023, the Claimant sent an e-mail with three attachments, consisting of a total of 54 pages of additional documents. This included the following documents:
(1) various emails from various dates between October 2015 and November 2018;
(2) occupational health report dated 23 February 2016;
(3) occupational health report dated 23 August 2016;
(4) handwritten notes of Dale Wooton dated 21 August 2017 as to the previous week;
(5) handwritten weekly plan dated 21 August 2017 payroll form dated 10 October 2017;
(6) copies of handwritten diary entries from October and November 2017;
(7) various lists of dates, as checked on 12 December 2017 and 16 January 2018 by Leanne Bird, Assistant Manager, in respect of attendances at work;
(8) written feedback from December 2017 on an eye exam observation;
(9) extracts from GP records covering consultations between 30 January 2018 and 16 February 2018;
(10) screenshots of WhatsApp messages from various dates between August 2018 and September 2020;
(11) various sickness certificates from 2019;
(12) letter dated 25 March 2019 as to Respondent's change of occupational health service provider;

(13) undated handwritten notes of a catch-up meeting (date unclear);
(14) undated notes of a conference call (date unclear);
(15) other undated handwritten notes and undated written communications.

41. The application to introduce new evidence was considered on 12 July 2023 when the Tribunal heard representations from both parties.

42. The application was refused, and oral reasons were given at the time of refusing the application. The reasons are now provided in writing as set out in the paragraph below.

43. The Tribunal noted that the Claimant was complaining about her alleged treatment by the Respondent over the course of her employment between 2015 and 2020. The Claim had been issued in 2020. Directions had been given to ensure that the case was ready for trial, with the directions including the disclosure of all relevant documents. The trial was originally due to take place in April 2022. The Claimant had written to the Respondent and the Tribunal on 7 March 2022 to say that documents were missing from the bundle. The Respondent had asked her to send any missing documents. The Claimant had provided a list of documents. The Respondent had then cross-referenced the list with the bundle and established that all of the documents which had been said to be missing were, in fact, included. The Respondent had made plain that if there were any missing documents, they needed to be provided. The case had duly proceeded to a final hearing in April 2022. That hearing had been adjourned due to the Claimant's health (rather than on the basis of any other reason). By the time of the relisted hearing in May 2023, there was an expanded bundle. In her representations made to the Tribunal on 12 July 2023, the Claimant had suggested that all of the additional documents had come from the Respondent. This was wrong. Pages 963 to 1065 consisted of additional documents provided by the Respondent. Pages 1066 to 1102 consisted of additional documents from the Claimant. Additionally, the Claimant had then produced a supplemental bundle of some 25 pages at the beginning of the hearing. If documents were missing, they should, at the very least, have been produced in that way. Indeed, during the hearing in May 2023, the Claimant had produced further documentation in the form of a full set of payslips. The Tribunal did not consider that it was satisfactory or acceptable as an explanation to say to the Tribunal, at such a late stage, as she had now sought to do so, that she had only just realised documents were missing, when she had had the bundle since April 2022 in one form or another, and the hearing had reached the end of the evidence on 22 May 2023. There had been no application to introduce any further evidence in May 2023. Submissions had been prepared with it being made clear that making submissions to the Tribunal was not an opportunity to introduce new evidence. Those written submissions had been prepared without any reference being made to any need to rely on or introduce further evidence. The case had only been adjourned as the Claimant had not been able to complete reading the

Respondent's written submissions. Effectively this had been an adjustment to allow the Claimant more time to read the submissions. Against this background, the further evidence had only been provided shortly before the hearing was due to commence on 12 July 2023. The Respondent's position was that the documents had not previously been disclosed with the possible exception of one document. The Claimant's evidence and that of the Respondent's witnesses had proceeded in May 2023 without it becoming clear that the questioning could not proceed or that documents which were in issue were not available or not in the bundle. Similarly, the parties had proceeded to prepare their closing submissions on this basis. It was unclear and the Tribunal was not satisfied from the representations made by the Claimant as to the basis upon which the Tribunal now needed to consider these documents. The Claimant's main point was that she felt that it was important that the members of the Tribunal had sight of all of the documents. The Tribunal was concerned that, if further evidence was now introduced it would potentially be necessary to recall witnesses to deal with the further documents, including the Claimant, who had obviously not been cross-examined on the content of the existing documents in the bundle. Instructions would need to be taken, further enquiries possibly made, which might result in further evidence being produced whether in the form of additional documents or in the form of further witness evidence. It seemed unlikely that such steps could be taken within the time available, so that the likelihood was that the case would go further part heard. This was a case where there needed to be finality. The case was in danger of becoming stale. It related to events going back to 2015. Although a litigant in person, the Claimant was clearly intelligent and well educated. It had been incumbent upon her to prepare her case so that, at the very least, any evidence had been introduced when the evidence was due to be heard. The Tribunal was satisfied that the Respondent would be significantly prejudiced through having to deal with the documents on the hoof which would potentially involve making enquiries going back to 2015 with possible issues as to whether any witnesses concerned were still employed or able to remember the matters in issue or whether any documents which might assist in taking instructions could be located. In these circumstances, and having regard to the overriding objective, the Tribunal refused the application.

Evidence

44. In terms of witness evidence, the Tribunal had a detailed Statement of Evidence from the Claimant which was 16 pages in length and Statements of Evidence from the Respondent's witnesses, Sarah Farrow, Sara Kidd, Izabela Pepciak, Louise Chatting, and Stewart Nichol. The Statements had been prepared prior to the hearing which was due to commence in April 2022. The Tribunal also heard oral evidence from these witnesses.

45. The Tribunal found the Claimant to be an intelligent and articulate witness. However, at times during her evidence she prevaricated or was evasive. The

impression was given of a witness who was seeking to answer questions in a way which suited the narrative of her case, even where this involved reinterpretation the evidence to suit that narrative. She appeared unwilling to make concessions, for example in relation to appreciating the extents to which the Respondent had, on any view, at times, gone to support her, an example being in relation to the steps taken to find a store to which she could relocate in Birmingham with the Claimant being taken on a tour of available stores and her eventual relocation involving having to relocate other employees. Some of her evidence the Tribunal simply found to be implausible, for example her explanation as to the steps taken by her to provide consent for her GP or specialist doctor to provide a report for occupational health purposes. This appeared to involve degree of improvisation on the Claimant's part in answering questions. Another example was the Claimant's evidence as to the circumstances in which she claimed that it had come to her attention that the Respondent had been making false allegations to third parties to the effect that she had been stealing patient records. The Tribunal also found the Claimant's evidence regarding the notes of the disciplinary investigation as indicative of the Claimant's approach to giving evidence which was, at times cavalier. Faced with a number of questions based on various colleagues having given evidence in investigatory interviews conducted by Kim Cockbill, to the effect that there was substance to the complaints which had resulted in the disciplinary proceedings against the Claimant, the Claimant's stock answer became that the notes of the interviews were unreliable because Kim Cockbill "*writes what she wants to write*", whereas the evidence did not begin to establish that there had been the wholesale falsification of interview notes which this was effectively suggesting. At times the Claimant was opportunistic. In seeking to justify introducing new evidence, she tried to claim that all of the evidence added to the bundle after the hearing in April 2022 had been added by the Respondent when it was clear from the documents and the index that documentation was added by both sides, quite apart from the supplementary bundle which she provided at the beginning of the hearing.

46. Ultimately, the Tribunal approached the evidence of the Claimant with a degree of caution. Generally, for the reasons given above, where there was a dispute between the evidence on the Respondent's side and that of the Claimant, the Tribunal preferred the evidence from the Respondent.

Findings as to disability

47. Paragraphs 2 and 4 of the Particulars of Claim rely upon the Claimant having a disability within the definition of section 6 of the Equality Act 2010, namely left-sided hemiplegia (cerebral palsy), which she has had from birth. In addition, she was diagnosed with trochanteric bursitis following an accident on the Respondent's premises in 2015 which is described below. She was also

diagnosed with optic neuritis in about 2018 resulting in poor vision in her left eye which causes her to be susceptible to falls.

48. The medical issues had been summarised in an occupational health report dated 7 July 2017 as set out below.

"(A) *has left sided cerebral palsy which causes a degree of weakness (fairly mild) in her left upper and lower limbs. She has a developmental abnormality of her left lower leg and foot associated with the cerebral palsy and the left hand is less dexterous than the right hand and also becomes fairly easily fatigued on repeated firm grasping or holding activities. Fatigue is also a factor in the left lower limb.*

These are her main limitations and other than that she has lived a very full life, has completed her qualifications and is able to live correctly independently".

49. A further occupational health report dated 21 February 2019 and amended on 1 March 2019 dealt with the Claimant's diagnosis of optic neuritis following an incident in which she had lost vision in her left eye on 20 May 2018 while at work. By that stage, her eyesight was described as meeting driving standards, but the Claimant was reporting that "*reading continuously for many hours can strain the left eye causing pain*".

50. The occupational health report provided following an appointment on 4 September 2019 reported the Claimant as saying that the visual function in her left eye was 6/12 and normalised in the right side which the report suggested "*indicates good progress in the return of visual function*".

51. The Claimant also referred the Tribunal to a number of medical documents including those set out below.

(1) Letter dated 11 April 2018 from Dr Rajput, General Practitioner, confirming that the Claimant had been suffering from migraines and anxiety since January 2018 with this triggered and made worse by stress, in particular issues with certain colleagues at work which made her stress and anxiety worse.

(2) Letter dated 15 August 2018 from Dr Myo, General Practitioner, confirming that the Claimant presented on 20 May 2018 with sudden onset flashes and vision loss with double vision resulting in an assessment at the Birmingham Eye Centre and Heartlands Hospital, and on 2 July 2018 experienced further worsening of her vision resulting in a diagnosis of optic neuritis on 3 August 2018 for which she was awaiting a neurology appointment and MRI scan.

(3) Referral letter dated 6 August 2019 from Dr Gani, GP Registrar, to Birmingham Healthy Minds, asking for the Claimant to be reviewed and considered for EMDR therapy in relation to possible PTSD since the loss of vision due to optic neuritis in 2018.

(4) Letter dated 9 October 2019 from Dr Gani, to whom it may concern, setting out the chronological facts of the Claimant's medical history from February 2018, including providing the details set out below:
(a) 2 February 2018 emergency attendance at hospital with raised blood pressure and migraines due to stress at work;
(b) 20 May 2018 attendance at hospital and Birmingham Midlands Eye Centre following sudden onset flashes of light, vision loss and diplopia in left eye due to stress at work;
(c) 9 July 2018 worsening of vision resulting in admission to Birmingham Midlands Eye Centre until 13 July 2018 for further investigations;
(d) 3 August 2018 diagnosis of optic neuritis confirmed;
(e) 4 October 2018 correspondence from neurologist stating that changes in the brain were an indication of aqueductal stenosis causing localised hydrocephalus;
(f) 14 February 2019 visual field scans showed superior temporal visual field loss;
(g) April 2019 started treatment for type 2 diabetes;
(h) June 2019 results of scan showed osteoporosis in the spine and osteopenia in hips and femur;
(i) June 2019 further MRI scan and OCT (Optical Coherence Tomography) confirmed atrophy of left optic nerve and thinning of retinal nerve fibre layer;
(j) July 2019 diagnosed with post-traumatic stress disorder following vision loss at work and referred for EDMR.

52. The List of Issues confirmed that the Respondent admits that the Claimant is a disabled person for the purposes of Equality Act 2010 section 6 as alleged in the Particulars of Claim.

53. The Claimant's case was not significantly challenged as to the impact of these impairments as described in the Claimant's Further Particulars and also summarised in the List of Issues, as below:
(1) not being able to climb stairs or stand for long periods of time;
(2) having a slow handwriting speed and struggling to hold some equipment;
(3) needing to remain seated as much as possible;
(4) having a pupil defect, a visual field defect and poor vision in her left eye, together with decreased depth perception and susceptibility to falls.

Findings of fact

54. The Respondent is a company which provides the services of opticians from a number of retail sites.

55. On 28 September 2015, the Claimant started a placement as a Pre-registration Optometrist at the Respondent's store in Wrexham. A pre-registration year refers to the training that is required to be undertaken following obtaining a degree in Optometry from University in order to become a qualified Optometrist. This would normally be a 12 to 18-month fixed term contract, with a view to becoming a

qualified Optometrist at the end of the fixed period. Pre-registrants work under the supervision of a qualified Optometrist.

56. On 15 October 2015 the Claimant injured herself in a fall at work. This resulted in a lengthy period of sickness absence.

57. During her sickness absence, around the end of March 2017, the Claimant submitted a grievance in which she made various complaints and alleged that a treatment amounted to disability discrimination. Complained about a lack of communication from the Respondent regarding her return to work. The Claimant's grievance was heard by James Sneddon, Regional Opticians Manager. The Claimant indicated in the grievance hearing that she wished to return to complete her pre-registration training in a store in Birmingham. However, James Sneddon left the Respondent's employment without providing a formal grievance outcome. The Tribunal was satisfied that the reason that the Claimant did not receive a formal outcome to her grievance was that the manager dealing with it left the employment of the Respondent. The Respondent has conceded that this first grievance amounted to a protected act for the purposes of Equality Act 2010 section 27.

58. The Claimant was overpaid in respect of her sickness absence between 2015 and 2017. The overpayment was calculated to amount to £2,091.51. This figure was calculated by manually reworking every payslip back to 2015 (see e-mail from Anthea Dodson dated 16 August 2017). The store managers in the Wrexham store had not processed the Claimant's sick pay properly meaning there was a period of time when she had been receiving her full salary when she should have been receiving either statutory sick pay or no salary.

59. Under the Claimant's contract of employment. The Respondent "*reserves the right to deduct overpayments from your salary or any other payments owed to you as soon as they are brought to its attention*". This allowed the Respondent to seek to recover this overpayment by deducting the amount from her wages.

60. The relevant provisions in respect of long-term absence and holidays were as set out below.

"*When a colleague is off long term, their holiday entitlement continues to accrue throughout their absence. If a colleague's absence crosses over into another holiday year, any holidays that were unused at the start of their absence will carry forward … for a maximum of 18 months from the end of the holiday year. If the colleague does not return to work or does not use these holidays within 18 months of the end of the holiday year they will be lost*".

61. The guidance given included the example set out below.

"*A colleague has 75 hours holiday remaining when they go off sick in February 2018. They're off for 4 months and return to work in June 2018. The 75 hours*

holiday will be carried forward and need to be used as soon as possible and no later than the end of September 2019".

62. Sarah Farrow, an HR Business Partner, became involved in supporting and managing the Claimant's absence in 2017. She set up regular telephone calls with the Claimant over the course of 2017 from around April 2017 until her return to work during which she caught up with the Claimant on a personal, one-to-one, level and encouraged her to visit Occupational Health. The evidence of Sarah Farrow was indicative of reluctance on the part of the Claimant to engage with any occupational health involvement. She confirmed that she had had a conversation with the Claimant where the Claimant indicated that her doctor had told her that occupational health was a way to get her out of the business. She encouraged the Claimant to attend Occupational Health to enable the Respondent to understand any adjustments needed to support her return to work.

63. An occupational health report dated 7 July 2017 was sent to Sarah Farrow. It set out recommended adjustments. In terms of the building in which she would be working, it stated that she would benefit from disabled access to the workplace, ideally working on one floor for the majority of her day, the use of a lift to gain access to other floors if this was required, and the use of bench / table mounted equipment wherever possible. It also made suggestions in relation to a phased return to work, being assigned mixed tasks so that she could be seated for approximately 50% of the time, and the possible need for assistance with manual handling tasks. A risk assessment was suggested, and one was undertaken on 17 July 2017. A further risk assessment was undertaken on 8 September 2017. The unchallenged evidence of Sarah Farrow was that the Respondent had complied with all of the occupational health recommendations from the report of 7 July 2017.

64. Following the Claimant's grievance and provision of the occupational health report, the Respondent accommodated a phased return to work for her as recommended. The Claimant had been asked which store she would be able to travel to in order to start her phased return. The Claimant indicated that the Birmingham High Street store would be suitable. However, that store did not have facilities to accommodate a pre-registration Optometrist on a permanent basis and it was not initially possible to find a branch with space for a pre-registration Optometrist. Therefore, it was decided to conduct the Claimant's return to work in the store requested by the Claimant, namely Birmingham High Street.

65. The Claimant returned to work on or about 17 July 2017. She was reluctant to accept during cross-examination that she was the one who requested a Birmingham practice as she had moved from Wrexham to her family home in Birmingham and told the Respondent that she needed to be in Birmingham, including for her medical treatment. She had raised a grievance as she wanted to ensure that she was moved to Birmingham. She had turned down work at other stores, including the Redditch store. She had confirmed that the grievance would

be resolved if she was placed in a Birmingham store and had set out the criteria that she wanted the Respondent to fulfil.

66. Once the Claimant was back in work in the Birmingham High Street store, the Respondent continued to look for suitable stores where the Claimant could work as a pre-registration Optometrist. One of the Respondent's Regional Operations Managers, Mary Green, arranged to take the Claimant on a road trip around Birmingham to try and find a suitable store for her. This involved visiting all of the Respondent's stores to determine which stores were accessible to the Claimant. The outcome of this exercise was that the Claimant's preference was to work in the Erdington Fort store. An e-mail from Mary Green sent on 28 June 2017 stated that Erdington Fort "*is ideal for her as everything is on one level there is even access to a public toilet on this level*" and "*you have two supervisors who can work together to support where necessary*".

67. Although there was no vacancy for the Claimant at the Erdington Fort store, the Respondent relocated other pre-registration employees in order to accommodate the Claimant at Erdington Fort. These displacements caused significant difficulties to those employees and one of them resigned. All of this was indicative of the Respondent seeking to do significantly more for the Claimant than might have been required.

68. The Claimant did not raise any concerns about the Erdington Fort store at the time and in fact told the Respondent that it was "*best suited*" to her needs. On 29 August 2017, Sarah Farrow and Hayley Rowbotham visited the Claimant in Erdington Fort to see how she was settling in following her return to work and rehabilitation period and to seek further understanding on how the Erdington Fort team and the Respondent could support her moving forwards.

69. The Claimant did raise an issue regarding transport and funding. The Respondent spoke to Access to Work and funding was awarded for the Claimant to travel to store by taxi. The Respondent's professional standards team also ordered various upgrades and pieces of new equipment to assist the Claimant.

70. One of the complaints that the Claimant makes is that specialist equipment which had been ordered for her was not delivered until February 2018, six months after she had started working at the store. She claims that this equipment was equipment which she had requested, and which had been agreed as a reasonable adjustment. The Respondent's position is that, after the Claimant had moved to the store, the Claimant started to experience pain in her left hip and requested additional equipment. The Tribunal accepted the evidence of Sarah Farrow that although there were some delays on the part of the suppliers, six of the seven items had been delivered correctly, but a stand mount (or "Steady Mount") was initially delivered to the wrong place. Any delays with the equipment were not material and did not prevent the Claimant from being at work. While the equipment was on order, the Claimant could have spent more time on the shop

floor conducting the dispensing side of her placement which is also a requirement of the pre-registration programme.

71. In relation to the Steady Mount, on 25 October 2017 Hayley Rowbotham e-mailed the Claimant to state that there had been confirmation that there was a stock issue which was causing delivery to be delayed so that the equipment had been ordered directly from Volk with the delivery time of 2 to 3 weeks given. The documentation suggests that it would have been delivered on or about 6 November 2017 but seems to have delivered (together with a mirror) by the Document Exchange ("DX") to Glasgow in error, which only came to light through the Claimant chasing the matter up with the DX.

72. However, enquiries with the Glasgow store eventually established that they could not find the equipment so that it became necessary to re-order the Steady Mount so that it was delivered directly to the Claimant store . An e-mail dated 22 January 2018 confirmed that it had arrived, together with the mirror, although the mirror was chipped in one corner and was the wrong mirror, so that it would be necessary to reorder it.

73. Following the Claimant returning to work in 2017, it came to light that she had been overpaid her sick pay. The situation was dealt with sympathetically in that Hayley Rowbotham specifically requested that the Claimant be paid a normal salary from the return to work on the basis that the overpayment could be discussed later with the Claimant. There were a number of conversations with the Claimant in which it was explained that she had been overpaid. As of 9 October 2017, the overpayment had been calculated to amount to £2062.42 (see note of conversation with the Claimant on that date).

74. On 4 November 2017 the Claimant sent a text message to Opinder Malhi who was the clinical governance optometrist. The relevant part of this communication was as set out below.

"*I've been meaning to speak to you about a very important topic: storage of record cards. I've been putting pink post its* [sic] *with the record card and also been asking for my records to be kept separate so I can file them myself.*

It's becoming very difficult as the filing system is extremely disorganised; even with me asking repeatedly to file my own records, my records are still being filed in random places. Records which are competencies cannot be found once filed. For example, patient (XX) *was eventually found in the S drawer after my Visit 1. I personally filed* (YY) *in the* (Y) *drawer but other record cards were thrown in so I couldn't find it again.*

It's also becoming difficult to monitor disease progression as (patients) *are coming in and previous records can't be found. I have spoken to David and Sammy about this and we've come up* (with) *a solution whereby I take*

photocopies of the records on file originals in main filing, but keep photocopies separately. Would this be allowed?

May I have a separate box in which my records are kept so I can file them myself?

Any advice you could give would be greatly appreciated.

Kind regards

(A)

Sammy and David have also been copied into this message".

75. The Claimant's case is that this was a qualifying protected disclosure because it contained information tending to show that her employer had failed or was failing or was likely to fail to comply with a legal obligation to which it was subject, namely the legal obligation to file and process any data relating to the patients concerned in a way which complied with data protection legislation.

76. Opinder Malhi replied to the Claimant on 6 November 2017. The reply was complimentary towards the Claimant (for example, describing one of the Claimant's suggestions as "*great*") and indicated that she took the issues being raised by the Claimant seriously.

77. The Claimant submitted a second grievance in November 2017 which raised various issues, including complaining of deductions from her wages and an alleged failure to make adjustments. She also complained about the way Sarah Farrow had treated her. As part of her grievance the Claimant said she no longer wished to deal with Sarah Farrow with the result that Sarah Farrow's involvement with the Claimant's employment came to an end around this time. The Respondent has conceded that this second grievance amounted to a protected act the purposes of Equality Act 2010 section 27.

78. The Claimant's second grievance was investigated by Josh Jeeves, Area Opticians Manager, with the grievance outcome being provided on 21 March 2018.

79. In relation to the Claimant's complaint about reasonable adjustments, the investigation undertaken by Josh Jeeves established that after the Claimant had moved to Erdington Fort, she had requested additional equipment and all of the additional equipment which she had required had now been delivered and installed. He recognised that there had been a delay caused by equipment being delivered to a different practice by mistake and apologised for this delay. However, he clearly considered that this delay had been outside the control of those responsible for obtaining the equipment.

80. In relation to the Claimant's complaint regarding the Respondent seeking to recover an overpayment of salary / sick pay from the Claimant, the investigation of Josh Jeeves established that there was a total overpayment between

November 2015 and July 2017 amounting to £2,062.42. In relation to the Claimant's complaint that her salary for September 2017 had been reduced by £340 and her salary for October 2017 and had been reduced by £244, Josh Jeeves found that this was in relation to the Claimant's phased return to work and had previously been discussed with the Claimant. In relation to the outstanding overpayment of £2,062.42 this would need to be repaid by way of a repayment plan in the Claimant would need to agree a reasonable amount to be paid back monthly.

81. In relation to a complaint made by the Claimant regarding carrying over annual leave, Josh Jeeves held that there should have been no difficulty in the Claimant taking any annual leave for the current annual leave year between 1 April 2017 and 31 March 2018 as she had returned to work at a point when there was still seven months left of the holiday year. However, he agreed to the Claimant carrying over five days from her current annual leave entitlement into the annual leave year for 2018-2019. In relation to the Claimant's unused annual leave entitlement from 2016-2017, he referred to the Respondent's holiday policy which was to the effect that holidays could not be carried over save in exceptional circumstances but that where an employee was on long term absence and their absence extended beyond the end of one holiday year, this was deemed to be an exception, so that he considered it reasonable that the Claimant's holiday entitlement for 2016 to 2017 should have been carried over or a payment made for any underused holiday. He upheld this element of the grievance and stated that he would ensure that a payment was made to the Claimant in respect of her underused holiday entitlement from 2016-2017.

82. On 15 March 2018, Sammy Arif, the Consultant Optometrist who was the Claimant's secondary supervisor, wrote to Kim Cockbill, as the Store Manager, stating that he wished to withdraw as the Claimant's supervisor. His e-mail gave the reasons for doing this, including suggesting that the Claimant's "*attitude and behaviour*" was not "*professional*". This included various criticisms of the Claimant, such as not taking constructive feedback on board.

83. By letter dated 9 April 2018, the Claimant was invited to a formal disciplinary meeting to discuss allegations of potential misconduct, with the allegations alleging rudeness towards her secondary supervisor, Sammy Arif, on three separate occasions, namely 28 February, 7 March and 12 March 2018. The Claimant suggests that the wrong date was given in referring to any incident on 7 March 2018 and the correct date should have been 14 March 2018. This would also be consistent with the e-mail sent by Sammy Arif on 15 March 2018 which refers to the Claimant's behaviour on 14 March 2018 as having prompted "*my final conclusion*" of withdrawing from supervising the Claimant "*due to the stress and anxiety it causes*". The correct date was given in the eventual outcome letter sent to the Claimant.

84. The letter dated 9 April 2018 enclosed copies of the notes taken at interviews with the Claimant, Sammy Arif, David Semp (the other supervisor) and Leanne Bird (Assistant Manager at the store).

85. The notes from the interview with David Semp described having witnessed the Claimant being rude to Sammy Arif when Sammy Arif was being professional and helpful in trying to offer support to the Claimant. Leanne Bird described the Claimant being argumentative and raising her voice in an incident which she described as getting ridiculous and out of hand to the extent that she had to step in to stop it.

86. in her oral evidence, the Claimant sought to suggest that the records of these investigation interviews, which had been conducted by Kim Cockbill, had been falsified. The Tribunal found this suggestion implausible. The notes were clearly verbatim notes which were signed by the participants in the interviews (although the Claimant did not sign the records of her interviews with Kim Cockbill). There was a significant degree of consistency and corroboration in the criticisms being made of the Claimant.

87. The disciplinary hearing was conducted by Emma Barnbrook, Practice Manager, and took place on 13 April 2018 resulting in a decision letter dated 16 April 2018. The letter included the findings set out below.

    "*You apologise if you came across rude and accepted that you should have done things differently when you scribbled you do not agree on notes from meetings and to have reacted the way you did when Sammy had a red eye patient in however you stated that Sammy also argued with yourself. It was therefore my decision not to issue you with a Written Warning*".

88. The letter made various recommendations, including having a mediation meeting with Sammy Arif and the Claimant having coaching "*on communication*".

89. The Claimant commenced a further period of sickness absence on 20 May 2018. This sickness absence was to continue until her employment terminated in August 2020. The absence commenced as a result of the Claimant losing vision in her left eye on 20 May 2018 whilst in the store. The Claimant says that she was eventually diagnosed with optic neuritis in October 2018. Although she states that a large portion of her vision has returned, she has a pupil defect and a visual field defect in the left eye. She states that the poor vision in her left eye has left her with decreased depth perception and susceptibility to falls.

90. The Claimant also states that she was diagnosed with post-traumatic stress disorder on 11 October 2018 in relation to events on 20 May 2018 when she lost her vision.

91. In June 2018, Sara Kidd, an HR Business Partner, became involved in providing support for the management of the Claimant's sickness absence. She was initially asked by People Point, the Respondent's HR advisory service, to assist

the Claimant's line manager, Kim Cockbill, who was the manager of the Erdington Fort store, with arranging a support meeting for the Claimant. Kim Cockbill wrote to the Claimant on 22 June 2018 inviting her to attend a meeting to discuss her absence on 29 June 2018. The Claimant cancelled this meeting before it took place and Kim Cockbill tried to re-arrange it for 9 July 2018. On 5 July 2018, the Claimant e-mailed Kim Cockbill and advised she did not feel well enough to attend the meeting. At this stage, Sara Kidd advised Kim Cockbill to arrange a phone call with the Claimant instead and to share a copy of the Respondent's long term absence policy with the Claimant so that she could understand the reasons for the Respondent wanting to make contact with her. Kim Cockbill advised the Claimant she would do this on 9 July 2018. After this, there was a routine where Kim Cockbill would call the Claimant on a weekly basis. As time went on the Claimant would often not answer the phone and would simply e-mail later advising that her condition was the same.

92. After the Claimant went on sick leave, it came to light that a number of patient record cards could not be located at the Erdington Fort practice. An investigation was carried out which included speaking with everyone in the store. As the Claimant was absent, Sara Kidd advised Kim Cockbill to ask the Claimant about it the next time they spoke.

93. On 12 October 2018, Kim Cockbill, had contacted the Claimant and, in the course of the subsequent conversation, had raised the issue in respect of missing patient records, and had asked if the Claimant was able to assist as to their possible whereabouts.

94. The Particulars of Claim sought to characterise this development on the basis that it involved the Respondent having "*discovered that patient files were missing and they were carrying out an investigation into what had been the subject matter of my protected disclosure*", and suggested that the Respondent was "*intent on taking further unfounded disciplinary action against me*". The Respondent denies that the enquiry made by Kim Cockbill on 12 October 2018 was connected with the Claimant's alleged protected disclosure from 2017. The Tribunal was satisfied that the issue raised by Kim Cockbill was a genuine enquiry. Whilst it was not ideal having to raise the matter with the Claimant when she was absent through sickness, it was a legitimate management decision to do so given the need to locate the records and the possibility that the Claimant might be able to shed some light on their whereabouts.

95. It is to be noted that the Particulars of Claim effectively contain a gap between 12 October 2018 when the Claimant was contacted regarding the issue of missing patient records (paragraph 15) and 16 July 2020 when the Claimant was informed of the proposed store closure (paragraph 16). This partly reflects the reality of the situation, namely that the Claimant was not in the workplace, as she was away from work due to her long-term sickness absence. The relevant history of the matter between October 2018 and July 2020 is largely a narrative which

involves various steps being taken in relation to sickness absence management (or not taken, in so far as the history is largely one of various delays with the Respondent struggling to progress the matter, although not for the want of trying to take appropriate steps). If the Respondent had been motivated to get rid of the Claimant, as is the Claimant's case, as an act of victimisation, then it would have been open to the Respondent to have taken formal capability steps at a much earlier stage.

96. As the Claimant had not suggested that there was any likelihood of a return to work, Kim Cockbill completed an occupational health referral in November 2018. Kim Cockbill had been advised by Sara Kidd to conduct a long-term absence review meeting with the Claimant once the occupational health report had been received. The Claimant attended an occupational health appointment on 30 November 2018 and an occupational health report was prepared on 8 December 2018. However, the Claimant wished to review the report before it was released to the Respondent. On 20 December 2018, Kim Cockbill received a notification from Colleague Health (the Respondent's occupational health service) that the Claimant had refused the Respondent access to the report. In the circumstances, Sara Kidd advised Kim Cockbill to proceed with arranging a long-term absence review meeting.

97. On 29 January 2019, the Claimant was again referred to see Colleague Health. An appointment was arranged for the start of February which the Claimant subsequently cancelled and rescheduled for 15 February 2019. At around this time an e-mail was received from the Claimant requesting that Kim Cockbill only contact her by e-mail as she was very unwell.

98. An occupational health report was produced which was recorded as being dated 21 February 2019 but amended on 1 March 2019. The report referred to the Claimant having given a history of having been diagnosed with optic neuritis in her left eye. She was reporting only a slight improvement in her eyesight, although her eyesight met driving standards. She reported that reading continuously for many hours can strain the left eye causing pain. She also reported feeling low in mood and stated that management actions were not helping. At this stage, she was awaiting the results of repeat MRI scans with regard to her optic neuritis and wanted to wait until she had seen a consultant to discuss the outcome of the scan before returning to work. A phased return to work with adjustments would be needed.

99. At the time, the Claimant provided consent for Kim Cockbill to view this report, but no one else. Kim Cockbill wrote to the Claimant on 22 March 2019 by recorded delivery inviting her to attend a meeting on 29 March 2019 to review the report. That letter was returned as undelivered. Kim Cockbill wrote again on 29 March 2019 inviting the Claimant to a meeting on 6 April 2019. In response to this letter the Claimant notified Kim Cockbill that she was too poorly to attend and asked that the meeting was rescheduled. The meeting was rescheduled to 27

April 2019. The Claimant did not attend that meeting and asked instead that she provide dates on which she could attend a meeting. Kim Cockbill agreed to this and requested suitable dates from the Claimant. The Claimant delayed in providing dates and eventually said she could not attend any meetings until after the end of June 2019.

100. A long-term absence review meeting was eventually held on 11 July 2019. The Claimant was represented by a British Medical Association representative. Kim Cockbill subsequently sent the Claimant the meeting notes and the Claimant said there were lots of inaccuracies. The Claimant disputed that the meeting was a long-term absence review meeting and stated that Kim Cockbill had described it as a "*support*" meeting, although all of the invites were clearly described as being for a long-term absence review. The Claimant refused to discuss the February 2019 occupational health report with Kim Cockbill because she felt that it was out of date. She requested that a new referral was made to Colleague Health.

101. Kim Cockbill made a further referral to Colleague Health following the meeting and an occupational health appointment took place with the Claimant on 4 September 2019. However, the Claimant initially refused the Respondent access to the report. She said her occupational health appointment had been rushed, and that she wanted to have a new appointment. The meeting notes and report were peer reviewed by another occupational health practitioner who confirmed that the appointment had been carried out correctly. As such, Colleague Health refused to arrange another appointment.

102. On the basis that a further occupational health report had been prepared, albeit the Respondent had not had access to it, Sara Kidd advised Kim to move to the next stage of the long-term absence process, which would be a capability review meeting (which was Stage 3). An invite was sent to the Claimant on 16 October 2019 inviting her to attend a meeting on 21 October 2019 with an independent manager and noting that a potential outcome could be dismissal on capability grounds. The Claimant complained in response to this. She disputed any meeting having taken place at Stage 2 of the procedure (which involved a long-term absence review meeting) on the basis that she understood that the previous meeting had been an informal support meeting. This was not accepted by the Respondent, but the Respondent decided to arrange another Stage 2 meeting rather than further delay discussion about the Claimant's possible return to work with a grievance process.

103. In the meantime, the Claimant had contacted Colleague Health on 6 October 2019 advising that she now wanted to request that some amendments be made to the occupational health report and requested three weeks to do so. In reviewing the report for these purposes, the Claimant provided supplementary information which required a further review of the report. Kim Cockbill finally

received the Claimant's occupational health report in or around the start of December 2019.

104. The resultant occupational health report was stated to be based on the referral information, information provided by the Claimant, observations during a single assessment and the clinical opinion from the consultation. It set out the history of recent treatment provided by the Claimant. The Claimant was reported as saying that the visual function in her left eye was 6/12 and normalised in the right side which the report suggested "*indicates good progress in the return of visual function*". It was suggested that the current level of visual function should be sufficient "*to undertake some degree of working through appropriate adjustments, restrictions and general measures*" with the Claimant suggesting that she "*that the use of neutral density filters over the left eye to aid comfort would support her at work*". The Claimant had stated that she had received treatment with oral steroids for her optic neuritis. She told the independent occupational health physician that she had not yet returned to any level of social functioning which she felt was as a result of being immunocompromised due to the high original steroid starting dose (although the steroid therapy had stopped in June 2019). The report also noted that, during the consultation, the Claimant was found to be low in mood. In terms of her fitness for work, it was noted that "*there are both medical and non-medical factors operating in this case*" quote. The Claimant presented with a significant ophthalmological problem which was likely to require ongoing medical management, but in parallel with this her "*feelings surrounding the workplace are acting as a significant barrier to her returning to work*". The report was unable to confirm her fitness to return to work without seeking "*further collateral information*" for which purposes it was suggested that there was a need to "*write to the GP/Specialist for a targeted report in order to investigate the collateral medical history further in order to provide clear, prescriptive and supportive advice as to how to best support* (A) *back into work and help rehabilitate her further*". It was suggested that if the Claimant's GP was to provide any report, and it would be important that it should contain copies of relevant hospital letters. The report stated that "*I think it is best that any decisions regarding the reasonable adjustments to support her back into work are deferred until we are in receipt of the targeted report and thereafter advise further*". However, it was noted that "*I understand that in the past you have implemented equipment into the testing rooms to aid comfort and support posture and this is still currently available*" and this "*will be needed when she returns to work*".

105. The report also noted that the Claimant had made reference to a number of workplace issues which she perceived to have contributed to work-related stress and suggested that it would assist the Respondent to undertake a formal stress risk assessment with a view to "*resolving the non-medical issues which may be arising within the workplace*". It was further suggested that the Claimant "*has become very sensitised to the breakdown in employment relationship with her*

direct line manager and feels that the situation has become untenable" so that there is "*merit in considering relocating her to a different store where she can potentially be managed by a different line manager in order to create and restore employment relationships as a way forward*". It was suggested that, as the Claimant was likely "*to find any meetings with the line manager very stressful… it may be best that further administrative processes are led by HR or someone independent from the team*".

106. The penultimate paragraph to the report noted that the Claimant was "*hesitant to give consent to approach her GP and specialist and has consequently taken the Access to Medical Reports consent form away with her to deliberate further*". It was stated that without this consent "*we will be unable to seek such further information*" but it had been explained to the Claimant "*that without such information we will be unable to provide further guidance and supportive employment related information to help the situation*".

107. On 10 December 2019, having viewed the occupational health report, Kim Cockbill e-mailed the Claimant noting that it was suggesting that any future meetings be held with an independent manager / HR and stated that she would be happy to support this going forward but would need the Claimant's consent for any such manager to have additional access to the most recent occupational health report in order to support the Claimant further.

108. In the meantime, on 13 December 2019, Kim Cockbill also obtained confirmation from Colleague Health that the Claimant had not yet provided the consent for a report to be obtained from her GP or specialist.

109. On 15 December 2019, the Claimant replied to Kim Cockbill suggesting that HR already had the report but seeking further clarification as to whom Kim Cockbill was seeking to send the report. The later appeal decision letter suggests that it is incorrect that HR would already have the report as Colleague Health would only supply the report to named people once the Claimant had completed the consent form for this to happen.

110. Kim Cockbill seems to have replied on 16 December 2019 giving the name of Janet Paget, but on 3 January 2020 the Claimant refused to give such consent on the basis that Janet Paget had been present at a previous meeting, so that she did not consider her to be an independent manager for the purposes of carrying out any meeting.

111. On 17 January 2020, Kim Cockbill e-mailed the Claimant seeking consent for the report to be provided to Emma Coxon, who was an Employee Relations Manager, Sara Kidd, who was an HR Business Partner and Emma Barnbrook who was the Practice Manager at Boots Opticians, Merryhill, who had been identified as the manager "*who will be supporting your case going forward*". Kim asked the Claimant to give consent, as soon as possible "*in order for them to*

access the report and decide on the best way to support you back into the workplace".

112. The Claimant replied on 27 January 2020 stating that she had already sent Emma Coxon a copy of the report. Colleague Health had e-mailed her on 10 January 2020 asking her to do this, and she had sent an e-mail on the same day attaching the report and saying that the password would follow in a separate e-mail. However, the Claimant wanted clarification as to the reason that the report needed to be sent to an HR Business Partner and stated that she did not consider Emma Barnbrook to be an independent manager as she "*has previously been involved in my case*".

113. On 5 February 2020 Kim Cockbill sent an e-mail to the Claimant which:
(1) asked her to confirm "*that you are happy for Emma* (Coxon) *to view it*" (presumably on the basis that sending the report to her did not, technically, confirm consent for her to view the report);
(2) explained that seeking consent for the HR Business Partner to view the report was so the HR Business Partner "*could also support your return back into the workplace*"; and
(3) asked the Claimant to provide specific detail regarding any previous involvement on the part of Emma Barnbrook "*in your absence support … as I don't recall this*", with a response being requested within five working days.

114. The Claimant replied on 7 February 2020 stating that she could not provide a response within five working days due to hospital appointments but asked to be given until Saturday 15 February 2020 to respond to the e-mail.

115. On 15 February 2020 the Claimant emailed Kim Cockbill stating that she was still confused as to the reason an "*HR Business Partner/senior management need access to the report*" and referred to the involvement of Emma Barnbrook in the previous disciplinary proceedings as meaning that she "*is not a suitable manager for future meetings*".

116. Kim Cockbill replied on 22 February 2020 indicating the Emma Coxon had yet to receive the report. Kim Cockbill also indicated that she would "*come back to you shortly with regards to an alternative manager*".

117. A further e-mail was sent by Kim Cockbill on 14 March 2020 with the Claimant responding on 20 March 2020 that "*I will respond when I'm able to; I'm currently in isolation as I'm immunocompromised*".

118. On 3 April 2020, Emma Coxon e-mailed the Claimant directly as "*we appear to be struggling in our communication*s". She confirmed that she had yet to receive a copy of the report. She asked that the Claimant e-mail her a copy of the report and any associated passwords by return, but no later than 8 April 2020, so that she could advise on the appropriate way to progress matters. For these

purposes, she stated that "*on Thursday 9th April we will be holding a case conference to agree the appropriate progression of this case*".

119. In passing, the Tribunal notes that the Claimant has provided an e-mail, which is in the bundle, which is the e-mail of 10 January 2020, which seems to show her e-mailing the report to the correct e-mail address for Emma Coxon, but not the password. She does not seem to have produced any corresponding e-mail showing her e-mailing the password (or providing any consent for a report to be obtained from her GP). In any event, for a reason which is unclear from the evidence before the Tribunal, Emma Coxon had not received the report when it was sent in January (and, would, in any event, have also needed to have been sent the password for the report).

120. The Claimant replied to Emma Coxon on 3 April 2020 seeking to point out that she had sent the report to the correct e-mail address for Emma Coxon on 10 January 2020. Her e-mail stated that the "*report is attached for your reference in the original email*" and the "*password will be sent in a separate email*". It seems that this is the point in time at which Emma Coxon actually received the report and / or was able to view it.

121. The Claimant sent a further e-mail to Emma Coxon on 9 April 2020 querying Emma Coxon's actions in seeking to arrange a case conference to progress matters by asking Emma Coxon to refer her to the section in the updated absence policy where there was any reference to a case conference. She sought confirmation that the case conference was being cancelled. She also suggested that the occupational health report (which Emma Coxon had only just seen) was now out of date and therefore a new occupational health report should be obtained "*before any substantive decisions are made*". This rather overlooked the fact that they were no further forward than they had been at the time of the previous occupational health report since the "*collateral information*" sought by the previous report, in the form of a targeted report from the Claimant's doctors, had yet to be obtained.

122. The Tribunal is satisfied, on the balance of probabilities, that the Claimant had yet to provide consent for a targeted report to be obtained from her GP or specialist. The Particulars of Claim assert that the Claimant gave consent for the Respondent to obtain the targeted report from her GP on 10 January 2020, but refers to the Respondent claiming that it did not receive any such e-mail. In fact, there seems to be no documentary evidence as to the Claimant having given consent at this point in time, still less any e-mail to this effect. The Claimant does seem to have provided a copy of an e-mail which was not received, but this was not an e-mail providing the requisite consent; rather, it was an e-mail apparently sending a copy of the occupational health report to Emma Coxon. As stated, the e-mail also referred to sending the password for the report by way of a separate e-mail, and any such separate e-mail has not been produced. Similarly, no e-mail has been produced from 10 January 2020 providing consent to a report being

obtained from the Claimant's doctors. It appears possible that the Claimant may have got confused and in referring to consent having been provided on 10 January 2020 was actually thinking of the e-mail sent to Emma Coxon apparently attaching the report on this date (albeit without the password).

123. In the course of cross-examination, the Claimant's position became that, although the occupational health report had made it clear that she would need to complete a consent form and return it to the Respondent, she had actually given the consent to her GP and so had assumed that her GP would have provided the targeted report. On further questioning by Ms Hill, the Claimant clarified that this did not involve giving written consent to her GP, but that any such consent had been given verbally. The Tribunal found this evidence unsatisfactory, since any consent would need to have been documented and confirmed in writing. Moreover, the Claimant's asserted assumption that a GP would have simply provided any report to the Respondent seems inconsistent with the previous occasions when occupational health reports had been provided to the Respondent when the Claimant had insisted upon seeing a copy of any such report first.

124. The absence of any consent to a report being obtained from the Claimant's own doctors appears clear from the e-mail exchange with Emma Coxon on 9 April 2020. The Claimant noted that the Respondent's occupational health providers had changed from Nuffield Health to Healthworks and asked if the Nuffield consent form was still applicable. Emma Coxon's reply confirmed that the Respondent was moving from Nuffield to Healthworks, but the Nuffield consent form would be fine. She was asking for a copy of the completed consent form to be e-mailed to her, indicating that a photograph of it would be sufficient. She was making it clear that the Respondent wanted to act on the recommendation in the report by seeking a targeted report from the Claimant's doctors, but needed the Claimant's consent to do this.

125. On 24 April 2020, Emma Coxon contacted the Claimant again as she had not received a response. She asked that the Claimant respond by return, either with the form, or notifying the Respondent that she did not intend to provide consent. On the same day the Claimant replied to Emma Coxon to inform her that she was not well and requested that Emma Coxon wait until the current pandemic had passed. The Tribunal notes that this was a two-page form which she had for some time which simply required her to indicate her consent or otherwise to a report being obtained from her doctors and her wishes with regard to the disclosure of the report.

126. The position in respect of obtaining consent from the Claimant had still not been resolved by May 2020. Eventually, on 11 May 2020, Emma Coxon set a deadline of 13 May 2020. On 14 May 2020 the Claimant e-mailed pointing out that she did not have access to a printer and so was providing consent in the form of an e-mail making it clear that she would wish to see any GP report before

it was provided to the Respondent's occupational health advisers. It had taken her eight months and multiple prompts to provide consent. This was despite the fact that the occupational health report from September 2019 had made it clear that the report from the Claimant's doctors was needed "*in order to provide clear, prescriptive and supportive advice as to how to best support*" her "*back into work and help rehabilitate her further*". The penultimate paragraph of the report had specifically stated that it had been explained to the Claimant that, without "*this consent we will be unable to seek such further information*" and "*without such information we will be unable to provide further guidance and supportive employment related information to help the situation*".

127. The appeal decision letter dated 1 September 2020 states that, unfortunately, "*by the time you granted consent in May, due to Covid-19 Health Partners would not write to GPs due to their support for the NHS in reducing the pressures placed upon it*".

128. The Claimant seeks to rely upon the occupational health report having recommended, as a reasonable adjustment, that the Respondent should consider transferring her to an alternative store and complains that this recommendation was "*never explored or actioned*". This was one of the issues dealt with in the dismissal appeal. The Respondent's position is that without the Claimant's consent to obtain a targeted report from her own doctors, and in the face of ongoing delay in the Claimant allowing managers access to the occupational health report, it had not been possible to progress the matter in terms of identifying the specific adjustments required to help the Claimant to return to work.

129. The appeal decision letter concluded that, based on the history set out above regarding the steps taken to try and progress the matter following the occupational health report from September 2019, "*I understand that on numerous occasions you were given opportunities to work with us to establish the best ways in which we could have supported you however the delay in your responses did not allow us to establish best possible ways of supporting your return to work and whether transfer to a different store should and could have been considered and accommodated*". In the decision letter, it was stated that "*I would agree that the process took far too long however I have found that it was primarily yourself causing the delays*". The letter also suggested that, in relation to different managers becoming involved in the Claimant's case, both Janet Paget and Emma Barnbrook were "*independent from the team and not your direct line manager*" and therefore "*met the criteria set out in the Colleague Health report however it was at your request they were not involved*".

130. In July 2020, Claire Bradshaw took over management of the Claimant's long-term absence and sought to arrange another occupational health referral on 20 July 2020. In the event, Claire Bradshaw e-mailed the Claimant on 28 July 2020 stating that quote "*I have since heard back from Colleague Health, their*

professional view is, as you stated that nothing has changed following your previous consultation, a further consultation would not add value". She noted that the Claimant had "*explained that talking through your medical history can be distressing to a further consultation at this time is not required*".

131. The Tribunal accepts that the various delays that there had been, as described above, had prevented a further long-term absence review meeting taking place (or a case conference), which would have enabled the Respondent to explore further any adjustments which could have been made to assist the Claimant return to work. Equally, any further long-term absence review meeting might also have resulted in matters then being progressed through the further stages of the Respondent's capability procedure given that, at this stage, the Claimant remained signed off work with no anticipated end date to her absence and had given no real indication that she was likely to return to work.

132. In the meantime, on 16 July 2020 the Claimant was informed of the proposed closure of the Erdington Fort store.

133. The Respondent has explained its decision to close the store in terms of having seen an increase in its operating costs, albeit alongside a marginal increase in sales, with the issue being exacerbated by the pandemic. This had resulted in a review of its portfolio of stores across the UK. The review resulted in a decision, taken by the Managing Director and Finance Director, with approval from the Board, to close 48 stores across the business, meaning approximately 500 employees were placed at risk of redundancy. This included the Erdington Fort store. Although it was a busy store, the Respondent was not making any money from it because the property and rental costs were very high.

134. Each store was treated as a separate establishment for consultation purposes. There was only one store with over 20 employees. Collective consultation arrangements were put in place for that store. For all the other stores, the Respondent consulted individually with staff members.

135. All of the 12 employees at the Erdington Fort store were placed at risk of redundancy. Louise Chatting, as the Area Manager for the West Midlands, was responsible for running the Boots Opticians stores within the West Midlands area, including the Erdington Fort store. Five of her stores were proposed for closure. She had a catch-up with her managers on or around 14 July 2020 to check that they had arranged first consultation meetings with everyone in their stores. During this meeting Kim Cockbill, who was the Store Manager, brought to light that a consultation had not yet been arranged for the Claimant because the Claimant had been on long-term absence and had raised concerns about Kim Cockbill leading or being part of absence meetings with her. Kim Cockbill had understood that she was not to have any communications with the Claimant. Louise Chatting therefore decided that the best course of action was to lead the Claimant's consultation myself. Louise Chatting had not had any involvement in

the direct management of the Claimant prior to becoming involved in the redundancy process. She contacted the Claimant by telephone on 16 July 2020 to inform her of the announcement to close her store. She explained to the Claimant that they would need to have a meeting to discuss the proposal, and this was arranged for the following day. She sent the Claimant a letter confirming details for the consultation.

136. The first consultation meeting with the Claimant took place on 17 July 2020. The purpose of this first consultation meeting was to explain to the Claimant the process and the reasons for the proposed redundancies. The Particulars of Claim complain that the meeting was arranged at short notice which did not allow the Claimant any time to seek trade union assistance and representation. There does not seem to be any evidence of the Claimant having requested that the meeting be delayed. Louise Chatting had asked the Claimant whether she was happy to proceed with the meeting and she confirmed that she was. The evidence of Louise Chatting, which the Tribunal accepts, is that if the Claimant had indicated that she was unhappy about not being represented, she would have adjourned and rescheduled the meeting for a time when a representative was available. Given that this was a meeting in relation to a redundancy situation, it was clearly in her interests for the meeting to take place as soon as possible.

137. During the meeting, Louise Chatting provided the Claimant with all the information about the proposal to close her store. She advised the Claimant that details of vacancies within the business would be made available following the meeting. The impression that she got was that the Claimant did not seem concerned about the process. At the end of the meeting, a date was agreed for the second consultation meeting.

138. The Claimant complains that there was a failure to inform her of the selection criteria for redundancy. The Respondent's position is that there were no formal selection criteria because the store was closing and all of the employees who worked at the store were at risk of redundancy (and would be made redundant unless alternative employment was found for them). Ultimately, it only proved possible to find alternative employment for one of the employees at the store, namely the Assistant Manager who was transferred to another store. The Respondent suggests that this individual successfully applied for a role as a Contact Lens Optician.

139. Following the initial meetings having taken place, everyone at risk of redundancy, including the Claimant, was sent a link to a web page which set out all the Respondent's available vacancies across the country.

140. Louise Chatting was also working with surrounding Area Managers on an ongoing basis to try and identify whether there were any other vacancies that had not yet been advertised. She asked these Area Managers whether there were any stores in their areas that could accommodate a Pre-registration Optometrist.

They were unable to identify any location that could accommodate a Pre-registration Optometrist due to space requirements and the need for an available and suitable supervisor. Such a store needs to have an additional consulting room with equipment for the Pre-Registration Optometrist to use for work. The stores that fitted these requirements already had a Pre-registration Optometrist in post. The evidence of Louise Chatting, which the Tribunal accepted, is that it is very difficult for a supervisor to supervise more than one Pre-registration Optometrist at a time. The Respondent did have some optical consultant roles on the vacancy list for which the Claimant could have applied, but she did not do so.

141. A second consultation meeting with the Claimant took place on 31 July 2020. The Claimant was accompanied by Peter Jackson, an employment adviser from the BMA. The Claimant confirmed that she had seen the list of vacancies. The Claimant's representative asked whether a new Pre-registration Optometrist post could be created for the Claimant to complete her studies. Louise Chatting explained that she had looked into this and had not been able to identify any stores that could create a new vacancy for the Claimant. The Claimant asked if she could take the place of one of the pre-registration students who had been due to start in September 2020. Their contracts had been pushed back due to the pandemic. Louise Chatting did not have an immediate answer to this and undertook to check.

142. Louise Chatting sent an e-mail to the Claimant on the morning of 5 August 2020 setting out answers to questions that had been raised in the second consultation meeting. She explained to the Claimant in that e-mail that the reason the pre-registration students were not starting in September was that the previous year's students remained employed, having been unable to complete their exams due to lockdown. As such, the fact that the incoming pre-registration students were not starting in September did not create any additional vacancies. In relation to a query regarding holiday pay, she stated that the Claimant had 435 hours of holiday carried over from 2018/19 and 2019/20 and had would have accrued 94.3 hours for 2020/21 in the period up to 31 August 2020.

143. A further consultation meeting took place on 5 August 2020 with the Claimant similarly accompanied by Peter Jackson. Louise Chatting asked the Claimant whether she had applied for any alternative roles. The Claimant confirmed she had not applied for any roles. The Tribunal accepted the evidence of Louise Chatting, which was that, if the Claimant had applied for a role, or was intending to apply for a role, Louise Chatting would have waited for the outcome of that application before making a decision about the Claimant's redundancy. The Claimant said during the meeting on 5 August 2020 that she thought the consultation had been too hasty. Louise Chatting explained that she had followed the recommended timelines. In addition, she had been flexible in ensuring that meetings with the Claimant were scheduled around her medical appointments. The second consultation meeting had been re-arranged at the Claimant's request

and the final consultation meeting had been rescheduled to accommodate the Claimant. The meeting on 5 August 2020 was paused so that the Claimant could confer with her representative. When the meeting was reconvened, Louise Chatting outlined to the Claimant her redundancy entitlement and gave her notice that her employment would be terminated by reason of redundancy.

144. The indicative figure given for the Claimant's severance payment was £2707.28. This represented an enhanced redundancy payment. The redundancy information provided at the beginning of the process was to the effect that redundancy pay would amount to two weeks' pay per completed year of service on the basis that this payment would include any entitlement to a statutory redundancy payment.

145. Louise Chatting provided written confirmation of her decision by letter on 6 August 2020. The letter gave the Claimant notice of the redundancy. The Claimant was informed that her last day would be 30 August 2020 and she could continue to apply for alternative roles up until that date. Effectively, the letter was giving her 24 days' notice rather than the 28 days' notice to which she was entitled, but the letter informed her that she would receive a payment in lieu of notice. The letter stated that "*you will receive payment for your unserved notice in your final pay*". Effectively, she was entitled to four days' pay due to the notice being too short. The store closed on 31 August 2020.

146. In the course of the consultation process, the Claimant had made a request which was described in terms of an "*abeyance for six months*". The rationale for this seems to have been that a job opportunity for the Claimant might arise during this period at another store, although there was nothing to indicate that there was any likelihood of this happening. Effectively, it was being suggested that the Respondent should put any implementation of the Claimant's redundancy on hold for six months. The point was further made that the Claimant was not costing the Respondent anything at this point in time because she had exhausted her sick pay entitlement.

147. The Respondent did not agree to the request for a six-month abeyance. The Respondent's reasoning was that the impact of the pandemic and its ongoing consequences meant that there was a lack of "*visibility*" as to what the position would be in six months' time. There was also a lack of visibility in terms of the prospects for the Claimant returning to work.

148. The Claimant contends that there was inadequate consideration of available vacancies. However, it is not being suggested by the Claimant that there was an existing vacancy for which she should have been considered. Rather, the Claimant's case is that inadequate consideration was given to her suggestion that the Respondent should either create a new pre-registration role for her or else should "bump" her into the post of another Pre-registration Optometrist and make that person redundant instead.

149. The Tribunal accepts the Respondent's position that it was unable to locate a vacancy for a Pre-registration Optometrist in the Midlands area. There were vacancies for other roles, but in this regard the position was that the Claimant was provided with a list of vacancies and did not apply for any. The Respondent did not agree to create a new pre-registration role for the Claimant. This would have involved creating a role for which there was no business need, given that the impact of the pandemic, including ongoing social distancing requirements, had reduced the amount of work available. Similarly, the Respondent did not agree to "bump" the Claimant into another role. This would have involved making another Pre-registration Optometrist redundant instead of the Claimant when the position would have been that such an individual was presently working at a store which had not been closed (whereas the Claimant was off sick with no immediate prospect of return), and such an individual was far closer to qualifying than the Claimant.

150. The Claimant appealed against the decision dismissing her. Her appeal was considered at an appeal meeting on 25 August 2020, at which the Claimant was accompanied by Peter Jackson. The appeal meeting was conducted by Stuart Nicol, Head of Flagships, who dismissed the appeal.

151. The Claimant had been employed by the Respondent just under five years. During that period, she was on sick leave for approximately four years.

152. As at the point in time of her dismissal, the Claimant had been absent from work due to sickness since 18 May 2018. The position in respect of sick pay was that, due to the Claimant's length of service, she was only entitled to four weeks' company sick pay in a rolling twelve-month period. Company sick pay was payable as an addition to statutory sick pay. As was clear from the fact that it needed to be explained to the Claimant in cross-examination, it would seem that the Claimant did not appreciate that she was only eligible for statutory sick pay for a maximum of 28 weeks. Where an absence was one continuous period of absence, once exhausted, the entitlement to company sick pay and statutory sick pay remained exhausted in relation to the period of absence.

153. The value of four weeks' company sick pay in 2018, for absence in 2018 was £981.84. Over the course of her absence from May 2018, the Claimant received payment of £1,048.34 in company sick pay. The value of the statutory sick pay to which she was entitled was £2,577.12. Over the course of the Claimant's absence between June and December 2018 she was paid a total of £2,577.40 in respect of statutory sick pay payments.

154. The Claimant's wage slips show that, as of May 2018, her normal gross monthly salary was £1,353.63. It had increased to £1,381.25 by July 2018. The payslip for May 2018 shows her receiving her salary in full for this month, even though her sickness absence dated from 18 May 2018. The way in which payroll dealt with sick pay can be seen from her wage slip for June 2018 which still shows

her full salary of £1,353.63 as a credit on the payslip but this is alongside a debit of £1,199.54 described as "*Company Sick Pay Offset*". The difference between the two figures was explained on the basis of the figure for salary being 1/12th annual salary but the Company Sick Pay Offset figure being based on the actual hours that the employee had been due to work that month (but for sickness). The wage slip then shows a credit for statutory sick pay of £276.15 and a credit for company sick pay of £118.38. This meant that the gross pay for June 2018 was £548.62. Similar entries appear for subsequent months, although there is some variance in the amounts. For example, in September 2018 the debit for Company Sick Pay Offset of £1,593.75 was greater than the figure for salary of £1,381.25 but the corresponding figures for statutory sick pay and company sick pay were £460.25 and £122.22 respectively. The gross amount paid was £369.97. It does appear to be an unnecessarily complicated way of making payments of statutory sick pay and company sick pay to an employee who was off sick and not working at all.

155. By the end of the year, the Claimant had effectively exhausted her entitlement to either company sick pay or statutory sick pay. Ironically, at the point in time when she simply had no entitlement to pay, the wage slips become even more complicated. The wage slips would show salary being credited every month and, in some months, company sick pay and / or statutory sick pay. There would be a debit for Company Sick Pay Offset and a credit described as "*Rounding (N)*". The crediting of a sum described as "*Rounding (N)*" seems to have been a payroll device to reconcile the payroll figures (and the figures on the payslip). The same sum would then we recovered the following month and would appear in the list of deductions described as "*Rounding Recove*".

156. An example which shows how unnecessarily complicated this was can be seen by looking at the payslip for 11 May 2019 where the column listing payments includes credits of £342.41 for the company sick pay, £1,466.44 for salary and £4,510.36 for "*Rounding (N)*", but also includes debits in the form of a debit for £2,577.40 described as "*SSP payment*" and £2,445.75 described as Company Sick Pay Offset. The debits and credits added up to a total in the payment column of £1,296.06. In the deductions column there was then a single entry for £1,296.06 described as "*Rounding Recove*" (in other words, recovering or cancelling out the "*Rounding (N)*" credit from the previous month) so that the total deductions amounted to £1,296.06 and equalled the total payments. Obviously, this resulted in the Claimant receiving a net payment of £0.00, which was the extent of her entitlement to pay at this point in time. However, it was nonsensical that this was being communicated to her by way of a wage slip which showed credits or notional payments being made to her in excess of £6,000.00 with these credits then being cancelled out by debits or deductions amounting to the same sum.

157. Any employee would be genuinely confused by this. The explanation which was provided by the Respondent was that the entries on the wage slips reflected the way in which its payroll operated. A detailed explanation was set out in the closing submissions on behalf of the Respondent, although the Tribunal itself found the explanation confusing and, therefore, of limited assistance.

158. One relevant factor though seems to have been that there was a payroll cut-off date relatively early in the month (apparently around the second Tuesday of the month) so wage slips would not take account of information entered onto the payroll after the cut-off date. It can be seen that the dates of the wage slips themselves were near the end of the month but gave a much earlier date in the month as the date up to which any adjustments had been claimed. An example is the wage slip for July 2020 which is dated 28 July 2020 and gives 11 July 2020 as the cut-off date for any adjustments.

159. The Tribunal also found that further confusion was generated by the fact that the Respondent's payroll records, which appeared to show the debits and credits for each month (pages 1003 to 1060 in the bundle) did not necessarily correspond, in terms of the debits and credits shown, with the wage slips actually received by the Claimant. In particular the payroll figures for April to August 2020 (pages 1056 to 1060) differ from the figures on the wage slips produced by the Claimant as the wage slips which she actually received for these months. The explanation would seem to be that the payroll information has been retrospectively amended, presumably with debits and credits being assigned to the months to which they related, whereas on the actual wage slips sent to the Claimant not all of the applicable debits or credits for that month had been processed.

160. This is illustrated by comparing the payroll information for 28 August 2020 with the actual wage slip received by the Claimant the 28 August 2020. The payroll information shows that the severance payment and the payment in lieu of notice have now been assigned to this month (whereas they were shown on the wage slip sent to the Claimant for 28 September 2020) and similarly the payroll information for 28 August 2020 shows a sum due for outstanding holiday which now appears as £4,803.90 (whereas the entry for outstanding holiday originally appeared on the wage slip dated 28 September 2020 in the sum of £880.90). This reflects the fact that the Respondent seems to have re-calculated the Claimant's outstanding holiday entitlement in February 2021 with the result that she became entitled to a further sum of £3,987.32 gross and £3,378.95 net.

161. However, all of that said, notwithstanding the confusion generated by the Respondent's payroll information and wage slips, the Claimant is sufficiently intelligent that she either did or should have appreciated that the length of her sickness absence had reached the point where she had ceased to be entitled to pay.

162. Effectively, the wage slips seem to have been including the amounts (or notional amounts) which the Claimant would have been entitled to had she not been off sick. This possibly extended to the company bonus and Christmas gift. Thus, the wage slip for November 2019 includes a credit of £120 described as "*Christmas Gift*", whilst the wage slips for January 2020 and April 2020 included credits described as "*Optics Bonus*" for £200 and £500 respectively. However, the wage slips for each of these months in each case shows the total payments being equalled by the total deductions so that the net payment was £0.00. Thus, these appear simply to have been notional payments rather than sums to which the Claimant was entitled. Quite apart from the fact that the Respondent's bonus scheme was described as a discretionary bonus scheme (and gifts are, by their nature, discretionary), the Claimant had not been at work since May 2018 so was not in work for any period to which the sums would otherwise have related. The notional nature of the supposed payments is further illustrated by the fact that the Claimant accepted in cross-examination that an employee would not receive both a Christmas gift and a bonus.

163. The Claimant's payslip for September 2020 showed her being credited with a severance payment of £2,707.28, a payment in lieu of notice of £483.44, and the payment in respect of outstanding holiday of £888.90. This amounted to £4,079.62. However, the wage slips also shows a debit in the payments column of £1,466.44 described as "*Backpay – Pensionable*". However, the payments column also shows credits in respect of salary and Company Sick Pay Offset even though the Claimant had not worked during this month and had exhausted her entitlement to sick pay. In addition to a national insurance contribution of £74.57, the deductions column also showed a deduction of £3,219.03 described as "*Rounding Recove*". The net payment the Claimant received was £827.08. The actual gross figure (in other words, the figure before the deduction Of National Insurance) was effectively £901.65.

164. As stated, the Respondent has subsequently recalculated the sums due to the Claimant (as can be seen from the spreadsheet at page 1065) so that the outstanding holiday payment of £880.90 was increased in February 2021 to £4,803.90 with the result that she became entitled to a further sum of £3,987.32 gross and £3,378.95 net.

165. The Particulars of Claim contained an allegation that, since her employment ended, the Claimant has been actively looking for new employment without success but has discovered that her future employment prospects had been damaged because the Respondent had informed prospective employers that "*I stole patient records*". She believes that this is a further act of victimisation for having made a protected disclosure in 2017 and on the grounds of the protected acts involved in submitting her grievances. The Tribunal accepts the evidence of the Respondent that it had not received any reference requests from prospective employers. The Tribunal has not been provided with any evidence from which it

can make a finding that prospective employers were told that the Claimant had stolen patient records. The Tribunal concluded that the Claimant's evidence regarding this was implausible. Essentially, she was suggesting that she was in the process of being interviewed, when the interviewer paused the interview, and when the interviewer came back the Claimant was informed that the process was being brought to an end because the interviewer had been informed of the Claimant having stolen patient records. The Tribunal considered it extremely unlikely that the Respondent would have made such an allegation concerning the Claimant in the absence of there being any documented basis for such an allegation or that any interviewer would have reported the allegation back to the Claimant in the middle of an interview in this way.

Relevant legal principles

Victimisation and public interest disclosures

166. The term "*qualifying disclosure*" is defined by section 43B of the Employment Rights Act 1996 ("ERA 1996") as meaning "*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 … (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*".

167. In *Williams v Brown [2019] UKEAT/0044/19*, HHJ Auerbach considered (at paragraph 9) the questions that arise in determining whether a qualifying disclosure has been made, as set out below.

168. "*It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held*".

169. The area of dispute raised by the Respondent was that it was not accepted that the text message relied upon by the Claimant was a public interest disclosure as the Respondent contended that no information was conveyed.

170. There must be a disclosure of information. An allegation against the employer or a simple expression of dissatisfaction by the employee will not be enough (see *Cavendish Munro Professional Risks Management Limited v Geduld [2011] IRLR 38, EAT*). However, a disclosure of information may be made as a part of making an allegation. In *Kilraine v London Borough of Wandsworth [2018] ICR 1850, CA*, it was held that sometimes a statement which can be categorised as an allegation will also contain information and amount to a qualifying disclosure, but it depends on whether it falls within the language of ERA 1996 section 43B(1). Sales LJ

stated that, in order for a communication to be a qualifying disclosure it has to have "*sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)*".

171. Under ERA 1996 section 47B(1) a "*worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*".

172. Under ERA 1996 section 103A, an "*employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*".

Unfair dismissal

173. ERA 1996 section 98 sets out the basic test for unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within ERA 1996 section 98(2).

174. Redundancy is a potentially fair reason for dismissal. In *Abernethy v Mott, Hay & Anderson [1974] IRLR 213, CA*, it was said that "*a reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee*".

175. The definition of redundancy for the purposes of ERA 1996 section 98(2) is found in ERA 1996 section 139 and, so far as material, is as set out below.

"*(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish".

176. Once the employer has shown a potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the Claimant for that reason. ERA 1996 section 98(4) states that this (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 sufficient reason for dismissing the

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

177. The proper application of the general test of fairness in ERA 1996 section 98(4) has been considered by the Employment Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "*band of reasonable responses*" (see *Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT*).

178. In cases where the Respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in *Williams & Others v Compair Maxam Limited [1982] IRLR 83, EAT*. In general terms, employers acting reasonably should seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing .an employee, the employee could be offered alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

179. The definition of consultation which has been applied in employment cases (see, for example, *John Brown Engineering Limited v Brown & Others [1997] IRLR 90*) is taken from the Judgment of Glidewell LJ in *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72* (at paragraphs 24 and 25) as set out below.

"*24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:*
'Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation'.

25. Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

180. If the dismissal was unfair, the issue arises, in accordance with the principles established in the case of *Polkey v A E Dayton Services Limited [1988] AC 344, HL*, as to whether any adjustment should be made to any compensatory award to reflect the extent of any possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

Burden of proof in discrimination cases

181. Equality Act 2010 section 136 provides for a shifting burden of proof, as set out below.

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

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

182. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong [2005] ICR 931*. This guidance has subsequently been approved by the Court of Appeal in *Madarassy v Nomura International plc [2007] ICR 867* and by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054* (at paragraphs 25-32). In *Efobi v Royal Mail Group Limited [2021] ICR* at paragraph 26, Lord Leggatt made it clear that Equality Act 2010 section 136 had not made any substantive change to the previous law.

183. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of any other explanation, that the treatment was at least in part the result of her disability. At the first stage, when considering what inferences can be drawn from the primary facts, the Tribunal must ignore any explanation for those facts given by the Respondent and assume that there is no explanation for them. It can, however, take into account evidence adduced by the Respondent insofar as it is relevant in deciding whether the burden of proof has moved to the Respondent. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the impugned decisions or treatment.

184. In *Madarassy v Nomura International plc*, the Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the Respondent. This was approved by the Supreme Court in *Hewage v Grampian Health Board*, where Lord Hope stated, in a passage endorsed by Lord Leggatt in *Efobi v Royal Mail Group Limited* at paragraph 38, Lord Hope stated that it was important not to make too much of the role of the burden of proof provisions, as set out below.

"*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other*" (paragraph 32).

Direct discrimination

185. Equality Act 2010 section 13 provides that 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*".

186. Thus, direct discrimination takes place where a Claimant is treated less favourably, because of the relevant protected characteristic, than the employer treats or would treat others. This can involve comparing the treatment of a Claimant with that of an actual comparator, or comparing the Claimant's treatment with that which would have been received by a hypothetical comparator.

187. Section 23(1) of the Equality Act 2010 provides that on a comparison for the purpose of establishing direct discrimination there must be "*no material difference between the circumstances relating to each case*". In the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, Lord Scott explained that this means that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class*".

Discrimination arising from disability (Equality Act 2010 section 15)

188. Discrimination arising from disability is defined by EA 2010 section 15(1) on the basis that "*person (A) discriminates against another (B) if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim*".

189. Accordingly, the Claimant must have been treated unfavourably. Moreover, the unfavourable treatment must also be "*because of something arising as a consequence of*" the Claimant's disability.

190. If the unfavourable treatment was because of something arising as a consequence of the Claimant's disability, the question then becomes that of whether it was justified as a proportionate means of achieving a legitimate aim.

Duty to make reasonable adjustments (Equality Act 2010 sections 20 and 21)

191. EA 2010 section 20 sets out the duty to make adjustments in the terms set out below.

"*(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) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

192. EA 2010 section 20(10) states that a *"reference in this section...to a physical feature is a reference to...a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises*...".

193. ERA 1996 section 21 provides simply that a failure to comply with the above requirements is a failure to comply with the duty to make reasonable adjustments, and that a failure to comply with the duty gives rise to discrimination against the disabled person.

194. Guidance was given by the EAT in *Environment Agency v. Rowan [2008] ICR 218, IRLR 20, EAT*, as set out below.

"*In our opinion an employment tribunal … must identify: (a) the provision, criterion or practice applied by or on behalf of an 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…. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage*".

195. Further guidance was provided by EAT in *Project Management Institute v Latif [2007[IRLR 579, EAT*, as set out below.

"*The … Claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the Claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift.*

However, we do think that it would be necessary for the Respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not" (Elias P).

196. Further guidance was given by the EAT in *Royal Bank of Scotland v Ashton [2011[ICR 632, EAT*, as set out below.

197. "*It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered… it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.' This essentially brings us back to the fact that the duty to make reasonable adjustments is cast in terms of 'steps' that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the Claimant is subjected by the PCP*".

Victimisation (Equality Act 2010 section 27)

198. EA 2010 section 27(1) and (2) is in the terms set out below.

"*(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".

Wrongful dismissal / notice pay

199. An employer will be in breach of contract if the employer terminates an employee's contract without the contractual notice to which the employee is entitled, or a payment in lieu of that notice, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

Unlawful deductions from wages

200. ERA 1996 section 13(1) provides that an employer shall not make a deduction from wages of a worker employed by the employer unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from

wages pursuant to ERA 1996 section 23. The definition of "*wages*" in section ERA 1996 includes holiday pay.

Holiday pay

201. Under Working Time Regulations 1998 regulation 14(2) a worker is entitled to be paid in respect of any statutory leave that is outstanding on termination of employment. A complaint in relation to unpaid holiday pay can be brought both as a complaint in respect of unauthorised deductions from wages and also as a complaint under Working Time Regulations 1998 regulation 30.

Time limits and backdating

202. As far as the whistleblowing victimisation complaints of detriment are concerned, ERA 1996 section 48(3) provides that an Employment Tribunal shall not consider such a complaint unless it is presented "*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period* of *three months*". For these purposes, where an act extends over a period, the "*date of the act*" means the last day of that period.

203. The time limits applying to complaints of unfair dismissal are provided for at ERA 1996 section 111 namely that a complaint cannot be considered unless it is presented to the Tribunal "*(a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three mont*hs". These provisions also apply the complaint under ERA 1996 section 103A that the dismissal was automatically unfair on the basis that the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

204. In *Beasley v National Grid* [2008] EWCA Civ 742, CA, Tuckney LJ held that whilst section ERA 1996 111 may impose a harsh regime, the time bar exists for "*the very good policy reason, that parties should know where they stand within a limited time of any dispute arising*". Tuckney LJ also stated that there are good policy reasons behind the regime outlined in s 111(2) and there "*is no grey area for complaints which are only a bit out of time*".

205. Under ERA 1996 section 23, similar provisions to those in ERA 1996 section 111 apply to a complaint of unlawful deductions from wages brought under ERA 1996 section 23, with any discretion to extend time similarly depending on the Tribunal being satisfied that it was not reasonably practicable to bring proceedings earlier. Thus, in relation to each complaint, the Tribunal has to be

satisfied that the complaint was made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made. if not, the Tribunal has to be satisfied that there was a series of deductions, and any complaint was made to the Tribunal within three months (plus any early conciliation extension) of the last one.

206. in *Bear Scotland Limited v Fulton [2015] ICR 221, EAT*, Langstaff P held that whether there is a 'series' of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments, but went on to hold that if there is a gap of more than three months between any two deductions in the chain, the series of deductions is broken. However, in *Smith v Pimlico Plumbers Ltd [2022] IRLR 347, CA*, the Court of Appeal expressed the "*strong provisional view*" that *Bear Scotland Limited v Fulton* was wrongly decided as there was nothing in ERA 1996 section 23(3) to support this interpretation of a "*series of deductions*". (It is noted that, subsequent to the hearing, this "*provisional view*" has been confirmed as being correct by the Supreme Court in *Chief Constable of the Police Service of Northern Ireland v Agnew [2024] ICR 51*).

207. In *Arora v Rockwell Automation Limited [2006] UKEAT/0097/06*, the EAT held that (1) where there is an actual deduction, time starts to run from the date that the deduction is made, or the date on which the payment from which the deduction is made is tendered; (2) where there is a shortfall, the same principle applies; (3) where there is no payment at all, time starts to run from an earlier point, the date on which the contractual obligation to the payment arose.

208. The Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) inserted section 23(4A) and (4B) into ERA 1996 providing that an Employment Tribunal can only look back two years from the date of the complaint when considering unlawful deductions under ERA 1996 section 27(1)(a).

209. Complaints in respect of holiday pay can also be bought under regulation 30(12)(b) of the Working Time Regulations 1998 ("WTR 1998") with time running from the date on which it is alleged that the payment should have been made (effectively the termination of employment in the case of an alleged entitlement to pay in lieu of holiday which arises on termination). There is no express limit on backdating under WTR 1998 1998 but, at the time of the Claimant's employment, the effect of WTR 1998 regulation 13(9) was to state that there was no right under the Regulations for annual leave to be carried forward from the leave year in which it arose, and a worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year. However, the effect of *HM Revenue and Customs v Stringer (C-520/06) [2009] ICR 932*, and *NHS Leeds v Larner [2012] 1389, CA*, is that WTR 1998 regulation 13 (setting out the entitlement to leave which originally derived from the Working Time Directive 2003) should be interpreted so that (1) any leave that a worker was unable to take because of being on sick leave can be taken on his or her return to work, notwithstanding that this may be in a later leave year and (2) where such leave can be treated as

having been carried over into the leave year which is the current leave year when employment is terminated, any payment in lieu of outstanding annual leave should take account of the leave carried over in this way. The decision of the EAT in *Plumb v Duncan Print Group Ltd [2016] ICR 125*, suggests that the right to carry over such leave in this way is limited to a period of 18 months after the end of the leave year in which the right to the leave in issue arose. However, the effect of the decisions in *King v Sash Window Workshop Limited (C-214/16) [2018] ICR 693, CJEU*, and *Smith v Pimlico Plumbers Limited [2022] IRLR 347, CA*, is that untaken leave can also be carried forward where a worker is prevented from taking leave by the employer, or deterred from doing so by the employer's refusal to pay holiday pay or where the employer fails to ensure that he or she can take the leave. In these cases, the leave not taken can be carried forward into each succeeding leave year, without limit, until either the leave is taken (in which case there is a corresponding right to holiday pay) or the employment ends, at which point again a right to payment in lieu crystallises and time starts to run.

210. In relation to discrimination complaints, section 123(1)(a) of the Equality Act 2010 ("EA 2010") provides that "*a complaint … may not be brought after the end*" of … "*the period of 3 months starting with the date of the act to which the complaint relates*" or "*such other period as the employment Tribunal thinks just and equitable*". EA 2010 section 123(3)(a) provides that "*conduct extending over a period is to be treated as done at the end of the period*" and section 123(3)(b) provides that "*failure to do something is to be treated as occurring when the person in question decided on it*".

211. In *Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA*, the Court of Appeal gave guidance as to considering whether allegations of discrimination amounted to an act extending over a period (so that any time limit would run from the end of that period) set out below.

"*The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (Mummery LJ at paragraph 52)

212. In relation to the discretion to extend the time limit where it is just and equitable to do so, *Bexley Community Centre v Robertson [2003] IRLR 434, CA*, the Court of Appeal provided the guidance set out below.

"*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*" (Auld LJ at paragraph 25).

213. Thus, the burden of proof is on a Claimant to satisfy the Tribunal that any complaint was either made within the applicable time limit for doing so, or that it would be just and equitable to extend time.

214. In *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA*, the Court of Appeal dealt with the argument that, in the absence of an explanation from the Claimant as to the reasons for not bringing a Claim in time and an evidential basis for that explanation, the Employment Tribunal could not properly conclude that it was just and equitable to extend time. The argument was rejected, as set out below.

"*I cannot accept that argument. As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment Tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the Claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard*" (paragraph 25).

215. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5*, Underhill LJ indicated concern that Tribunals had tended to use the factors relevant in dealing with any discretion to extend time in personal injury cases, as set out in Limitation Act 1980 section 33 as a checklist and advised that they should not do so. He went on to give the guidance set out below.

"The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

The following is a non-exhaustive list of factors which may prove helpful in assessing individual cases:

— the presence or absence of any prejudice to the Respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

— the presence or absence of any other remedy for the Claimant if the claim is not allowed to proceed;

— the conduct of the Respondent subsequent to the act of which complaint is made, up to the date of the application;

— the conduct of the Claimant over the same period;

— the length of time by which the application is out of time;

— the medical condition of the Claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;

— the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given".

216. The fact that a Claimant has awaited the outcome of his or her employer's internal procedures before making a Claim is just one matter to be taken into account by an Employment Tribunal in considering whether to extend the time limit for making a Claim (see *Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713, CA*).

Issues to be determined

217. The Tribunal now turns to the issues to be determined by reference to the questions formulated in the List of Issues (as discussed and clarified above).

Time limits

218. Given the date that the ET1 Form of Claim was presented, and the dates of early conciliation, any complaint about something that happened before 11 July 2020 may not have been brought in time.

219. The Tribunal began by looking at the complaints under the Equality Act 2010 where a time limit of three months applies as set out in section 123 of the Equality Act 2010.

220. On the face of it, the only events which were within the primary time limit of three months were those which related to the redundancy process. The Claimant had been off work due to sickness since May 2018. The Claimant does seek to contend that her dismissal was a discriminatory dismissal, and clearly this complaint is in time. The issue becomes whether or not the vast majority of the matters about which the Claimant complains, which occurred on or before 11 July 2020, amounted to conduct extending over a period, so as to be treated as part of the same continuing act of discrimination, with that act being a continuing act as at 12 July 2020?

221. Ultimately, the Tribunal concluded, as will be explained below, that there was no act of discrimination that had occurred in the period of three months prior to the Claimant notifying ACAS of her prospective Claim. As discussed below, the dismissal did not amount to an act of discrimination. The appeal did not amount to an act of discrimination (there is no separate complaint in respect of the appeal). Similarly, the Tribunal concluded that any treatment of the Claimant in the period from 12 July 2020 did not involve victimisation. Thus, the Claimant is not able to rely upon there being an act of discrimination which was taking place or had taken place in the period between 12 July 2020 and the date when she contacted ACAS on 11 October 2020. It follows that the remainder of her complaints of discrimination contrary to Equality Act 2010 are out of time.

222. The Tribunal does have the discretion to extend time where it is just and equitable to do so, but it is not an unfettered discretion, and the burden is on the Claimant to persuade the Tribunal that it is just and equitable to extend time as made clear in *Bexley Community Centre v Robertson* (see above).

223. The Tribunal concluded that the Claimant has not provided a satisfactory explanation for the delay in issuing proceedings. There was some suggestion that she proceeded on the basis that time would effectively run from the date of any appeal decision. However, she does not complain separately about any aspect of the appeal and did not actually appeal until 14 August 2020. Moreover, this does not explain any earlier failure to bring proceedings. Prior to the commencement of the consultation process on 16 July 2020 she would have been unaware that there was even going to be a process which would result in a redundancy dismissal appeal meeting. The vast majority of her case concerns complaints about matters which had occurred (and were mostly potentially out of time) prior to the redundancy process.

224. The Tribunal recognises that the Claimant was off work due to sickness in the period from May 2018 until her dismissal. However, throughout most of this period she was still effectively dealing with issues relating to her employment, for example in relation to the management of her sickness absence, and this had resulted in lengthy and protracted correspondence by e-mail. The Claimant also had the assistance of her professional association and told the Tribunal that, as a result, some of the e-mails had been drafted on her behalf. She also had legal advice from the legal advisor for the Association of Optometrists. Even allowing for the possibility the Claimant being incapacitated at times, the Tribunal was satisfied that throughout most of the period prior to 12 July 2020 she was capable of either completing the ET1 Form of Claim or setting out the matters about which she wanted to complain or could have made arrangements for this to have been done.

225. The Tribunal considered the issue of any prejudice to the Claimant or Respondent which would arise from either extending the time limit or not extending the time limit. As far as the Claimant is concerned, it is clear that the

event which has prompted her to take proceedings is that of being dismissed, and even if her more historic complaints are all to be out of time, she can still complain about her dismissal. Moreover, in so far as she wishes to rely upon the earlier history of the matter, she can still do so, in so far as she satisfies the Tribunal that any such evidence is relevant, in support of the complaints which are in time. By contrast, the Tribunal was satisfied that there was prejudice to the Respondent through any extension of time. Any such extension of time had the effect of putting the Respondent at risk of adverse findings in relation to complaints which had either become stale or which were matters in respect of which the passage of time had inevitably had an adverse effect on the cogency of the evidence, both in terms of the availability of evidence and the impact on memories. This was compounded by the fact that the consequence of the redundancy process about which the Claimant complains is that many of the potential witnesses had also been made redundant and so were no longer employees of the Respondent.

226. In the circumstances, the Tribunal did not consider it appropriate to exercise the discretion to extend time as provided for in the Equality Act 2010 in respect of complaints regarding matters which had occurred more than three months before the Claimant had taken the first step of notifying ACAS of her prospective Claim.

227. The complaints of victimisation on the grounds of having made a protected disclosure are complaints to which the provisions in respect of time limits under the Employment Rights Act 1996 apply. Thus, the complaints of being subjected to victimisation through being subjected to disciplinary proceedings in April 2018 are clearly out of time. The Claimant also complains about other matters amounting to whistleblowing victimisation, namely not following up occupational health recommendations, telling prospective employers that she had stolen patient records and dismissing her. The Tribunal was not satisfied that any alleged acts of victimisation were part of a series of similar acts or failures. Thus, any earlier acts of victimisation were not part of a series of series of similar acts or failures which included an act of victimisation which had occurred on or after 12 July 2020. Consequently, complaints of victimisation which related to acts which occurred before 12 July 2020 were out of time.

228. For the same reasons as given above in relation to bringing any complaints of discrimination, the Tribunal was satisfied that it would have been reasonably practicable for the Claimant to have brought any complaints within the applicable time limit of three months. Accordingly, the Tribunal has no power to extend the time limit in respect of any complaints of whistleblowing victimisation that are out of time.

229. The issue of time limits also applies to the complaints of unauthorised deductions from wages for which the same time limit of three months applies under section 23 of the Employment Rights Act 1996. Thus, in relation to each

complaint, the Tribunal has to be satisfied that the complaint was made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made. if not, the Tribunal has to be satisfied that there was a series of deductions, and any complaint was made to the Tribunal within three months (plus any early conciliation extension) of the last one. Where necessary, the Tribunal has given separate consideration below to the issue of time limits when dealing with those each complaint in respect of unlawful deductions. Where the Tribunal was not satisfied that any alleged deductions made prior to 12 July 2022 were part of a series of deductions where the last deduction in the series occurred on or after 12 July 2020, so that a complaint in respect of alleged deductions made prior to 12 July 2020 was out of time, the tribunal was satisfied, for the reasons as given above, that it would have been reasonably practicable for any complaint to have been made to the Tribunal within the time limit, so that it was not appropriate to extend the time limit concerned.

Victimisation

230. The Claimant relies upon a text message sent to Opinder Malhi, the Clinical Governance Optometrist, on 4 November 2017. The List of Issues referred to the date of this text message as all November 2019, but it was established at the beginning of the hearing that the correct date was 4 November 2017. However, it can be seen that this alleged protected disclosure occurred almost three years before the Claimant's dismissal.

231. The Tribunal was satisfied that this text message involved the Claimant disclosing information. She was disclosing the information that patient records were not being correctly filed.

232. The Tribunal was also satisfied that the Claimant believed that the disclosure of information was made in the public interest. The Claimant makes the point in the text that the consequence of this was that it was becoming difficult to monitor disease progression in patients as they were coming in and previous records could not be found.

233. The Tribunal was also satisfied that this belief was reasonable. It is self-evident that there is a public interest in the treatment of patients being carried out properly and that this involves being able to have access to relevant patient records.

234. The Tribunal was further satisfied that the Claimant believed that the disclosure tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation. The Tribunal was not specifically referred to any professional obligations which are specific to opticians or those providing optical care to patients in relation to any legal responsibilities in respect of patient records. However, the Claimant put her case on the basis that not filing patient records correctly would be in breach of data protection requirements. The

Tribunal was prepared to accept that the patient would be a data subject, and that an employee failing to file their records so that they could not be retrieved when needed would be acting in breach of the data protection legislation in relation to filing systems for the data of data subjects.

235. Although the Tribunal concluded that the reliance which the Claimant later came to place upon this text message was somewhat opportunistic, the Tribunal was satisfied that it was reasonable for the Claimant to believe that failure to file patient records correctly or adequately would involve a failure to comply with a legal obligation.

236. It is convenient at the same point in time to deal with the complaint of victimisation contrary to Equality Act 2010 section 27. The Respondent accepts that the grievances submitted by the Claimant in or around March / April 2017 and in November 2017 would have amounted to protected acts. This is a realistic concession given that the Claimant was essentially complaining that she believed that, as a disabled person, she was not being treated correctly in terms of the requirements of the Equality Act 2010.

237. However, having found that the text message amounted to a protected disclosure and the Claimant's grievances amounted to a protected act, the Tribunal was not satisfied that the matters complained about as amounting to victimisation were on the grounds of the Claimant either having made the protected disclosure to Opinder Malhi or because of the protected act involved in submitting either grievance.

238. The Tribunal accepts the point that is made that the response of Opinder Malhi to the text message and the response of the Respondent in seeking to deal with the grievances (notwithstanding the fact that the outcome from the grievance in the spring of 2017 was not confirmed, which seems to have been as a result of James Sneddon having left the Respondent's employment) indicated that the Respondent had no problem with the Claimant raising the issues she did in the text message and respected her right as an employee to bring a grievance which it then sought to deal with appropriately (albeit there seems to have been no formal confirmation of the outcome of the first grievance).

239. The first victimisation complaint is that of the commencement of disciplinary proceedings against the Claimant on 13 April 2018. The Tribunal has effectively concluded that this was out of time and the discretion to extend time, whether under the Equality Act 2010 or the Employment Rights Act 1996 should not be exercised. However, the Tribunal is also satisfied that, although ultimately it was decided not to take disciplinary action against the Claimant, the reasons for commencing the disciplinary proceedings were genuine reasons. Essentially, this stemmed from the Claimant's supervisor having complained about her rudeness which is consistent with the fact that he withdrew as her supervisor due to his opinion that her "*attitude and behaviour is not professional*". There was no

evidence to suggest that the Claimant's supervisor or those involved in conducting the disciplinary process were influenced by any protected disclosure or protected act on the part of the Claimant. The evidence which was gathered through the investigatory process was, broadly speaking, consistent with the disciplinary allegation. The disciplinary outcome, which involved a decision not to deal with the matter by way of a formal sanction, was partly based upon the Claimant's limited acceptance as to the criticisms that had been made, and the decision that the matter could be dealt with through the various recommendations made, including coaching on communication. It is be noted that, throughout the investigatory and disciplinary process, the Claimant did not seek to suggest that the disciplinary proceedings were being pursued by way of victimising her for having made a protected disclosure or for a protected act. The fact that the Respondent dealt with the matter by not imposing a formal sanction is ultimately inconsistent with the Claimant's case theory, namely that this was an employer motivated to get rid of her or otherwise victimise her. Had the Respondent been so motivated, it might have dealt with the disciplinary proceedings in 2018 rather differently.

240. The next complaint of victimisation alleges that the Claimant was victimised by a failure to follow up occupational health recommendations. The Tribunal accepts that there were delays in progressing matters after occupational health advice had been sought. The various delays are effectively explained through the correspondence through which the Tribunal was taken at great length, and upon which detailed findings of fact have been made. Thus, for example, particularly significant causes of delay arose from the need to get the Claimant to provide appropriate consent to enable a report to be obtained from her GP or specialist doctor as well as delays in the Claimant allowing managers access to occupational health reports. As a consequence, Kim Cockbill did not receive the occupational health report until around early December 2019 and Emma Coxon did not actually receive it until about 3 April 2020, notwithstanding the Claimant's email of 10 January 2020. Moreover, consent for taking the next step being advised by the occupational health report, namely getting a targeted report from the Claimant's own doctors, could not be taken as it was not until 14 May 2020 that the Claimant provided the requisite consent. Getting a report could not then be progressed quickly because of the pandemic so that no report had been obtained by the time that the Respondent was considering dismissing the Claimant on the grounds of redundancy. The occupational health report itself had specifically stated that "*any decisions regarding the reasonable adjustments to support her back into work are deferred until we are in receipt of the target report*". Ultimately, the Tribunal is satisfied that it was the Claimant's own failure to facilitate such a report being obtained which resulted in steps not being taken to give further consideration to the other recommendations being made in the occupational health report. There was no evidence that this amounted to a deliberate failure to follow up occupational health recommendations by reason of

the Claimant having made a protected disclosure or pursued grievances. The consequence of the delay was that the Respondent was not in a position to progress with any formal capability proceedings which might otherwise have been commenced at a far earlier point in time. Had the Respondent wanted to victimise the Claimant or bring her employment to an end because of a protected disclosure or grievances, then it would have taken steps to have tried to pursue formal capability proceedings much quicker.

241. The next complaint of victimisation is the allegation that the Respondent victimised the Claimant by telling prospective employers that the Claimant had stolen patient records. This allegation originally seems to have been understood by the Respondent on the basis that it was being suggested that the Respondent had given a reference to a prospective employer which had been unfavourable. The reality was that the Respondent had not provided any such reference. However, in evidence, the Claimant suggested that an interview was stopped midway through as the interviewer "*received a call*" and then "*returned and told me I was a thief*" and terminated the interview. The Tribunal found it completely implausible that this would have happened. It also seemed to be inconsistent with evidence given by the Claimant to the effect that it was because an employee of the Respondent was in the store concerned. The Tribunal had significant concerns regarding the Claimant's credibility in relation to this evidence which was not helped by the lack of any detail which would have enabled the issue to be investigated. For example, the Claimant was not willing to provide the names of those involved and she was unable to date the incident more precisely than placing it simply as "*sometime in 2020*". In the absence of such detail, it was difficult to investigate properly whether there was any supposed link between the alleged incident and any grievance or protected disclosure on the part of the Claimant. However, ultimately, for the reasons set out above, the Tribunal was not able to accept the Claimant's evidence is credible in relation to this allegation.

242. The Claimant also alleges that her dismissal was by reason of having made a protected disclosure or because she had done the protected act of submitting the grievances concerned. The Tribunal was satisfied that the decision to dismiss the Claimant was because of a genuine redundancy situation arising from the Respondent's need to close various stores, including that where the Claimant worked. The Tribunal recognises that sometimes employers will take the opportunity presented by a redundancy situation as a convenient way to end the employment of an employee, where the employer may be motivated by other reasons in wanting to get rid of the employee. However, had this been the case, the Respondent would potentially have utilised earlier opportunities that had arisen. For example, it might have dealt with the disciplinary proceedings differently or taken a rather more robust approach in seeking to take the Claimant through any capability processes. By contrast, the disciplinary proceedings in 2018 did not involve any formal sanction being imposed, and the respondent was in the position of taking far longer than it would normally have taken to reach the

point of having a capability meeting at which the possibility of the claimant's employment being terminated might have been considered.

243. It follows that the Tribunal did not find the complaints of victimisation, whether under the Equality Act 2010 or under the Employment Rights Act 1996 to be well-founded.

Unfair dismissal

244. The Tribunal was satisfied that the reason or principal reason for dismissal was that of redundancy. The decision to consider dismissing the Claimant (and many other employees) arose because of a genuine redundancy situation which involved the store in which the Claimant worked being closed. Redundancy is a potentially fair reason under the Employment Rights Act 1996.

245. On the basis of the reason for dismissal being redundancy, the issue for the Tribunal is whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

246. The Tribunal was satisfied that the consultation process, as set out in the findings of fact above, was reasonable. It fulfilled the essential requirements in respect of consultation as to a proposal of redundancy. The Claimant's case was that she wanted the redundancy consultation period extended by six months, effectively placing her redundancy in abeyance for six months. The Tribunal was satisfied that it was reasonable on the part of the Respondent not to do so. The Tribunal accepts the Respondent's case that there was no "*visibility*" about when a suitable vacancy would become available as this was in the middle of a pandemic. This request seems to be based on the premise that the Claimant was absent through sickness and had exhausted her sick leave, so was not costing the Respondent anything financially. However, any such premise was flawed. Clearly, there was no certainty that the Claimant would remain on sick leave for six months. Indeed, proceeding on such a basis would have been inconsistent with the Claimant's case that recommendations to assist her to return to work should have been implemented, in which case, presumably, on her case, there might have been the possibility of returning to work earlier, and had she done so the Respondent would have been in the position of having to pay an employee who was redundant, in that their workplace had been closed, and no alternative role had been identified. Given the lack of visibility regarding the position in respect of both the pandemic and the prospects for the Claimant returning to work, the Respondent could not reasonably be expected simply to delay any decision in respect of redundancy on the basis that the position might be different in six months' time.

247. Similarly, the approach to redundancy selection was reasonable. The Respondent was closing a significant number of stores, and it was within the band of reasonable responses to proceed on the basis that those who worked at the stores were at risk of redundancy. The only alternative might have been, for

example, to construct a pool which included all those employed in a pre-registration role within a certain area. However, the fact that a different approach to selection might have been made does not mean that the approach adopted by the Respondent was outside the band of reasonable responses. The Tribunal is satisfied that it was within the band of reasonable responses.

248. The Tribunal is also satisfied that the approach taken by the Respondent in relation to giving consideration to suitable alternative employment was reasonable. Louise Chatting took steps to establish that there were no pre-registration vacancies elsewhere for which the Claimant could sensibly be considered. There were Optical Consultant roles available, but the Claimant did not apply. Thus, the Claimant effectively did not engage with the process by which consideration was being given to finding suitable alternative employment for 'at risk' employees. The process involved informing employees of vacancies so that they then had the opportunity to apply. The Tribunal does not accept that the Respondent could reasonably be expected to create a vacancy for the Claimant for which there was no business need. Similarly, the Tribunal does not accept that the Respondent could reasonably be expected to have created a vacancy for the Claimant by making another Pre-registration Optometrist redundant, in other words by bumping another employee out of his or her job. Due to the length of time the Claimant had been out of the business, the existing Pre-registration Optometrists were much further advanced in their courses than the Claimant – they were almost qualified by the time of the redundancies. Bumping the Claimant into their positions would have meant putting someone much less experienced in place of a more qualified individual and would not have made business sense.

249. In the circumstances, the Tribunal was satisfied that the Claimant's dismissal was within a band of reasonable responses available to the Respondent as a reasonable employer in all the circumstances of the Claimant's case.

Direct discrimination (Equality Act 2010 section 13)

250. The Claimant complains of two alleged acts of direct discrimination, namely commencing disciplinary proceedings against the Claimant on 13 April 2018 and dismissing the Claimant.

251. The Claimant relies upon a number of actual comparators including other optometrists, namely David Semp, Furyal Mahmood, and Sammy Arif, and other staff members, namely Ganeyu Yusuf, Bethany Morris, Lauren Baker, Kim Cockbill, Tony Maguire, Emily Temple, Heather Nye, Naila Abid, Selina Khan and Leanne Bird. The basis of the comparison was that the Claimant was suggesting that they either had the same role as her or undertook some of the same duties as her. This would not, on its own, cause these potential comparators to be valid actual comparators in the sense of the statutory requirement of being in the same position in all material respects as the Claimant, save only that they were not

disabled. The Tribunal had very little meaningful evidence regarding the position of any of the actual comparators cited by the Claimant. In relation to the allegation of being treated less favourably than any comparators as a result of disciplinary proceedings been commenced against her, the Tribunal could see that, within the investigatory interviews, the Claimant made some criticisms of the conduct of Sammy Arif towards her, but the Tribunal did not think that it could be said that he was in a comparable position to her in terms of being the focus of the sorts of concerns which had resulted in the Claimant being the subject of a disciplinary investigation. In relation to the allegation of being treated less favourably through being dismissed, the Tribunal understood the position to be that all the members of staff working in the same store as the Claimant were placed at risk of redundancy. Within that redundancy process, all of the staff members at the store had the opportunity to put themselves forward for alternative posts. Whether a member of staff was ultimately made redundant ultimately depended on whether they were successful in putting themselves forward for an alternative post. It was difficult to compare the Claimant's position with that of any member of staff who avoided redundancy in this way given that she had not put herself forward for an alternative post in this way.

252. In her Statement of Evidence, the Claimant also refers to an Assistant Manager at her store, Heather Nye, who was also under a training contract, having been transferred to work between other stores in order to complete her training rather than been dismissed for redundancy. Again, the Tribunal was not satisfied that this involved the Claimant comparing herself with a valid comparator. Heather Nye was not a Pre-registration Optometrist. The position in respect of Heather Nye was no different from any other employee who was able to avoid redundancy as result of a post being identified.

253. Ultimately, the Tribunal was not satisfied that the actual comparators put forward by the Claimant were valid comparators. Their circumstances were materially different. This is often to be expected in many direct discrimination cases where, properly analysed, there will not be other employees in the same position, in all material respects, as the Claimant (but for the protected characteristic in issue). In these circumstances, the Claimant's case falls to be considered by reference to whether she was treated less favourably than a hypothetical comparator would have been treated. The Tribunal was not satisfied that the available evidence provided a basis for concluding that the Claimant had been treated less favourably than a valid hypothetical comparator would have been treated.

254. The Tribunal was satisfied that any comparator in respect of whom the same complaints had been made, who was not disabled, would have been treated no differently. Similarly, the Tribunal was satisfied that the Claimant was not dismissed because of her disability. This was a large redundancy exercise involving the closure of many stores, so that, far from being treated less

favourably than others, the Claimant was being treated in the same way as many others, all of which suggests that a relevant actual or hypothetical comparator was being or would have been treated no differently from the Claimant in being made redundant.

255. In any event, in relation to the issue of whether the Claimant had been treated less favourably, because of her disability, than any actual or hypothetical comparator, the Tribunal was not satisfied that facts had been proved from which the Tribunal could infer, in the absence of any other explanation, that any such treatment was at least in part the result of her disability. The Tribunal concluded that the concerns raised in relation to the Claimant's conduct were genuine concerns and had such concerns been raised in relation to a Pre-registration Optometrist who was not disabled, the same process would have been followed in terms of undertaking an investigation and instigating a disciplinary procedure. In relation to the decision to dismiss the Claimant on the grounds of redundancy, the evidence before the Tribunal was that a very large number of people had effectively been treated in the same way as the Claimant through being placed at risk of redundancy and then made redundant. This included colleagues working in the same store as her and other Pre-registration Optometrists. As such, the point was not reached of the burden of proof transferring to the Respondent to establish on the balance of probabilities that the Claimant's disability formed no part of the reason for any treatment in issue. The Tribunal was satisfied that the treatment was not because of her disability, but because of her conduct and because she was redundant.

256. In any event, as already discussed above, the Tribunal was satisfied that the first of the two complaints of direct discrimination (the complaint as to the disciplinary proceedings in 2018) was out of time and that the time limit should not be extended, for the reasons discussed above in relation to time limits.

Discrimination arising from disability (Equality Act 2010 section 15)

257. The Claimant alleges discrimination arising from a disability on the basis that the Respondent treated her unfavourably by doing the following things:
(1) commencing disciplinary proceedings against the Claimant on 13 April 2018;
(2) failing to follow up on the occupational health recommendations of Colleague Health made following an occupational health appointment on 4 September 2019;
(3) denying the Claimant the opportunity to work between two other stores to complete her training; and
(4) dismissing the Claimant.

258. The Claimant's case is that the following things arose in consequence of the Claimant's disability:
(1) not being able to climb stairs or stand for long periods of time;

(2) having a slow handwriting speed and struggling to hold some equipment; (3) needing to remain seated as much as possible;
(4) having a pupil defect; and
(5) a visual field defect and poor vision in her left eye, together with decreased depth perception and susceptibility to falls.

259. The issue then becomes as to whether the unfavourable treatment complained about above was because of any of those things. The Tribunal was not satisfied that any unfavourable treatment was because of any of those things.

260. Based on the conclusions already arrived at above, the commencement of disciplinary proceedings was clearly not because of any of those things. It was because of the complaints made about the Claimant. In any event, this particular cause of action is out of time.

261. The alleged failure to follow the occupational health recommendations was similarly not because of any of those things. It was because of the various delays in progressing the matter which have analysed above, in some considerable detail, in the findings of fact made. As has already been discussed, this largely arose because of the position adopted by the Claimant in dealing with the process.

262. The complaint regarding any denial of an opportunity to work between two other stores to complete her training is not altogether clear. The Respondent's position is that it was not requested. The Claimant's Statement of Evidence at paragraph 38 refers to the previous Pre-registration Optometrist at the Erdington Fort store having attended the Boots store in Yardley on a Wednesday when her supervisor had his or her day off work and suggests that the Claimant was denied the opportunity given to the previous Pre-registration Optometrist. In fact, paragraph 33 of the Claimant's Statement suggest that this opportunity was not denied to her, but the onus was placed on her to arrange to attend another store by seeking to speak to the managers concerned herself, but she does not seem to have had any success at this. However, there is nothing in the Claimant's Statement to suggest that this was because of anything arising from her disability. Indeed, the reverse is the case insofar as she makes the point that she was (in her case) denied such opportunities despite having "*additional needs*"; in other words, her additional needs were not taken into account. On the face of it, any arrangements put in place in 2017 for the Claimant to complete her training at a Birmingham store were put in place on the basis that the Claimant specifically identified Erdington Fort as the most suitable location, having regard to her disability, for her to be placed. Further or alternatively, on the face of it, any such complaint about arrangements put in place in 2017 would be out of time.

263. Paragraph 63 of the Claimant's Statement of Evidence also effectively refers to the Claimant not having been given the same opportunity as the Assistant Manager at the store, Heather Nye, was also under a training contract and was

transferred to work between other stores in order to complete her training rather than been dismissed. The evidence of Louise Chatting, which the Tribunal accepted, was that she had sought to identify a store where a Pre-registration Optometrist could be accommodated and was unable to identify such a location. This reflected the space requirements and need for a supervisor involved. Any such store needed to have an additional consulting room with equipment for the Pre-registration Optometrist to use. The stores that fitted these requirements already had a Pre-registration Optometrist. At the second consultation meeting it was suggested, by or on behalf of the Claimant, that a pre-registration post could be created for the Claimant to complete her studies or that she could take the place of pre-registration student who was due to start in September 2020. The response of Louise Chatting was to the effect that this was not possible. The Respondent was already in the position where it could not accommodate the intake of September starters due to the Pre-reregistration Optometrists from the previous year not having completed their courses because of the effect of lockdown. Moreover, creating a post, where one did not already exist, at a point in time when the Respondent was effectively deleting posts as part of a redundancy exercise was not a viable and / or reasonable option. Based on the reasoning put forward by Louise Chatting, which the Tribunal accepted as genuine and valid, the Tribunal was satisfied that the decisions made were not because of anything arising in consequence of the Claimant's disability.

264. As far as the Claimant's dismissal is concerned, based on the conclusions already reached by the Tribunal, it did not arise from the Claimant's disability, it arose from the redundancy situation.

265. In the circumstances, it was not necessary for the Tribunal to consider whether any treatment was a proportionate means of achieving a legitimate aim, in respect of which the Respondent's case is that its aims were those of running an efficient business.

Reasonable adjustments

266. The Further Information of the Claimant suggested that the duty to make adjustments arose in relation to five sets of circumstances as listed by way of five bullet points. Two of the bullet points identified a provision, criterion or practice ("PCP"). Two of the bullet points identified a feature of the physical premises. The final bullet point identified the lack of an auxiliary aid (in other words, a piece of technology or equipment that is intended to assist a disabled person).

267. The complaint in relation to the lack of an auxiliary aid alleged that a piece of equipment called the Steady Mount was delivered to the wrong store, so that the Claimant did not receive it in a timely manner, without which the Claimant could not use the Volk lens to view the back of the patients' eyes. In fact, paragraph 15 of the Claimant's Statement does not say that she could not use the Volk lens but that not having the Steady Mount made the task harder.

268. Where an item or piece of equipment was only provided after some delay, clearly any alleged breach of duty would have ceased to be continuing once the item or piece of equipment was provided. In other words, any complaints about the state of affairs before the item or equipment was provided would be out of time in the sense of any complaint about such matters being outside the primary time limit once three months had passed from the date that any item or piece of equipment was provided. The Particulars of Claim assert that there was a delay of six months until February 2018 before the specialist equipment which had been ordered for the Erdington Fort store was delivered. In fact, what it is worth, the Steady Mount seems to have arrived by 22 January 2018. Either way, the primary time limit of three months for bringing the complaint arising out of this specialist equipment not being provided would have expired in May 2018. For the reasons set out above in discussing the impact of time limits on the Claimant's case, the Tribunal was not satisfied that it was just and equitable to extend the time limit in relation to this matter.

269. In any event, the duty which arises is where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, in which case, the duty is to take such steps as it is reasonable to have to take to provide the auxiliary aid.

270. There were certainly unfortunate delays in obtaining the Steady Mount. These have been set out in the findings of fact made above. Initially there was a stock issue so that the item then had to be ordered directly from Volk with a delivery time of 2 to 3 weeks given. However, the item seems to have been delivered by the DX, on or about 6 November 2017, to Glasgow, in error, which only came to light through the Claimant chasing the matter up with the DX. However, enquiries with the Glasgow store eventually established that they could not find the equipment so that it became necessary to re-order it so that it was delivered directly to the Claimant store where it arrived on or before 22 January 2018. Whilst it was unsatisfactory that it seems that, having been delivered to the wrong address, the equipment effectively went astray, this is often the consequence of a delivery being made in error. The Tribunal was satisfied that the Respondent had clearly taken steps as it was reasonable to have to take to provide the Claimant with this auxiliary aid. Put another way, the Tribunal was not satisfied that it could be said that the Respondent had acted unreasonably in the steps that it taken.

271. The complaints in relation to the physical premises related to (1) the toilets and staff room being located on the first floor; and (2) only providing a locker for the Claimant in April 2018.

272. In order for any duty to rise, the Tribunal had to be satisfied that the physical features of the premises to which the Claimant was referring had put her at a substantial disadvantage in comparison with persons who are not disabled. If so,

the duty on the Respondent was to take such steps as it is reasonable to have to take to avoid the disadvantage.

273. It was not entirely clear from the Claimant's Particulars of Claim and Further Particulars whether these complaints were purely in relation to the Erdington Fort store, although, from the evidence, the Tribunal understood that the specific complaints were in relation to the Erdington Fort store. Insofar as the Particulars of Claim and Further Particulars might have been interpreted as raising a complaint in relation to the premises at the Wrexham store, the Claimant did not attend that store after October 2015 and was assigned to a Birmingham store at the end of her sickness absence in July 2017. Any complaint in respect of the Wrexham store would be significantly out of time and the Tribunal was not satisfied that it was just and equitable to extend the time limit in relation to any such matter, for the reasons already given. Indeed, there would have been all the more reason to have taken steps at the time to pursue any issues in respect of legal liability given that the Claimant's case is that the premises at Wrexham were to blame for a fall which resulted in a significant injury and a large amount of time off work.

274. In relation to the Erdington Fort store, the reality of the matter is that the Claimant had identified this store as the one which best suited her having effectively been given a tour of the Respondent's stores in the Birmingham area. This store was considered by Mary Green to be "*ideal for her as everything is on one level there is even access to a public toilet on this level*". This was a reference to the toilets provided for the use of customers which it had originally been agreed the Claimant could use although this would not normally have been allowed. Alternatively, there were toilets for staff on the first floor which the Claimant could access using a lift in the loading bay.

275. The Claimant's Statement of Evidence does not really identify any issues with the premises other than paragraph 28 which raises an issue in respect of not having had a key to the drawer in her room and not having had a locker until April 2018, although the issue in respect of a locker seems to have been that the Claimant was offered a locker but it was in the bottom row of the lockers in the locker room which she suggests was not suitable as her disability caused her to have difficulty bending down. She suggests that the Respondent should have got another member of staff to swap his or her locker with the available locker on the bottom row. The Claimant suggests that, as a result, she had nowhere to store her belongings for seven months.

276. However, on the face of it, this complaint is also out of time in that the issue had been resolved on the Claimant's case, by April 2018. The Tribunal was not satisfied that it would be just and equitable to extend time in relation to this matter for the reasons previously given.

277. In any event, the Tribunal was not satisfied that any issue in respect of having access to a locker caused the Claimant to be at a substantial disadvantage. It is noteworthy that the Claimant's grievance dated 19 November 2017 included a significant list of issues since her return to work, including issues in respect of reasonable adjustments, but no issues with respect to the premises were raised. Similarly, the matters now raised by the Claimant regarding the premises are not matters which are raised in the detailed occupational health reports of 1 March 2019 and 4 September 2019. It is noteworthy that, insofar as the issue of consideration being given to the Claimant transferring stores was raised in the 4 September 2019 report, this was on the basis of the Claimant's perception regarding her treatment at work being a barrier to the returning to work, not because of any suggestion that the workplace was unsuitable because of her disabilities.

278. For the same reasons, the Tribunal was also not satisfied that the Claimant was substantially disadvantaged by the toilets and staff room being on the first floor. There were toilets accessible to the public on the same level as the Claimant would be working. There was also a lift which she could use, albeit a lift which she describes as a goods lift. Moreover, she had satisfied herself that, of the premises which she had visited in the Birmingham area, the premises at Erdington Fort were best suited to her.

279. There was no suggestion that the lay-out of the premises at Erdington Fort could have been reconfigured so that the staff room and toilets were on the same floor as all of the Claimant's activities as a Pre-registration Optometrist. Realistically, if these physical features of the premises caused the Claimant to be at a substantial disadvantage, then the only step which would have avoided that disadvantage would have been for the Claimant to be transferred to a different store where everything was on the same level or for the Respondent to have moved its store from Erdington Fort to different premises. There was no evidence before the Tribunal identifying suitable premises of the Respondent's in the requisite area where the Claimant could have completed her training as a Pre-registration Optometrist where the layout of the premises would have been better suited to her as a disabled employee. In relation to the Respondent leaving the premises altogether, the Tribunal was satisfied that, having particular regard to the fact that the Claimant had identified the Erdington Fort store as the store which was best suited to her, moving premises was not a step which it was reasonable for the Respondent to have to take.

280. The Tribunal now goes on to consider whether or not there was a breach of a duty to make reasonable adjustments as a result of any provision, criterion or practice ("PCP") having placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

281. As discussed at the outset of these written reasons, the relevant PCPs had identified as being (a) there was "*a nineteen-day consultation period for*

redundancy" and (b) "*I was dismissed for redundancy*". However, any PCP relating to the Claimant's dismissal might more precisely be identified as that of considering making redundant members of staff who worked in stores which were due to close (or who were otherwise considered to be at risk of redundancy).

282. Based on the Particulars of Claim, the substantial disadvantage which the Claimant was alleging to have arisen from these PCPs was that of losing her employment, which would also have the effect of bringing her training to an end, and would impact particularly significantly upon her (as against a non-disabled employee whose job and training might also have come to an end) "*due to the nature of my disability, the length of my sickness absence, and the fact that I was halfway through my training period*".

283. Essentially, the Claimant has identified processes which were to her disadvantage. However, whilst these processes and / or any outcome deriving from these processes, may have amounted to a detriment, in that they were unfavourable to the Claimant, identifying something which was to her detriment does not, in itself, involve identifying treatment which placed her at a substantial disadvantage in comparison with persons who are not disabled. Clearly, a large number of non-disabled employees were consulted as to possible redundancy over a consultation period of a similar length and / or selected for redundancy and / or dismissed. They would have faced the same issues in terms of vacancies with the Respondent where they might be redeployed or finding alternative employment if they were dismissed and / or finding alternative employment where they could continue any training if they have not yet concluded that training. As such, the Tribunal wasn't satisfied that the Claimant was substantially disadvantaged in comparison to such non-disabled employees. Indeed, there may also have been non-disabled employees who were absent through sickness at the point in time when any redundancy consultation process was taking place. In common with the Claimant, and such employees might not been in a position to seek alternative employment until they were fit for work. The occupational health report of 4 September 2019 had been heavily qualified, for example by reference to the need to consider any collateral information provided by a report from the Claimant's own doctors, but, subject to this, it had suggested that the Claimant would be able to consider returning to work within a period of four to six weeks with appropriate supportive measures. Moreover, her fitness for work was partly influenced by the non-medical factors operating in her case which related to her feelings around the workplace where she was employed by the Respondent. On the face of it, these non-medical factors would not have applied to her fitness for work by way of alternative employment for a different employer. In relation to the medical factors which were operating in her case in relation to her fitness to work, the report stated that the Claimant's then current level of visual function should support her with being able to undertake some degree of working through appropriate adjustments, restrictions and general measures. In

short, the report anticipated that the Claimant's disability should not prevent her from being able to return to work.

284. Alternatively, if the position was otherwise, and the reality was that the Claimant's disability was going to prevent her from being able to undertake remunerative employment, then she was not additionally disadvantaged by any PCP involved in the Respondent's process of considering redundancies in that she was already in a position where she had ceased to be able to undertake remunerative employment (given that she had already exhausted her sick pay entitlement) or obtain alternative employment

285. As such, the Tribunal was not satisfied that the PCPs relied upon by the Claimant (which essentially related to the redundancy processes being followed) caused her to be substantially disadvantaged in comparison with persons who are not disabled. Nevertheless, the Tribunal went on to consider the individual adjustments that the Claimant was alleging should have been made, assuming for these purposes that the substantial disadvantage relied upon by the Claimant had been established.

286. It is appropriate to consider first the suggested adjustment of obtaining a targeted report from the Claimant's doctors, as recommended in the occupational health report, as the Tribunal's conclusions on this issue will also potentially inform any consideration given to other adjustments which the Claimant relies upon as having been recommended by the occupational health report. This is because the issue as to the reasonableness of the adjustments concerned, and whether any duty arose to make the adjustments, partly depends, in relation to a large number of the proposed adjustments, on any determination as to whether the approach adopted by the Respondent in relation to dealing with the occupational health report of 4 September 2019 involved taking such steps as it was reasonable to have to take (to avoid the disadvantage in issue).

287. The Tribunal has already concluded that the effect of the occupational health advice was that giving consideration to any recommendations or suggestions made within the report and giving consideration to any other adjustments which might be appropriate was contingent upon a targeted report being obtained from the Claimant's own doctors. Apart from the fact that this was the advice being provided in the occupational health report, it was sensible advice given that it was clear from the occupational health report that advice could not be given as to the Claimant's fitness to return to work without the medical position being investigated further through obtaining such a report or reports from the Claimant's own doctors. The report specifically stated that it was best that any decisions regarding the reasonable adjustments to support her back into work be deferred "*until we are in receipt of the target report*". The Claimant was fully aware of this. She had not provided the completed consent form at the occupational health appointment itself, and the penultimate paragraph of the report specifically records that she was advised that, without this consent to seeking further

information from her own doctors "*we will be unable to provide further guidance and supportive employment related information to help the situation*".

288. The Tribunal has found that there was a delay of over eight months in the requisite consent being provided by the Claimant , quite apart from the fact that there were also significant delays, effectively caused by the Claimant, in providing the occupational health report itself to those managers who needed sight of the report in order to progress the matter in terms of both seeking to support the Claimant's return to work, and seeking to manage her sickness absence which included the application of any appropriate capability procedures. The Tribunal was satisfied, based on the findings of fact made, as set out above, that the delay in providing the consent to a report being obtained from her own doctors was caused by the Claimant. She was the one who needed to provide consent. She could have provided it at the time of the occupational health appointment itself but did not do so. She was aware that the consent was needed in order to progress matters in terms of identifying the support which would be needed in order to facilitate a return to work in the event that she was fit to return to work. On the balance of probabilities, the Tribunal was not satisfied that the consent form had been provided by the Claimant, as she sought to assert, on around 10 January 2020. The Tribunal found the Claimant's evidence in relation to the extent of any steps taken by her to provide consent to be confusing and unpersuasive. The reality was that she was still being chased to provide consent in April 2020. Indeed, her response to an e-mail from Emma Coxon on 24 April 2020 seeking the return of the consent form was to state that "*I've not had an opportunity to look for the form as I'm in isolation upon the advice of my medical team*" and "*I would therefore very much appreciate if you could wait until after the current pandemic has passed*". Eventually, Emma Coxon had to set a deadline for the return of the form which resulted in the form being received on 14 May 2020. Once consent had been provided, there was a delay in progressing the matter further on the part of the Respondent's occupational health service providers for understandable reasons due to the pandemic. The consequence was that a report had not been obtained by the time that the Claimant was dismissed for redundancy. In all the circumstances, as have been described in some detail, the Tribunal is satisfied that the Respondent had taken such steps as it was reasonable for the Respondent to take in order to seek to obtain a report.

289. In any event, the Tribunal was not satisfied that obtaining a report from the Claimant's own doctors would have removed any substantial disadvantage arising from the PCPs in issue which related to the process of consulting about and making a decision in relation to the Claimants proposed redundancy. In the first place, obtaining a medical report is not, in itself, an adjustment, but is part of a process (as was envisaged by the occupational health report) by which any necessary adjustments might have been identified. The breach of duty would not be in relation to failing to obtain the medical report but would be in relation to any

adjustments which might have been identified by a medical report, subject to the Tribunal satisfied that a duty to make a such adjustment had arisen and the Respondent had failed to comply with the duty. That point was never reached.

290. One of the Claimant's arguments is that, had a medical report been obtained from her own doctors, the Respondent would have been in a position to act upon any occupational health recommendation to the effect that consideration should be given to finding her a post in another store. The potential adjustment of finding the Claimant a post in another store appears elsewhere on the list of suggested adjustments and will be considered separately. However, in the absence of a medical report having been obtained, the Respondent (and the Tribunal) did not have the information as to what adjustments might have then been considered to be needed in the light of the information as to the Claimant's position and any disadvantage provided by such a report. Thus, the Tribunal cannot find that obtaining a medical report would have moved any disadvantage in relation to the redundancy situation.

291. The next suggested adjustment is that of allowing a period of paid disability leave from November 2019 whilst adjustments were made. Insofar as any delay was caused by the delay in the Respondent being provided with the report setting out occupational health recommendations, or by the delay in obtaining the consent to seek a report from the Claimant's own doctors, the Tribunal has already found that the Claimant was significantly responsible for this delay. As such, the Tribunal was not satisfied that allowing the Claimant to take paid disability leave in such circumstances would have been a reasonable step for the Respondent to have been expected to take as part of the duty to make adjustments under Equality Act 2010 section 20. In any event, allowing the Claimant to take paid disability leave would not have removed any disadvantage arising from the redundancy process or redundancy situation. As it was not an adjustment which would have avoided the disadvantage identified, no duty to make the adjustment arose.

292. The next suggested adjustment which needs to be considered is that of undertaking a stress risk assessment. Essentially, this is another step which the Claimant is suggesting should have been taken as a result of occupational health advice, and so this raises the same issues and fails for the same reasons, as those set out above in relation to the other suggestions made in the occupational health report. Whilst the report was suggesting that a stress risk assessment be carried out before the Claimant returned to work, given that any advice as to the Claimant's fitness to return to work could not be given until a report had been obtained from the Claimant's own doctors, the Tribunal is satisfied that this is not a step that it was reasonable for the Respondent to have to take until the report from her own doctors was obtained. Moreover, the Tribunal is satisfied that the Claimant was the main source of any delays in steps being taken as a result of the occupational health report. Further or alternatively, taking any steps in

relation to a stress risk assessment was contingent upon identifying someone other than the Claimant's immediate line management for the purpose of dealing with such matters as the report specifically stated that it was "*best that the formal stress risk assessment is not undertaken by immediate line management*". Ultimately, it was Emma Coxon who was eventually identified as the manager who would be responsible for taking any steps arising out of the report, but it was only in April 2020 that Emma Coxon finally obtained a copy of the report. One of the first steps was to seek to arrange a case conference to progress matters, which might have provided an opportunity to consider making arrangements for a stress risk assessment, but the Claimant effectively objected to having a case conference on the basis that she was not satisfied that it was provided for in the Respondent's absence policy and on the basis that the occupational health report (which Emma Coxon had only just seen) was now out of date so that a new occupational health report should be obtained.

293. In any event, carrying out a stress risk assessment is not an adjustment in itself, but simply a possible means of identifying other adjustments which might be needed. Similarly, a stress risk assessment would not, in itself, have been a means of removing, avoiding or reducing any disadvantage faced by the Claimant as a result of the processes involved in the Respondent consulting about redundancy and making a decision about her proposed redundancy.

294. The next possible adjustment relied upon by the Claimant is that of appointing a point of contact other than the Claimant's line manager, as recommended in the occupational health report. Again, this is another step which the Claimant is suggesting should have been taken as a result of occupational health advice, and so potentially raises the same issues as already discussed in so far as it was being suggested that any consideration given to adjustments was deferred until a report had been obtained from the Claimant's own doctors. In fact, once she had received a copy of the report on or before 10 December 2019, it is clear that Kim Cockbill agreed to the suggestion that there should be a different point of contact and asked for the Claimant's consent to disclose the report to another manager. In the findings of fact set out above, the Tribunal set out the detailed history in relation to the attempts to identify a different point of contact with the Claimant objecting to various suggestions, notwithstanding the fact that the advice in the occupational health report had been limited to the observation that the Claimant "*is likely to find any meetings with the line manager very stressful and it may be best further administrative processes are led by HR or someone independent from the team*". It was Emma Coxon who was eventually identified for these purposes. Based on the Tribunal's findings of fact in relation to the steps taken by the Respondent once Kim Cockbill had agreed to step back from her involvement in the Claimant's absence management, the Tribunal is satisfied that the Respondent had taken such steps as it was reasonable for the Respondent to take. In any event, simply identifying a point of contact other than the Claimant's line manager was not an adjustment which was going to remove any

disadvantage relied upon by the Claimant in relation to the redundancy processes. Once there was a proposal in place to close the store at which the Claimant was working, steps were quickly taken by which Louise Chatting assumed responsibility as the point of contact in dealing with the redundancy process with the Claimant. It follows that the Tribunal is satisfied that there was no breach of the duty to make adjustments in relation to any steps taken regarding putting a point of contact in place for the Claimant.

295. The next suggested adjustment to be considered is that of assigning the Claimant to a different store with a phased return to work, which the Claimant suggests was recommended by the occupational health report. The occupational health reported stated that the Claimant's "*feelings surrounding the workplace are acting as a significant barrier to her returning to work*". This reflected the history provided by the Claimant which involved describing "*a breakdown in employment relationships and a feeling of being unsupported at work on a number of occasions and I think this has highly sensitised her*". Thus, "*the current ongoing unresolved perceptions of the workplace, I feel, are acting as a barrier*". Later on, the report stated that "*she has become very sensitised to the breakdown in employment relationships with her direct line manager and I think she feels the situation has become unbearable*". As such, the report stated that, consequently "*there is merit in considering relocating her to a different store where she can potentially be managed by different line manager in order to create and restore employment relationships as a way forward*". The report stated that "*I think it may help to have an open discussion with a regarding this at some stage".*

296. However, as stated above, the report also stated that it was best that any decisions regarding reasonable adjustments to support the Claimant back into work be deferred until receipt of the targeted report, at which point it was clearly envisaged (by the words "*thereafter advise further*") that further occupational health advice would be provided as to any adjustments which were needed. That point was never reached.

297. Ultimately, the Tribunal was not satisfied that the Claimant's suggestion that her position at the Erdington port store was untenable as a result of a breakdown in relationships, in particular with her line manager, amounted to a substantial disadvantage in comparison with a non-disabled person. The Tribunal was not satisfied that any difficulties in relation to the working relationship were caused by the Claimant's disability. Changing stores to allow the Claimant to escape a line manager with whom the Claimant felt unhappy was not an adjustment or step which the Respondent was under a duty to take in any event. The disadvantage which the Claimant was suggesting gave rise to the duty was that not that of the redundancy processes, but that of working with a line manager and in a workplace where relationships had broken down. Moreover, even if the Claimant had established the requisite substantial disadvantage, based on the wording of the occupational health report and the advice it contained, the Respondent had

taken such steps as were reasonable in that it had taken steps to obtain a targeted report from the Claimant's own doctors before seeking to make decisions in respect of adjustments. As far as any phased return to work was concerned, there was no suggestion that any return to work, whether at the Erdington Fort store, or elsewhere, not being on the basis of a phased return to work. Indeed, a phased return to work had previously been accommodated for the Claimant without any difficulty. In the circumstances, the Tribunal concluded that there was no breach of the duty to make adjustments in relation to this proposed adjustment.

298. In relation to the suggested adjustment of acquiring neutral density filters, the occupational health report of 4 September 2019 had noted that when the Claimant was able to return to work, her "*current level of visual function should support her with being able to undertake some degree of working through appropriate adjustments, restrictions and general measures*". The report noted that the Claimant "*in particular, felt the use of neutral density filters over the left eye to aid comfort would support her work*". The report asked the Respondent to "*consider this where feasible*". The Tribunal is satisfied that this is a suggested adjustment which was effectively subject to the advice in the occupational health report to defer making any decision until a report from the Claimant's own doctors was available. Clearly, such a report might have provided the information from which it was clear that such an adjustment was necessary, because the Claimant would otherwise be substantially disadvantaged in comparison to persons who were not disabled, or that such an adjustment was not necessary or would make no difference. Indeed, such a report might, theoretically, have made clear that the Claimant was unlikely to return to work or return to work any time soon, in which case taking steps which might be needed for a return would be otiose. In short, the Tribunal is satisfied that the Respondent took such steps as it was reasonable to take in relation to this suggestion, namely it sought to progress the matter by seeking the Claimant's consent to a report being obtained from her own doctors, but ultimately such consent was provided too late in the day for this possible adjustment to be further considered before employment came to an end. Moreover, it is not an adjustment which would have removed any disadvantage in relation to the redundancy process, which is where the alleged substantial disadvantage arose.

299. The next adjustment relied upon is that of extending the redundancy consultation period. The Tribunal's findings of fact, as set out above, note that the Claimant had sought an extension to the consultation period to ensure that she had union representation, and also to attend a medical appointment, and this extension had been agreed by the Respondent. However, in terms of extending the consultation period beyond the period of time covered by the three consultation meetings which took place, the Tribunal was not satisfied that there was any evidence that extending the consultation period would have achieved anything, in that there was no evidence that this would have avoided the Claimant

being made redundant. In any event, the Tribunal was not satisfied that the length of the consultation period, in itself, placed the Claimant at a substantial disadvantage in comparison with non-disabled persons. The Claimant was in the same position as her non-disabled colleagues. Avoiding redundancy depended on identifying an alternative post. The Claimant had the list of vacancies and could have sought to have expressed an interest in vacancies on the list but did not do so. There were, for example, roles available as an Optical Consultant, for which the Claimant could have applied, but her evidence to the Tribunal was that it would be "*prejudicial*", despite the fact that it potentially would have allowed her to continue in employment with the Respondent and so be considered for a Pre-registration Optometrist role if and when a suitable role became available. In short, the Tribunal was not satisfied that the Claimant was substantially disadvantaged in comparison with non-disabled persons by the length of the consultation period or that it was a reasonable adjustment for the Respondent to extend the consultation period.

300. The next suggested adjustment is that of transferring the Claimant to an alternative role to enable her to return to work and complete her pre-registration training. In so far as this is contending that, had action been taken as a result of the occupational health advice provided, an alternative role would have been found for the Claimant, the Tribunal has already dealt with this issue above. In any event, at that stage it was premature to be seeking to identify an alternative role for the Claimant when she was fit to return to work given that there was no clarity as to when she might be fit to return to work, which was a significant part of the reason for seeking to obtain a report from her own doctors in the first place. At the point of the redundancy consultation process, it was identified by Louise Chatting that there was no pre-registration vacancy to which the Claimant could reasonably be transferred and to which she might then have returned, once fit to do so. It follows that the Tribunal was not satisfied that any duty arose that there was any breach of duty.

301. The next suggested adjustment is that of creating a new pre-registration role for the Claimant following the closure of the Erdington Fort store. This has been discussed in the context of unfair dismissal. In the circumstances of this case, any duty to make reasonable adjustments did not extend to creating a role for which the Respondent had no business need. This was particularly the case at a point in time when Respondent was having to close stores in the middle of a pandemic and there was no visibility as to the extent to which the situation might improve or get worse. Moreover, as at August 2020, the Claimant's prospects of returning to work remained significantly uncertain so that the Respondent could not have been confident that she would fulfil any such pre-registration role.

302. Finally, the Tribunal considered the suggested adjustment of granting a six-month abeyance in respect of the Claimant's redundancy. This has also already been discussed in the context of the complaint of unfair dismissal. The

Respondent was entitled to look at the position as it existed in July or August 2020, whereas the Tribunal now has the benefit of hindsight. However, even with hindsight, there is no evidence that delaying the redundancy would have avoided the Claimant being made redundant (rather than simply delaying it). As the Respondent puts it, there was no visibility in terms of the position being any different in six months' time. Moreover, the Tribunal was not satisfied that this was a reasonable step for the Respondent to have to take when (1) there was no clarity as to when the claimant might be fit to return to work, and (2) if she did become fit to return to work, the Respondent would be in the position of employing and paying an employee was otherwise redundant for the next six months. As such, the tribunal was not satisfied that this was a reasonable step for the Respondent to have to take.

303. For the reasons set out above, the Tribunal has concluded that the Respondent was not in breach of any duty to make reasonable adjustments.

Financial claims

304. The financial sums being claimed by the Claimant were set out in an undated Schedule of Loss. The Further Particulars provided by the Claimant then purported to copy the specific sums being claimed from the Schedule of Loss into the Further Particulars (although not all of the figures claimed in the Schedule of Loss have been so copied).

305. Obviously, some of these heads of claim, which involve claiming for losses which the Claimant says have been caused by the treatment complained about in her various complaints, depend upon the Tribunal concluding that the complaints concerned were well-founded. As such, these are remedy issues which would have fallen to have been dealt with after any decision on liability, depending upon whether the specific complaints in issue were upheld. It follows that some of the sums being claimed are outside the scope of the decision as to liability being explained in these written reasons.

306. It can be seen that the periods of claim fall into three distinct periods, namely (1) sums which the Claimant claims she was entitled to whilst employed by the Respondent but which were not paid or not paid in full or reduced by deductions and / or losses which she claims had already incurred prior to her dismissal as a result of the treatment complained about in her various other complaints; (2) losses which she says were incurred between the date of her dismissal and the date of the hearing which she claims arose as a result of the treatment complained about in the ET1 Form of Claim; and (3) future losses being claimed for the period from the date of hearing.

307. In actual fact, the two documents in which the Claimant sets out the amounts being claimed do not always clearly differentiate between these three periods. Neither document adequately explains how the various sums have been calculated. It is also not clear whether the sums being claimed are the sums

which the Claimant says represent her total entitlement (so that credit would then need to be given for the sums actually paid by the Respondent), or whether the figures being put forward are net figures in the sense of being the amounts which are outstanding or which she is claiming that she should have been paid on top of the amounts which she was actually paid.

308. Ultimately, the burden of proof is on the Claimant to satisfy the Tribunal as to her contractual or statutory entitlement to any sums claimed. Her evidence simply did not begin to do this. For example, other than paragraphs 9, 10 and 12 which comments on the issue in respect of any overpayment of sick pay between 2015 and 2017, her written Statement of Evidence only really deals with the issue of any sums that she might be owed at paragraph 66. This paragraph raises the issue of there being shortfalls in her final payments following the termination of her employment by alleging that she received £827.08 as a redundancy settlement so that she calculates that £3,219.03 was deducted from her final redundancy package. In fact, the figure of £827.08 was the net payment which was shown as being made to the Claimant by her final wage slip of 28 September 2020. As set out in the Tribunal's findings of fact, that wage slip showed the Claimant being credited with a severance payment of £2,707.28, a payment in lieu of notice of £483.44, and a payment in respect of outstanding holiday of £888.90. This amounted to £4,079.62. After the deductions and debit payments set out in the wage slip, this was reduced to £901.65 gross and £827.08 net after deduction of National Insurance.

309. In terms of the other sums being claimed, paragraph 66 simply contains a generalised assertion that there "*were ongoing miscalculations and deductions from my salary and sick pay between 2015 and 2020*", "*bonuses during November 2019, January 2020 and April 2020 were also withheld*", and "*I am also owed holiday pay from 2015 to 2020*". The Statement of Evidence does not set out any evidence as to the sums involved.

Redundancy payment

310. Neither the Schedule of Loss nor the Further Particulars specifically refer to any head of claim in respect of a redundancy payment. However, the Schedule of Loss does claim a basic award calculated as £1,352.00 on the basis that this represents the Claimant's gross weekly pay of £338.00 multiplied by her four years of service. Put simply, a basic award for unfair dismissal is calculated in the same way as a redundancy payment and it is not normally possible to recover both. Any basic award would normally be reduced by the amount of any redundancy payment already paid. It follows that it seems that the Claimant is claiming that she is still entitled to the full amount of any basic award or redundancy payment, rather than an outstanding balance. The Tribunal was satisfied that the Claimant received a severance payment £2707.28 gross. This was effectively an enhanced redundancy payment in accordance with the redundancy information provided at the beginning of the redundancy consultation

process to the effect that redundancy pay would amount to two weeks' pay per completed year of service, with this being on the basis that the redundancy pay would include any entitlement to statutory redundancy pay. Paragraph 66 of the Claimant's Statement of Evidence, says that *"£3,219.03 was deducted from my final redundancy package, which meant that I received £827.08 as a redundancy settlement*". This would seem to be referring to the payments received by the Claimant on the termination of her employment in a wider sense and not just her redundancy payment. As described above, the Claimant's final wage slip dated 28 September 2020 showed the Claimant being credited with the sum of £2,707.28 described as "*Severance Pay Tax Free (N)*", although the wage slip also shows debit payments and deductions so that the Claimant received the sum of £901.65 gross and £827.08 net after deduction of National Insurance, with this sum being in respect of all of the sums due to her at the time of her final wage slip. The Tribunal was satisfied that the Claimant's entitlement to a statutory redundancy payment was met through the payment made to her at the time of her final wage slip so that the Respondent has effectively paid the Claimant a redundancy payment, but then deducted from any redundancy payment the sums which were owed to the Respondent as a result of earlier overpayments.

311. It follows that the complaint as to not having been paid a redundancy payment is dismissed.

Notice pay

312. In her Schedule of Loss and her Further Particulars, in respect of notice pay, the Claimant claims £1,184.00. She does not explain how she has arrived at this figure. However, the Schedule of Loss gives her net weekly pay as £296.00 so that the notice pay being claimed is effectively four weeks' net pay. It follows that the Claimant is claiming that she is still entitled to the full amount of her notice pay, rather than an outstanding balance. She does not provide any information regarding any other sums received during the notice period for which credit might need to be given, such as benefits.

313. By letter dated 6 August 2020 the Claimant had been given notice of the termination of her employment by reason of redundancy. The Claimant was informed that her last day would be 30 August 2020. Effectively, the letter was giving 24 days' notice rather than the 28 days' notice to which she was entitled. However, the letter informed her that she would receive a payment in lieu of notice and stated that "*you will receive payment for your unserved notice in your final pay*". Effectively, she was entitled to four days' pay due to the notice being too short. As described above, the Claimant's final wage slip dated 28 September 2020 shows that she received £483.45 gross as payment in lieu of notice. The Respondent's position is that it has effectively paid the Claimant the sums due to her on the termination of her employment albeit this involved having deducted from any payment the sums which were owed to the Respondent as a result of earlier overpayments. For the same reasons as given above in relation to the

payment of the Claimant redundancy payment, the Tribunal accepts that this is the case.

314. It follows that the complaint as to a breach of contract in respect of her entitlement to notice and any complaint as to not having been paid notice pay to which she was contractually entitled is dismissed.

Deduction from wages of £1,466.00

315. In her Schedule of Loss, the Claimant then claims this sum of £1,466.00 with this being described as "*"Backpay pensionable" deducted from wages*". It was not entirely clear what the basis is for this head of claim. However, it can be seen that a deduction in respect of £1,466.44, described in these terms, was made from the Claimant's final pay, as set out in her final wage slip dated 28 September 2020. It can also be seen that her wage slip dated 28 August 2020 had shown her being credited this amount as salary for August. This was despite the fact that she was absent during August 2020 due to sickness and had exhausted her sickness entitlement, but this reflected the way in which the Respondent's payroll system operated as has been described above. By this point in 2020, £1,466.44 was the Claimant's contractual monthly salary, in that the Respondent's payroll was entering a credit amount in respect of this sum on the Claimant's wage slips. It was explained to the Tribunal that the entries on the wage slips in respect of salary represented 1/12th of an employee's annual salary and this figure representing 1/12th of salary was entered on the wage slip regardless of the actual hours worked (or due to be worked) in a month. However, since August 2020 was the Claimant's final month as an employee, the way in which the Respondent's payroll system operated meant that this effectively needed to be corrected in her final wage slip dated 28 September 2020 by entering a credit for the actual period of time in respect of which the Claimant would have been entitled to salary had she not been absent due to sickness, and so it can be seen that a credit is entered on the 12 September 2020 wage slip in the sum of £1,350.00 with this being described as "*Salary*". In other words, viewed in isolation, the Respondent's payroll was taking back the credit of £1,466.44 and substituting it with a credit of £1,350.00 as this was the correct amount to be credited for August 2020 (in so far as this Respondent's payroll system operated by entering a credit for salary even where an employee was off work due to sickness and not otherwise entitled to payment of his or her salary). The reason £1.350.00 was the correct figure to be credited, in this way, was that during this period the Claimant contractual hours would have involved her working 150 hours had she not been off work due to sickness (one day a week she was contracted to work 7.5 hours a day and three days a week she was contracted to work 10 hours a day). At the Claimant's hourly rate of £9.00 per hour this gives the figure for salary which was credited on the wage slip. In any event, as has been discussed above, these were notional credits in that the Claimant had no entitlement to salary, either way, for August 2020. As such, complaining about

this as an unlawful deduction is misconceived, although any misunderstanding partly arises from the arcane and abstruse nature of the Respondent's payroll system.

316. It follows that any complaint as to an unlawful deduction from wages in respect of a deduction of £1,466.00 is dismissed.

Sick pay

317. In her Schedule of Loss, the Claimant claims sick pay for the period between 1 June 2018 and 30 August 2020. Her sickness absence had effectively started on 20 May 2018. She is claiming £92.50 for the first 43 weeks amounting to £3,977.50, £94.25 the next 52 weeks amounting to £4,901.00, and £95.85 for the next 21 weeks amounting to £2,012.85. It follows that the total amount being claimed is £10,891.35. At first blush, this head of claim is inconsistent with the Claimant's argument that her redundancy should have been held in abeyance as she was not costing the Respondent anything at the point in time when she was made redundant. In fact, the weekly figures being claimed are the weekly figures for statutory sick pay between June 2018 and August 2020. As was explained to the Claimant in cross-examination, it would seem that the Claimant did not appreciate that she was only eligible for statutory sick pay for a maximum of 28 weeks. Moreover, the head of claim appears to give no credit for any statutory sick pay that was actually paid.

318. The position in respect of sick pay was that, due to the Claimant's length of service, she was only entitled to four weeks' company sick pay in a rolling twelve-month period. Company sick pay was payable as a top-up to statutory sick pay. The value of four weeks' company sick pay in 2018, for absence in 2018 was £981.84. Over the course of her absence between 2018 and 2020 the Claimant received payment of £1,048.34 in company sick pay. During the course of this absence the Claimant was entitled to 28 weeks' payment for statutory sick pay. The value of this was £2,577.12. Over the course of the Claimant's absence between June and December 2018 she was paid a total of £2,577.40 in respect of statutory sick pay payments. However, as the Claimant's absence was one continuous period of absence, she had no further entitlement to statutory sick pay or company sick pay over and above the sums processed.

319. In short, the Tribunal was not satisfied that the Claimant had been paid less than she should have been by way of sick pay. The head of claim in respect of sick pay seems to be misconceived in that it is based on the premise that the Claimant should have continued receiving statutory sick pay throughout her sickness absence. It follows that this complaint is dismissed.

Deduction from wages of £9,705.00

320. The Schedule of Loss then claims the sum of £9,705.00 on the basis that this is the figure for unauthorised "*deductions from wages as "overpayments"*".

321. This is not a figure which appears in the Particulars of Claim. Paragraph 25 referred to a dispute over whether or not there had been an overpayment to the Claimant in the sum of £2,000.00 in 2015 (the Claimant suggested that the overpayment was in the sum of £460.00). Paragraph 25 also referred to there having been "*ongoing deductions and miscalculations to my salary and to sick pay between 2015 and 2020*", without further detail of the amounts involved being provided. The Schedule of Loss and Further Particulars then simply put forward the sum of £9,705.00 with this being described as unauthorised "*deductions from wages as "overpayments"*". The Claimant's Statement of Evidence does no more than repeat the assertion, at paragraph 66, that there "*were ongoing miscalculations and deductions from my salary and sick pay between 2015 and 2020*".

322. The Respondent sought to deal with this issue by explaining the way in which its payroll system worked in that the Claimant's payslips show various adjustments being made. It certainly appears possible that the Claimant's concerns regarding possible miscalculations and deductions arise from not fully understanding the way in which the Respondent's payroll system worked. In fairness to the Claimant, as previously suggested in these written reasons, this was less than straightforward and easy to follow.

323. Effectively, the Tribunal was satisfied that this was a less than straightforward payroll device by which credits which had been generated, even though no payment was due, because of the assumptions or incomplete information generating the wage slip, were then recovered or reconciled the following month, resulting in wage slips recording credits and debits which were notional rather than actual. The Tribunal was satisfied that the credit and debit entries on the Claimant's payslips adjustments did not give rise to unlawful deductions from wages but amounted to payroll adjustments as the payslips which were generated were effectively based on information or assumptions which needed to be corrected or adjusted. These corrections or adjustments did not ultimately, over time, give rise to the Claimant receiving less pay than she should have done.

324. It follows that any complaint in respect unlawful or unauthorised deductions from wages, whether in the sum of £9,705.00 or otherwise, is dismissed.

Bonus payments

325. The Claimant's Particulars of Claim claimed that company bonuses during November 2019, January 2020 and April 2020 were also withheld from her in that these bonuses appeared on her payslip but were not paid into her account.

326. However, the actual sum being claimed by way of unpaid bonus which the Claimant claims she should have been paid prior to her dismissal is not entirely clear from either the Schedule of Loss or the Further Particulars. Neither document specifically refers to any bonus which the Claimant should have received as due in November 2019. Both documents claim the figure of £750.00

in respect of "*loss of commission/bonus 2020*", without making clear whether this involves claiming in respect of an unpaid entitlement or claiming in respect of a loss arising from dismissal. The reason for the figure being claimed being £750 is unclear. The figure claimed by way of bonus for 2021/2022 of £1,000.00 would obviously not seem to be a sum which was due to the Claimant on or before her dismissal but would appear to be a sum which would only be recoverable in the event of the Claimant succeeding with another complaint and satisfying the Tribunal that it was a loss caused by the matters complained about in that other complaint. When questioned, the Claimant accepted that this was being claimed as a future loss rather than a deduction which was owed to her.

327. The Respondent's case was that the payslips demonstrated that the Claimant normally received a Christmas gift payment and, if this was the case, then she would not have been entitled to a bonus payment in any event, in that employees who received Christmas gift payments were not also entitled to a bonus payment. This was not disputed by the Claimant.

328. In so far as the Claimant gives the dates for unpaid bonus of November 2019, January 2020 and April 2020, this involves referring to entries on her wage slips for these months. Again, the picture is one of confusion. The wage slip for November 2019 includes a credit of £120 described as "*Christmas Gift*", whilst the wage slips for January 2020 and April 2020 included credits described as "*Optics Bonus*" for £200 and £500 respectively. However, the wage slips for each of these months in each case shows the total payments being equalled by the total deductions so that the net payment was £0.00. Thus, the effect of these credits appearing on the Claimant's wage slip appeared to be exactly the same as the effect of the credits in respect of her monthly salary appearing on her wage slip, at a point in time when she was off work due to sickness and no longer in title to any form of sick pay. Wage slips showed that in previous years the Claimant had received a payment of £100 as a Christmas gift and had not previously received any bonus payments. This seemed to be consistent with the Respondent's case, which the Claimant accepted in cross-examination, that an employee could not receive both a Christmas gift and a bonus payment.

329. However, the bundle also contained a spreadsheet (page 1061) which amounted to a retrospective reconstruction of the sums to which the Claimant was entitled over the course of her employment with the Respondent dating back to 2015. The spreadsheet contained a column for each month showing the payroll entries as to the various debits and credits made in respect of the Claimant's remuneration, then a separate column for each month setting out the credits and debits which should be made. Both sets of figures actually credit the Claimant with bonus payments of £200 and £500 from January and April 2020 respectively.

330. Clearly, the reconstruction set out in the spreadsheet may be based upon a false premise in respect of any entitlement to a bonus payment. However, in

arriving at a balance as to the outstanding sum due to the Claimant, it shows any entitlement to a bonus to have been met.

331. Ultimately, the Tribunal had to seek to make sense of information which appeared, in places, to be contradictory, which gave rise to the possibility that some of the information was incorrect. On balance, the Tribunal concluded that it was more likely than not that the Claimant had no entitlement to a bonus payment. She had not received any such sum in the past. She accepted that employees who received a Christmas gift did not also receive a bonus. She had received a Christmas gift in the past. However, both the payment of a Christmas gift and the payment of a bonus appeared to be discretionary. The Claimant had not been in work for eighteen months or more prior to the dates when she seeks to claim that any such entitlement arose. In all the circumstances, the Tribunal was not satisfied that any entitlement had arisen to the sums being claimed.

332. In any event, any complaint about these deductions was out of time. The Tribunal was satisfied that these were either one-off payments or deductions, or, at best, the last payment or deduction in the series was in April 2020. Any complaint had been made outside the time limit of three months. For the reasons already discussed, the Tribunal was satisfied that it would have been reasonably practical to issue proceedings in time.

333. Accordingly, the Tribunal dismissed the Claimant's complaint as to bonus payments.

Loss of pension benefit

334. The Claimant was also claiming, in her Schedule of Loss and Further Particulars, a figure of £908.00 in respect of loss of pension benefit for 2020/2021. Although it is not entirely clear, this head of claim appeared to be claiming in respect of a loss alleged to have been caused by the dismissal. The total amount appears to be broken down to £454.00 for each year, in which case part of the figure for 2020 might have been in relation to a date pre-dating the dismissal. It is not clear how the Claimant has arrived at the figure of £454.00 for annual pension benefit. The Schedule of Loss had given a figure for the Respondent's annual pension contributions as being £1,202.52. However, during the hearing, the Claimant accepted that this head of claim was in respect of future loss rather than past deductions. In any event, in respect of the period prior to her dismissal, as the Claimant was absent and no longer entitled to any statutory sick pay or company sick pay, there was no salary against which any payment of pension contributions could be calculated.

335. It followed that the Tribunal dismissed any free-standing complaint in respect of loss of pension benefit as not well-founded.

Expenses

336. Although both the Schedule of Loss and Further Particulars included heads of claim in respect of expenses incurred with the figures being given being those of £783.00 for travel fares to courses, £500.00 for the cost of hotels and living expenses for courses and £538.19 for loss of equipment, no breakdown was provided for any of these figures. The figure of £500.00 appears to be an approximate or round figure, but both of the other two figures appear to be precise figures. No receipts have been provided and there seemed to be no evidence of the Claimant having claimed expenses at any point in time through any request for approval having been put through by the Claimant. The dates to which these expenses relate have not been given either. On the face of it, whether the sums are being claimed as unlawful deductions from wages or as sums to which the Claimant was contractually entitled, they must relate to periods when the Claimant was actually attending work, so it must follow that the Claimant is claiming these sums substantially outside any applicable time limit for doing so. Moreover, for the reasons already given in discussing the issue of time limits, the Tribunal is satisfied that it would have been reasonably practicable to have issued any proceedings in time. In any event, in the absence of evidence to substantiate the amounts being claimed or that any sums were being properly claimed, the Tribunal was not satisfied, on the balance of probabilities, that the sums being claimed were legally due to the Claimant.

337. Accordingly, the Claimant's complaint in respect of unpaid expenses is also dismissed.

Holiday pay

338. The Schedule of Loss and Further Particulars also include a head of claim respect of the accrued and untaken holiday pay with this being claimed in the sum of £2,500.00 for "*2016/2017*" and £5,335.02 for "*2017/2018/2019/2020*". Thus, two separate sums are being claimed, but it is not entirely clear that there is no overlap between the two periods. Moreover, neither document explains how each figure has been calculated. The figure of £2,500.00 is obviously a round figure whereas the figure of £5,335.02 appears to be a precise figure. Again, it is not clear whether either figure is a net figure or a gross figure. Neither the multiplier nor the multiplicand has been provided for the purposes of explaining the calculation used. The Schedule of Loss does give credit for £888 which is described as a payment by the Respondent for some holiday pay. This would appear to be the figure of £888.90 which appears on the wage slip for 28 September 2020 in respect of outstanding holiday. This fails to give credit for the recalculated sum of holiday pay which the Respondent accepted was due to the Claimant in February 2021.

339. The Claimant was absent due to sickness between October 2015 and July 2017. The Respondent's provisions in respect of long-term absence and holidays

provided for any unused entitlement as at the start of the absence to be carried forward and for holiday entitlement to continue to accrue throughout the absence. However, any such holidays were carried forward for a maximum of 18 months from the end of the holiday year. As such, the Claimant was in a position to take any outstanding holiday entitlement which she still had in July 2017 during the period when she was back at work between August 2017 and March 2018.

340. After the Claimant was credited with the sum of £888.90 in respect of outstanding holiday in September 2020, any entitlement to holiday pay was subsequently re-worked by the Respondent in February 2021 resulting in the Claimant being credited with the sum of £4,106.10 gross in respect of holiday pay due on termination (less the £888.90 for which credited already been given) with the result that she became entitled to a further sum of £3,987.32 gross and £3,378.95 net

341. The Claimant's Statement of Evidence simply asserted that she was owed holiday pay from 2015 to 2020. She did not put forward any evidence or basis for the reworked figure of the Respondent being incorrect. In the circumstances, the Tribunal was not satisfied that there had been any underpayment.

342. It follows that the complaint in respect of holiday pay is dismissed by the Tribunal.

Remedy issues

343. The remaining heads of claim in the Schedule of Loss and Further Particulars are remedy issues which would have fall to be considered in the event of liability arising from any of the complaints made by the Claimant within the proceedings. As none of the complaints have succeeded, the Tribunal has not gone on to consider these remedy issues.

Conclusion

344. The outcome is that all of the complaints of the Claimant are dismissed.

Employment Judge Kenward
11 October 2024