EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A L Baker	**v**	Day Lewis PLC

Heard at: Reading (by C.V.P.) **On:** 4, 5, 6 November 2024

Before: Employment Judge George

Members: Mr C Williams
Mr P Langman

Appearances
For the Claimants: Mr C Baker (Husband)
For the Respondent: Ms R Thomas (Counsel)

JUDGMENT

1. The complaint of failure to pay notice pay is not well founded and is dismissed.

2. The complaint in respect of holiday accrued but not taken on termination of employment is not well founded and is dismissed.

3. The unauthorised deduction from wages complaint is well founded. The Respondent shall pay to the Claimant **£43.76**.

4. The direct discrimination complaint is not well founded and is dismissed.

5. The complaint under s.15 Equality Act 2010 is well founded. The Respondent discriminated against the Claimant for a reason arising in consequence of disability by

    a. dismissing her, and by
    b. failing to follow their probationary policy.

6. Otherwise, the complaints under s.15 Equality Act 2010 are dismissed.

7. The complaint of a breach of a duty to make reasonable adjustments is well founded.

8. The Respondent shall pay to the Claimant, compensation for disability discrimination of **£18,746.13** calculated as follows.

Injury to feelings		
Compensation	£14,000.00	
Interest from 26 May 2023 to 6 November 2024: 531 days at 8% 531 days @ £3.07 per day	£1,630.17	
	£15,630.17	£15,630.17
Financial loss		
26 weeks Statutory Sick Pay (payable 26 May 2023 to 27 November 2023) at a weekly rate of £109.40	£2,844.40	
Interest from 27 August 2023 (the midpoint) to 6 November 2024: 438 days at 8% 438 days @ £0.62 per day	£271.56	
	£3,115.96	£3,115.96
Total award		**£18,746.13**

REASONS

1. On the 7 November 2024 the Claimant requested written reasons for Employment Judge George's decision to reject the reconsideration application and the panel's decision on the amendment application as well as in relation to the substantive issues. The reconsideration judgment is contained in a separate document. This document contains the judgment and written reasons for the decisions and judgments of the tribunal panel which were given orally at the final hearing on 6 November 2024. The reserved judgment on the preparation time order application is in a separate document.

2. The Claimant arises out of the Claimant's employment by the Respondent as a pharmacy assistant in one of their branches of the pharmacy business that they operate which started on 1 November 2022.

3. Following a period of conciliation between 10 June 2023 and 22 July 2023, the Claimant presented a claim form on 29 August 2023 and an in time response was received from the Respondents on 1 December 2023. The case was case-managed at a preliminary hearing on 5 July 2024.

4. At this final hearing we have had benefit of an electronic hearing file with numbered pages from 1-181. Page numbers in these reasons refer to that hearing file. The Claimant and her husband gave oral evidence in support of her claim and were cross examined on written statements that they adopted, subject to the following amendments.

    4.1. Mr Baker deleted the final sentence of paragraph 30.

4.2. Mrs Baker deleted paragraphs 8-14 as they would only have been relevant had the proposed amendment been permitted.

5. The Respondent called two witnesses, Danielle Brennan, the Regional Support Manager and Patricia Kant, a pharmacist who was one of two managers where the Claimant worked as a pharmacy assistant in Finchampstead.

6. As at Day one of the final hearing there were two unresolved applications by the Claimant. There was an application for reconsideration of judgments made by Employment Judge Talbot-Ponsonby at the Preliminary Hearing on 5 July 2024 and an application to amend the claim. Neither had been referred to an employment judge within the time the administration would usually aspire to. In the case of the reconsideration application, this had not been referred to Employment Judge Talbot-Ponsonby as it should have been. Regional Employment Judge Foxwell allocated the reconsideration application to me as it was not practicable for it to be referred to Employment Judge Talbot-Ponsonby without disruption to the final hearing which was not in accordance with the overriding objective. I decided that, as a Judge sitting alone, and rejected it for reasons which were given orally at the time and are repeated in writing in the reconsideration judgment sent at the same time as this judgment.

7. The amendment application was then determined by the Panel at the start of the final hearing. It was rejected and again, oral reasons were given at the time. The claimant requested those to be provided in writing.

The decision of the Full Tribunal on the amendment application.

8. The Claimant, as directed by Employment Judge Talbot-Ponsonby on 5 July 2024, made an amendment application on 7 July 2024. What was pursued before us was an application to add whistleblowing detriment and victimisation detriment complaints. These complaints were based on alleged acts by members of staff who were the Claimant's colleagues at the pharmacy. She said that specific actions and comments were directed towards her following her report to one of the pharmacy managers about the actions of a fellow co-worker. She described those actions in Box 8.2 of her claim form as unwanted, non-sexual touching and, not unreasonably, objected to it.

9. In these sorts of applications we take into account all relevant factors but the factors that are commonly important to consider are those set out in Selkent Bus Company v Moore [1996] I.R.L.R. 661, EAT. I explained those without naming the case specifically to Mr Baker and they are:

9.1. the nature of the amendment;
9.2. whether prejudice would be suffered by either party if the amendment is permitted or refused;

9.3. the timing and manner of the application, and
9.4. the applicability of any time limits.

10. None of those factors are determinative but it is relevant that a whistleblowing detriment claim under s.48 ERA has a more restrictive time limit than does a victimisation detriment claim under s.123 Equality Act 2010 (hereafter the EQA).

11. In relation to the nature of the proposed amendment and the change it would make to the scope of the hearing and the litigation, we think that the proposed amendments would have a relatively significant impact. The alleged facts about the communication relied on by the Claimant in relation to both proposed complaints would move from background to factual allegations that it is necessary for us to hear about and make a decision about in order to resolve the issues in the case. The same is true of the alleged actions of the co-workers. The amendment, if permitted, would change the focus of the hearing. At present, the principal focus is on the reason for the decision to dismiss, the respondent's actions or failures in managing the Claimant's performance and managing her probation. The focus would necessarily expand to the whole period of the probation and to include her relations with co-workers.

12. There is therefore the prospect that other witnesses would be potentially relevant, subject to the Respondent's election as to which witnesses it wishes to call. We do bear in mind that, on the Claimant's version of events, she alerted the Respondent's during her dismissal telephone call to there being actions that she wished to complain about and they said they could not investigate that. In other words, it is said that the Respondent missed an opportunity to investigate these complaints by not taking them seriously contemporaneously.

13. We have to balance the prejudice to the Claimant with that to the Respondent. We accept there would be prejudice to the Claimant in that, if the amendment application is unsuccessful, then these particular issues will not be publicly aired and the claimant will not have the opportunity to have a judgment in relation to the alleged actions by the co-workers. On the other hand, where she sets out in her statement the actions that she wishes to add as individual detriments (paragraphs 12-14), she does state that she originally decided to take no action in relation to those until she was dismissed or her performance was being criticised.

14. As far as the Respondent is concerned, they would suffer the prejudice of having to respond to an enlarged claim. The complaints remain imprecise despite having been articulated in writing following directions by an Employment Judge at the Preliminary Hearing. Matters such as exactly what words were communicated by the Claimant are not specified in the application or in the Claimant's witness statement. The Claimant argues that the Respondent did reply to the allegations in their original grounds of response and in the amended grounds of response. However, we read those as providing a very general response. We accept that it was not

until the July 2024 amendment application that the Respondent knew that they might have to defend themselves against those allegations within the litigation, some 15 months after the alleged events would have taken place. There is prejudice to the Respondent in having to defend in those circumstances.

15. We ignore the fact that the amendment application has been determined on Day One of what was intended to be the final hearing of this claim. That is because it appears there was tribunal delay which meant that the amendment application did not come before a judge in advance of the final hearing. There is some reason to think that the amendment application didn't make its way to the paper Tribunal file but it is clear that it was directed by an email to the Tribunal on 7 July. We approach our decision on the basis that the application was made in good time as directed by an Employment Judge at a Preliminary Hearing. The time between Preliminary Hearing and Final Hearing would have been longer had the original Preliminary Hearing not been postponed for the lack of available judicial resource. The Claimant is represented by her husband who is, himself, a lay person. They may not have realised when the initial claim form went in how much detail is needed in order to raise a particular complaint. So any effect on the full merits hearing date should be ignored, in our view.

16. The employment started on 1 November 2022. Taking into account the effects of early conciliation, any acts prior to the 18 April 2023 are potentially out of time subject to either them being part of a continuous course of conduct that ends after that date or an extension of time. Any extension of time for whistleblowing detriment complaints would need to meet the test that it was "not reasonably practicable" to bring the claim in time under the ERA. The question in relation to a victimisation detriment complaint would be whether it was just and equitable in all the circumstances to extend time under the EQA. The questions of time limits are not determinative. However it is relevant to the prejudice caused to a respondent if they have to respond to claims which are potentially out of time.

17. When considering the prospects that the proposed new complaints are out of time, we note that the Claimant expresses herself to be unclear about the dates on which the alleged events took place. It is not certain, but there are grounds to think that potentially the acts she wishes to rely on were, on the face of it, out of time, even when the claim form was presented. Taking the date of the application as 7 July 2024, the prospect that an action based on a series of actions involving co-workers was out of time as at the date of the amendment application is very real. Certainly time limits in the present case is a factor which weight should be given to when assessing the respective prejudice to the parties of allowing or refusing the application. The claimant's apparent decision not to complain about the actions initially is relevant because she might be less likely to successfully argue it is just and equitable to extend time for

complaints based on actions which she had made a conscious decision not to pursue at an earlier stage.

18. Taking into account all those factors, we think that the prejudice to the Respondent in having to respond at this stage to the proposed additional complaints outweighs that to the Claimant in not being able to pursue them. We refuse the application to amend.

The Issues

19. The issues had been listed by Employment Judge Talbot-Ponsonby and his record of hearing included them (starting at para.39, page 32). However, since the Preliminary Hearing, there has been some change to the disputed issues.

20. The Claimant is, and is accepted by the Respondent to be, disabled within the meaning of the act by reason of diabetes, cluster migraines, depression and back pain. On 3 April 2024, it was also accepted by the Respondent that she had been disabled throughout the relevant period of the claim, namely, the period of her employment by them.

21. Some concessions were made by the respondent on 15 October 2024, subsequent to the Preliminary Hearing (page 46). In particular, the Respondent no longer contested liability in respect of that aspect of the s.15 EQA claim which was based on dismissal; they accepted the factual allegation of dismissing the claimant while she was on sick leave (set out in list of issues paragraph 4.1.3) amounted to discrimination for a reason arising in consequence of disability. The same factual allegation was also pursued as a direct disability discrimination complaint and the respondent continues to defend that complaint. They also no longer contested liability in relation to the allegation of breach of the duty to make reasonable adjustments (paragraph 6 of the list of issues). In other words, they accepted that they had a PCP or requiring the claimant's attendance at work which put her to the substantial disadvantage compared with someone without her disability in that she was likely to need to take more time off sick. They accepted that there were steps which it was reasonable for them to have to take to avoid that disadvantage and that those were as set out in List of Issues para.6.5.

22. The disability discrimination issues that were still in dispute at the start of the hearing had, therefore, been narrowed. The tribunal needed to decide whether some acts or omissions had occurred:

    22.1. Had the Respondent had behaved as alleged in list of issues para.4.1.1? Had they deleted or ignored comments from a performance review document that, according to the Claimant, had been completed on 29 April 2023?

22.2. The Respondent accepted that, as a matter of fact, they had extended the Claimant's probationary period during her sick leave by a letter dated 19 September 2023 (list of issues para.4.1.2).

22.3. Had the Respondent, as a matter, failed to comply with procedures in the handbook (list of issues para.4.1.4)? This was clarified by the Claimant during the course of the hearing to be allegations that they had not followed the policy for excessive absences (page 150), the policy for managing a return to work from sickness absence (page 149), the harassment policy and/or grievance policies in respect of complaints by the Claimant about conduct of co-workers and finally, the statement in the company handbook that shortcomings in probationary period would be discussed with the probationer (page 128).

23. If any of those acts or omissions had occurred, then the tribunal would have to consider whether that act and the decision to dismiss the claimant were less favourable treatment on grounds of disability contrary to s.13 EQA (list of issues 4.2 to 4.4).

24. Separately, the extension of probation and, if the acts were shown to have occurred, the deletion of comments and failure to follow policy were alleged to have been done on grounds of the Claimant's migraine related sickness absence (list of issues 5.2 and 5.3). If so, then the Claimant would have shown that they had been done for a reason arising in consequence of disability. The Tribunal would then turn to the Respondent to see whether they could show that their actions were a proportionate means of achieving a legitimate aim.

25. Two legitimate aims were relied on in respect of the allegation that the extension of probation was s.15 EQA discrimination; the respondent argued that the extension was reasonably necessary to ensure that the claimant's competence could be properly assessed and, therefore, that they could maintain the efficient running of their business. These are issues paras.5.4 and 5.5.

26. The other two non-dismissal related s.15 EQA allegations were defended on the basis that they weren't done for reasons to do with the disability related sickness absence. Therefore, to the extent that we are satisfied that the comments were deleted and/or ignored or that the respondent had failed to follow procedure, we need to consider whether the Claimant's sickness absence was a more than trivial influence on the reasons for those actions (list of issues para.5.3). If we are satisfied of that, the Respondent does not argue that deleting the comments or failing to follow procedure was a proportionate means of achieving a legitimate aim.

27. There is an unauthorised deduction from wages claim which would require us to consider,

27.1. Were the wages paid to the claimant at the termination of her employment less than the wages they should have been paid?

27.2. Was any deduction required or authorised by statute?

27.3. Was any deduction required or authorised by a written term of the contract?

27.4. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

27.5. Did the claimant agree in writing to the deduction before it was made?

27.6. How much is the claimant owed?

28. The Respondents argue that they were entitled to deduct an overpayment of wages that had allegedly been made on a previous occasion. That is something that is provided for in the company handbook (page 127). By s.14 ERA, recovering overpayment of wages is excluded from the definition of unauthorised deductions in section 13.

29. The payslip is the means by which the employee should be informed of the mounting grievances for any deduction. The s.8 ERA right to receive a statement of the calculation of ones' s pay is a right to receive the statement at or before the date on which payment was made.

30. Although a claim for notice pay was added by amendment on 5 July 2024, it appeared, when properly understood, that the claim was in fact about the deductions that were made from the same pay packet which had the effect of cancelling out the payment lieu of notice. Therefore, no separate decision on list of issues 9 was needed. When you look at the June 2023 payslip (page 177), which is the relevant one for the notice pay claim, the Claimant was credited with pay in lieu of notice but she also had a deduction of the same amount which was queried. In reality this is a claim for unauthorised deduction from the wages by which the notice pay was paid. For this reason we decided that a separate claim for notice pay was not well founded and we dismiss it.

31. The time limit issues (list of issues section 2) did not arise on the remaining liability issues because all of the alleged events occurred within the primary limitation period.

32. There is a claim for holiday pay said to have accrued and not taken on termination of employment and the issues are as set out in list of issues section 7 (page 35 to 36).

33. It was clear, given the Respondent's concessions, that we were going to need to decide issues relating to remedy. It was agreed by the parties that it would be convenient to hear evidence and submissions relating to remedy

matters together with all outstanding liability matters. We therefore have decided the following issues relating to remedy:

33.1. What financial loss has been caused by the discriminatory acts? This included consideration of whether the Claimant would have remained in employment had the discriminatory acts not taken place.

33.2. What compensation should be awarded for injury to feelings?

33.3. Should there be an award of compensation for aggravated damages?

33.4. Should interest be awarded on any awards of compensation for discrimination and, if so, how much?

33.5. Has there been an unreasonable failure to comply with an applicable ACAS Code of Conduct? If so, is it just & equitable that that there should be an uplift on any compensation payable as a result?

34. The Claimant's application for a Preparation Time Order was argued following our judgment on the remaining substantive issues. We reserved our judgment on that application and it is sent out separately.

Findings of Fact

35. We now set out our findings of fact. We do not set out all of the evidence that we have heard but only the principal findings of fact; those that it is necessary to make in order to reach conclusions on the outstanding issues.

36. The Claimant started work on 1 November 2022 as a pharmacy assistant. Miss Kant is one of the two pharmacists managing the branch at which the Claimant worked and the Claimant reported to her and to her colleague. The Claimant's contract is at page 55. In particular we notice clause 8.I. (page 59), which explains that the employment is subject to a six-month probationary period during which either party may terminate the employment on one week's notice in writing. The right to extend a probationary period is reserved. Outside the probationary period the employee is entitled to one month notice or the statutory notice, whichever is the greater.

37. Further information about the probationary period is provided in Section 1 of the company handbook. In particular, the second paragraph of the section headed "Probationary Period" at page 128 reads as follows:

> "In the event that your progress and performance is not as expected, any shortcomings will be discussed with you and you will be given assistance so that you can achieve satisfactory performance. Before your appointment can be confirmed you must demonstrate that you are capable of performing the duties of the post satisfactorily and have the required standards of conduct and attendance".

38. The Claimant completed a new starter form (page 68). She disclosed health conditions which, as the Respondent now accepts, should have alerted them to the fact that the relevant medical conditions which in her case are disabilities are longstanding matters. She stated in her health declaration that she takes medication regularly. Miss Kant said that she has actual knowledge that the Claimant has diabetes and actual knowledge that the Claimant had headaches but had not appreciated that those were disabilities in the Claimant's case.

39. The Claimant did have a number of absences from work that are set out in a list at page 103. The Claimant, as we understand it, accepts that this is an accurate list.

40. She gave oral evidence that the two days' absence on 8 and 9 December 2022 were due to diabetes medication making her ill. Otherwise, prior to the absence on 13 April, the sick leave taken was not disability related. The two-day absence on 13 and 14 April 2023, was the first absence to be connected with headaches or migraine.

41. On 17 April 2023 the Claimant was absent for part of the day. The absence has been recorded as being for 0.13 of a day. From then, from 18 April to the date her employment ended, she was persistently absent due to headache/migraine. That is consistent with the explanation Mr Baker gave that the Claimant returned to work for one and a half days after the absence on 13 and 14 April. We note from looking at a calendar that the 15 and 16 April were Saturday and Sunday, we are not sure which of the two she worked but it is not material for our decision making.

42. In addition to the sickness absence which was related to headaches/migraine, the Claimant had unpaid leave of five and a half days in February 2023 for a holiday and two other short periods of annual leave for a day or part of a day. She had nearly three days' sick leave in November 2022 for cough, cold and flu, two days' sickness absence in December already referred to (stated to be for "infection/virus" but in fact related to diabetes medication) and one days' sickness absence for cough, cold and flu in March 2023.

43. The probation was extended on 19 April 2023. the Claimant had returned to work on either 15 or 16 April 2023 after 2 days off with Headache/Migraine. She had been in work for one and a half days before needing to be absent because of the same condition from 17 April 2023 onwards. As at her return to work on 15 or 16 April, she had had four separate periods of sickness absence totalling 7 days.

44. Those periods of sickness absence, for several different reasons, are enough for a reasonable employer to be concerned about the reliability of attendance on the part of the probationer. Miss Kant explained, and we accept her evidence on this point, that it made it difficult to organise the rota. The unpredictability of losing the Claimant's service when she was working a 10.00 am to 7.00 am shift had a particular impact on the pharmacy

because the way that shift interlocked with other shifts meant that if the Claimant was absent, they had to find people at short notice to cover the period between 6.00 and 7.00pm. This was apparently especially difficult on Wednesdays due to the rotas worked by other people. We accept her evidence on this point which was straightforward and credible.

45. At some point the Claimant decided to take action about unwanted touching by a co-worker. Although it was described in the ET1 as being of a non-sexual nature, the Claimant clearly thinks this was invasion of her personal space in a way which probably would not have happened had she been a man. The proposed amendment, which was rejected, included allegations that she had been excluded by other members of staff following her taking action about this unwanted touching. We do not need to make our findings about those allegations as they are not issues in the case as a result.

46. On about 14 March 2023, Miss Kant carried out a performance review in relation to the Claimant. We accept her evidence about the normal practice which was that the branch Christmas bonus was linked to the completion of an annual performance review in respect of each member of staff. The deadline for doing so was April of each year; an interim review was completed in July and the annual performance review completed in April the following calendar year. It is common ground that Miss Kant completed a performance review with the Claimant. The date that we have been told applies to the document at page 72 is 14 March 2023 and the Claimant did not appear to disagree with that. The performance review must have taken place before 13 April because the Claimant was at work when the performance review was carried out and she only returned to work for one and a half days after that date.

47. The document at page 72 has been provided by the Respondent. It is curious insomuch as it includes (page 73) the statement under 'Line Manager Feedback' "Probation passed with no issues, we will continue with Anna's training". What is curious is that, on any view, probation would not have been concluded until 30 April 2023, the six month anniversary of the start of the claimant's employment being 1 May. The statement being made within the performance review, without a separate probationary review being carried out, was also contrary to the normal practice. Miss Kant explained that their practice was to carry out a detailed assessment in the second three months, when the individual had had a chance to learn what was expected of them.

48. We accept Miss Brennan's evidence that the normal practice was that the support system operated by the Respondent (People XD) automatically told the Regional Support Manager or RSM when a person's probation was coming to an end. In the case of the Claimant, the RSM was Miss Brennan and she describes receiving a notification in respect of the claimant (DB para.6). That triggered Miss Brennan taking the action she describes in her witness statement.

49. Miss Brennan's description of the division of responsibility was that she would have handled the probation review which was totally separate to the performance review conducted by the pharmacy managers. She had input from the pharmacy managers but the decision on probation was hers and Miss Kant confirmed that.

50. Therefore the statement on page 73 does not make sense because of the time at which it is said to have been completed and because responsibility for the probationary review lay elsewhere and not with Miss Kant who, it is accepted, was the manager who completed the form. A second document described as a performance review is at page 75 the date attributed in the index to that is 29 April 2023. There are also screenshots (page 77 and following) that the Claimant says are of the form she was required to complete while she was on sick leave on 29 April 2023. In that form, she says, she set out more detail about her allegations against her co-workers. She says she was asked to do it urgently.

51. We bear in mind that there were two pharmacy managers at the relevant time and we have not heard from one of them. This is one of those occasions where the Tribunal is unable to make a definitive finding about the circumstances that are before us. We are unable to make a definitive finding about the circumstances in which the forms at page 75 and 77 were completed or, indeed, about how it is that the document at 72 and 73 contains the words it does. If it is the case that the Claimant completed a form from home on her own, not side by side with the manager as she accepted was how things were done with Miss Kant, then it is hard to understand why anyone would delete some parts and leave those which remain in the version at page 75. We also do not know who would have been responsible for that but we accept Miss Kant's evidence that it was not her. What we are sure about is there is no logical connection whatever between the Claimant's health conditions themselves and any alterations to the forms or between her health sickness absence and any alteration to the forms.

52. 17 April 2023, as already said, was the start of the period of sickness absence which ended with the Claimant's dismissal. There is a MED3 certificate dated 17 April 2023 for seven days so it seems likely that on or about 17 April, the Respondents knew that the Claimant was going to be absent for a week. The Claimant went to see a specialist about her migraines on 27 April 2023.

53. A letter extending the Claimant's probation was sent by HR on behalf of Miss Brennan on 19 April 2023 (page 81). Page 82 is the covering email. In that letter it was explained that Miss Brennan thinks that there has been insufficient opportunity to assess the Claimant's performance. As a matter of fact, given the absences up to that point, we think that that was a reasonable judgment for Miss Brennan to make. She extended the probation for three months up to the 19 July 2023. It would have been clearer had there been a reference in the letter to the reason why there was insufficient opportunity, namely, because of the absences.

54. The letter continues with a paragraph in which it is stated that "there will be regular progress meetings with you on a weekly basis. With the right support I know you will make every effort to improve your performance during the time". It would have been clearer had it said 'every effort to improve your attendance' during this time because it was the attendance which was the problem. We accept both that, as a matter of fact, Miss Brennan had attendance in mind but also, certainly based on the WhatsApp messages in the email that the Claimant then sent, that the Claimant read performance as meaning her ability to carry out the role when she was at work.

55. Generally speaking, our experience is that the word performance only covers attendance if there is a suspicion that the individual is malingering and there was no suspicion about that in this case. A bit more thought about the impact on the person receiving the letter might have led to a different choice of words. However, the statement that 'we have not yet had the opportunity to assess how you can perform' is evidence that it was in fact attendance that Miss Brennan had in mind because if Mrs Baker's attendance was not consistent then there would not be the opportunity to observe her.

56. The same day the Claimant emailed HR to the individual who has forwarded the letter, asking "Can you please let me know what parts I'm failing at?" because, in her words, the managers hadn't told her there were any problems. So far as we have been told, she doesn't get an answer directly from the HR adviser to whom she sent that email. Neither is there any evidence of communication between the HR Adviser and the Regional Support Manager asking for clarification.

57. The same day the Claimant sent a WhatsApp message to Miss Kant saying that no explanation has been given for performance issues (page 83). Miss Kant replied that it was possibly because of attendance and specifically mentions five separate events within less than six months. "There is a kind of scale to calculate it." By that point the fifth separate period of sickness absence has just started.

58. It was a rather casual way to explain the situation and it apparently didn't clarify matters for the Claimant. We think that the wording of Miss Brennan's initial letter would have been the opportunity to make the reason for the Respondent's actions clearer, not least because she was the person making the decision to extend the probationary period. However, there is no evidence that she was aware that the Claimant asked for that clarification, there is no evidence that she received the Claimant's email that was directed to the HR Adviser. This last point suggests a lack of the effective communication that one might might reasonably expect to happen between HR and the Regional Support Manager.

59. Miss Brennan had been in that position, according to her paragraph 5, only during the last few months of the Claimant's employment. She was

supporting 14 branches and was relatively new in the role. Miss Kant herself had transferred to the pharmacy only in October 2022. Pharmacies are, in our experience, busy places with a lot of administration connected with the day to day business of the branch. It must have been challenging to have a number of new personnel at the same time.

60. On 24 April 2023 Miss Kant sent an email to Miss Brennan (page 84), after a few days further sickness absence on the part of the Claimant saying, 'we don't want her anymore, sick leave again, counter assistant the easiest to replace'. This must be a reference, we think, to the 17 April 2023 sick note covering seven days which is stated to be due to a headache.

61. On 27 April Miss Brennan invited the Claimant to a probation review meeting for 12 May 2023 (page 89). The meeting was postponed because it was within the period covered by a sick note issued on the same date, 27 April, which covered three weeks to 19 May 2023 (page 87).

62. The Claimant states she was required to complete the performance review form on 29 April 2023. The Respondent denies this. See para.50 & 51 above for our findings about this.

63. On 23 May the Claimant was invited to rearrange the probation review (see page 91). At the time that What'sApp message was written, the expectation was that the rearranged meeting would be after the end of the three week sickness period covered by the fit note. However, in a WhatsApp message at page 91-92, the Claimant explained that she had been signed off again, provides a copy of the MED3 and states that she would, nonetheless, like the rearranged meeting to go ahead (see also the exchange on 25 May).

64. The meeting took place remotely on 26 May 2023 when Miss Brennan informed the Claimant that she was being dismissed. No reason was given for the Company being unable to confirm the Claimant's probationary period in the letter confirming termination of employment (page 95). She was told that she would be paid one week's pay in lieu of notice.

65. Miss Brennan wishes the Claimant good luck in securing suitable alternative employment "very soon". The Claimant was upset by that comment because she thought it insensitive when she had a disability and was unfit to work. We heard Miss Brennan's explanation for her use of that phrase. We do not think that it was intended to be malicious or sarcastic. It was a courtesy used without real thought about how it would be received by someone who did not have the full information. Miss Brennan had not in fact appreciated that she was dealing with someone who had a long term health condition. It is unhelpful for us to set about trying to point the finger or blame for that because there should be a system in place to ensure that Decision Makers have the relevant information. We are satisfied that Miss Brennan did not have the information available to her that she should have had and that, as a matter of fact, she was not aware that the Claimant had a long term health condition. That comment should be viewed in the context of that ignorance.

Findings and Conclusions in relation to the unauthorised deduction from wages and holiday pay claims

66. We make the following findings of fact in relation to the alleged overpayment of wages and the unauthorised deduction from wages claim. The reasons why we dismissed the notice pay claim are set out in para.30 above.

67. The Respondent has accepted that when they paid the Claimant for the 1 and 8 May 2023, which were bank holidays, they should have paid her SSP because she was covered by a sick note and had not requested holiday. They actually paid her holiday pay for those two dates which we understand to have been full pay. They then deducted those days' leave from the Claimant's accrued balance. The effect was that she had fewer days annual leave at the end of her employment and, therefore, has been underpaid by the amount of the SSP that she would have been paid for those two days. That is £21.88 for each of those two days, a net total of £43.76. The unauthorised deduction from wages claim succeeds in relation to that failure to pay SSP for 1 and 8 May 2023.

68. However, the holiday pay claim fails because she has in fact received the correct amount of holiday pay for the dates which were deducted from her entitlement in error and they were not owed to her on termination of employment. Nothing is owing in respect of the failure accurately to account for holiday.

69. The Claimant has also queried the deductions in payslips but the evidence focused solely on the June 2023 payslip page 177). There are two deductions listed: Salary Arrears of £293.55 and OCC Salary Offset of £420.00. That figure is the equivalent of one week's gross pay at this time.

70. The explanation offered by counsel was that in the May 2023 pay period (covered by the payslip at page 168), the Claimant was paid up until 31 May 2023 but she was dismissed with effect from 26 May 2023. There was an overpayment over wages covering 27-31 May 2023 inclusive and that is the figure covered by the description "Salary Arrears". Additionally, the sick note for the absence from the 22-26 May was only processed in the June payroll. The fit note is dated 22 May 2023 (page 88) and we can see it was forwarded to the Manager on 24 May. We accept that it was probably received by the Respondent after the payroll cut off date for May 2023's wages. So in the May 2023 payslip, one week's gross pay for the five days from 22-26 May 2023 had been paid as if the Claimant was at work. Then that one week's gross pay (£420) was clawed back in the June 2023 and the SSP for 22-26 May 2023 in the sum of £109.40 was paid.

71. We accept that this explanation is supported by such documentation as we have. However, we can understand why the Claimant did not appreciate what had happened because the payslips, on the face of it, are not clear and the descriptors for the different entries are not self-explanatory.

Law applicable to the disputed issues

72. The Claimant alleges that she was the victim of a number of acts of disability discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination, for present purposes, is where, by dismissing their employee (A) or subjecting her to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

73. Detriment means an act which the reasonable employee would think caused them to be disadvantaged in their work.

74. All claims under the EQA (including direct discrimination and discrimination for a reason arising in consequence of discrimination) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the following guidance is still applicable to the equivalent provision of the EQA.

75. When deciding whether or not the Claimant has been the victim of direct discrimination, the employment tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the Respondent proves that the reason for their action was not that of disability.

76. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

77. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden

of proof provisions may be of assistance if there are considerations of subconsious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

78. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

79. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

80. Section 15 EQA provides as follows:

> **"15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

81. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed

for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."

EHRC Employment Code paragraph 5.6.

82. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

    82.1. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

    82.2. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

    82.3. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

    82.4. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

    82.5. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

83. The other potential defence is lack of knowledge of disability. This is not relied on in the present case.

84. The law in relation to injury to feelings can be stated fairly briefly. We remind ourselves of the case HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

85. We also remind ourselves of the cases of MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved.

86. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

87. Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claim was presented on 29 August 2023 and therefore the applicable bands are those set out in the Sixth Addendum:

    87.1. Between £33,700 and £56,200 for the most serious cases with the most exceptional cases capable of exceeding this;

    87.2. Between £11,200 and £33,700 for serious cases not meriting an award in the highest band;

    87.3. Between £1,100 and £11,200 for less serious cases, such as an isolated or one-off act of discrimination.

88. The claimant argues that this is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: Armitage, Marsden and HM Prison Service, Johnson [1997] I.R.L.R. 162 EAT. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.

89. An award of compensation can be increased or reduced by up to 25% if the employer or employee has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s.207A Trade Union and Labour Relations (Consolidation) Act 1992). This potentially arises where there has been an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). The Code of Practice on Grievance Procedures is only engaged if a grievance is raised in writing; an oral grievance cannot lead to an ACAS uplift. Section 207A applies to a range of jurisdictions including to complaints brought under s.120 EQA (as direct discrimination, discrimination arising in consequence of disability and breach of the duty to make reasonable adjustments are).

Conclusions on the liability issues in dispute.

90. We start with our conclusions on the s.15 EQA claim.

91. The first allegation is that the respondent deleted or ignored comments made by the claimant on a performance review on 29 April 2023 and did so on grounds of disability related sickness absence. The alleged comments (page 78) are an alleged report by the claimant on the form that she feels excluded following her report to Tomas about the conduct of the co-worker. Our findings about the performance reviews are in paras.46 to 51 above. As we explain there, the Claimant's description of being required by Tomas to complete a second performance review form from home during her sickness absence on 29 April 2023 is hard to understand when it is common ground and Miss Kant and the Claimant completed one on 14 March 2023. On 24 April 2023 Miss Kant informed Miss Brennan that they did not want to retain the Claimant in employment which makes it hard to understand why Tomas required the Claimant to complete an unnecessary review form a few days later. Nevertheless, the respondent has disclosed the document at page 72 which is different to the review Miss Kant attests to and appears to be from their system. It is one of those occasions where the Tribunal cannot make clear findings on the balance of probabilities about what happened.

92. However, we are satisfied that whatever happened in relation to the performance review document was totally unrelated to disability sickness absence. We say that because the passage that remains in the document at page 75 still refers to exclusion; the majority of the text said to have been deleted concerns those complaints. Even the way the allegation was explained to us by the Claimant is to do with an alleged covering up of her complaints against her colleagues rather than her sickness absence, which is merely the context in which she states she completed the form remotely. Actions said to have been taken because of complaints about colleagues are not issues in the case.

93. Although we have not been able to make definitive findings about what did happen in relation to the performance review completed by the Claimant, the s.15 EQA claim based on that allegation fails because whatever happened the Claimant's sickness absence had no material part in the reasons for it.

94. We turn then to the question of extending the probationary period while the Claimant was on sick leave. The Respondent argues that to have extended the probationary period was not a disadvantage and therefore, although the act happened, it was not a detriment. That requires us to consider whether the reasonable employee would have regarded themselves as disadvantaged by having their probationary period extended.

95. At that time the Claimant had just started the fifth period of sickness absence, three of which were disability-related, within the probationary period of six months. We accept that the practice was for the Respondent not to carry out a detailed assessment during the first three months of the probation and, in the environment in which the Claimant was working, a six month probationary period was necessary. In any event six months is not an uncommonly long probation, in our experience.

96. Had a decision been taken whether or not to confirm the Claimant in employment in the first couple of weeks of April, against that background of that level of absence, there was a real prospect that her attendance record would have led to her dismissal. We can see that extending the probation meant that she being given a chance. Even though that had an impact on the level of notice pay that she was entitled to, we think that it cannot reasonably be regarded as a detriment in those circumstances. It would not have been in her interests at that stage for a final decision to be made by the end of April - even had the Respondent followed their policy and had the conversation about her performance before making a decision. We accept the Respondent's argument that it was not a detriment within the meaning of s.39 EQA to extend the probation in those circumstances. However, the reason why it was being extended was not communicated clearly and that caused confusion and upset to the Claimant.

97. Even if we are wrong about that, we are satisfied that the Respondent has shown that a decision to extend probation at the start of a third disability-related sickness absence (which was the fifth period of sickness absence overall) was a proportionate means of achieving a legitimate aim. The Respondent has a clear and legitimate interest in working to achieve reliable attendance by their pharmacy assistants. They operate a rota system and for staff reliably to attend when rota'd to do so supports business efficiency by ensuring proper cover for the pharmacy is available. Extending the Claimant's probation would have enabled them to assess her health needs and would have given her the ability to show that she could attend reliably. It should have given, if it had been used properly, the opportunity to explore reasonable adjustments. Extending the

probation would be the right balance of the competing interests of the business and the Claimant. In those circumstances, had we concluded the extension amounted to a detriment, we would have been satisfied that the Respondent has shown the decision was a proportionate means of achieving a legitimate aim.

98. The final contested allegation under s.15 EQA is the allegation that procedures in the handbook were not followed. We do not think that the Claimant had clearly brought a grievance such that the formal grievance procedures should have been followed. An informal report to Tomas about the co-worker's unwanted touching accompanied by the statement that she had dealt with it herself is not, in our view, a grievance which the Respondent was obliged to investigate. There is inconsistent evidence about the nature of any report about exclusion through the alleged performance review form on 29 April 2023 but that was not, in any event, the appropriate method by which to instigate a grievance. Therefore the Respondent did not fail to follow the grievance procedure or, indeed, the harassment and bullying procedure in the circumstances of this case.

99. However, in the case of a probationer, our view is that the probationary policy set out in the Company Handbook (page 128) stands in the stead of the Excessive Absences policy or the Return to Work policy. Essentially the same steps should have been taken in relation to Mrs Baker as a probationer in the more flexible way set out in page 128. That accords with Miss Brennan's evidence that there is a separate way of dealing with things for probationers. There was a failure to follow that policy because there never was a meeting with the Claimant at which unsatisfactory attendance was discussed with her. Although attendance is not specifically mentioned in that part of the Company Handbook, it seems to us to be implicit that "progress and performance" by a probationer includes their attendance.

100. We accept that Miss Brennan was new in the role and the absence of communication between her and HR suggests that support structures were not functioning as they should have done. We also accept that she had a heavy workload and that she failed to appreciate that the Claimant had longstanding health conditions and those factors contributed to the way she approached things.

101. In her email of 24 April 2023 (page 84) Miss Kant wrote to Miss Brennan setting out a list of topics for discussion between the pharmacy manager and RSM. Item 4, relating to the Claimant, clearly suggests that Miss Kant thought that the Claimant should not be confirmed in post because of another period of sick leave. We are satisfied that this email formed the basis of a discussion between them. When we look for the reason why Miss Brennan (who made the decision) changed from her planned course of action of extending the probationary period (which was done on 19 April 2023) to dismissal without providing assistance to the Claimant and without having the discussion of shortcomings envisaged in the probation section of the Company Handbook, we are satisfied that her change in

approach and failure to follow policy before moving to dismissal was at least in part motivated by the disability related sickness absence that started on 17 April 2023.

102. The Claimant has therefore shown that the failure to follow that part of the probationary policy that requires the Respondent to discuss her shortcomings and provide her with assistance, was at least, in part, motivated by disability-related sickness absence.

103. The Respondent has not shown that failing to follow the policy was a proportionate means of achieving a legitimate aim. We accept that the aim of business efficiency by securing reliable attendance was legitimate but when they have a policy it should in normal circumstances be followed. There was nothing so urgent about the situation that it justified them in failing to follow it. The s.15 EQA claim succeeds in relation to the alleged failure to follow policy as well as in relation to dismissal.

104. We then turn to the direct disability discrimination claim. We refer back to our findings about events that happened. The probation was extended and that, the dismissal and the failure to follow policy are acts which the Claimant has shown, or the Respondent has conceded, took place.

105. As set out in relation to our conclusions on the s.15 EQA complaint, there is cogent evidence that the Respondent's entire reason for extending the probation and for dismissing the Claimant, was the sickness absence and not the disability itself.

106. So far as the failure to follow policy is concerned, sickness absence was part of the reason why they moved straight to dismissal, based on that email at page 84. However, there is no reason to think that that failure was motivated by the Claimant's health conditions.

107. In particular, Miss Brennan who was responsible for those decisions was unaware of the longstanding nature of any health conditions. Inherent in direct disability discrimination is the question of motivation of the decision maker. Actual knowledge of disability is not a precondition of succeeding in a direct disability discrimination claim. However, it is hard for the Claimant to show that Miss Brennan was motivated by something of which we are satisfied she was unaware. She was aware of sickness absence but part of the shortcomings of the Respondent's management of this was that insufficient enquiry was made about the causes of those absences as a matter of course.

Conclusions on remedy issues

108. The Claimant sets out the impact on her of the dismissal and what happened to her afterwards in paragraph 20 and following of her witness statement. She says that she was unable to appeal. She applied for social security benefits to supplement her income but there was a delay in

being able to make a valid application because she had to change the type of benefits for which she was applying. As she explains in her paragraph 22, this was because she needed to make a different type of claim and because of complexity caused by her existing benefits. Ultimately, she has made a successful application although it seems to have been a quite a long drawn-out process. The stress and mental distress this caused does flow from the loss of the job even though the proximate cause was the Claimant and her family's personal circumstances.

109. Mrs Baker also explains that her mood has been adversely affected by the loss of her job and she has visited her doctor a few times for medication for depression to be increased and is still struggling with low mood. Since dismissal she has been unable to find work because of the impacts on her of the disability of persistent and frequent migraines. We have limited evidence about how long this condition has affected her. For it to amount to a disability it must be long-term and it was disclosed on the new starter form so precedes employment by the Respondent. She and her husband clearly believe that her migraines were exacerbated by returning to work between 15-17 April 2023 after her sickness absence for migraine started. However, there is no medical evidence from which it is possible for us to make that finding and we make no such finding. There is certainly no medical evidence which would justify the conclusion that the long term and continuing effects (including inability to work) were caused by returning to work for less than 2 days before the long term sickness absence started.

110. In terms of what might have happened had the Claimant not been dismissed, the experience of the Claimant since May 2023 has been that she has been unfit to work continuously because of migraines since that date. She has also since been diagnosed with fibromyalgia which clearly affects her and contributes to her unfitness to work. It is argued on her behalf that stress associated with dismissal, unemployment and litigation may well have triggered this condition.

111. We are not satisfied that this particular condition flowed from the dismissal or from the Respondent's actions prior to dismissal in a way that means that it is something that should be compensated for within these proceedings. There is a lack of objective or reliable evidence to support that argument. In particular there is no clinical evidence that fibromyalgia was caused by the Respondent's actions.

112. The Claimant should be put in a position that she would have been in had she not been dismissed on 26 May 2023, if the probationary policy had been followed and if adjustments had been made. The adjustments contended for included holding meetings and looking at the reasons for the sickness absence (see list of issues para.6.5 on page 35). Those would have been the mechanism by which the Respondent would get to the point where they could give the Claimant more time to recover. There is therefore an interrelation between the different adjustments that the Respondent accepts were reasonable steps that they should have had to

take. The adjustments also overlap with steps that the Respondent should have taken to make any decision to dismiss reasonably necessary.

113. Nevertheless, there is always a point, even with disability related sickness absence, where the employer's interest in having good efficient service from the employee allows them to dismiss in a way that is not discriminatory. The Respondent could not have been expected to wait indefinitely. The Claimant said that she would have tried to return to work and we accept that. However, it wasn't successful when she tried and she and her husband clearly thinks she tried too soon. There is no clear evidence that her health has improved despite the time that has passed. This is a tragedy for her and for her husband who has supported her most loyally through this litigation. However, there is no avoiding the fact that rs Baker's continued lack of fitness to work – which has not been shown to be caused by the Respondent's discriminatory actions - is relevant when it comes to the question of what would have happened had she not been dismissed on 26 May 2023.

114. The Respondents have accepted that the extended probation, which would have lasted up until 19 July, would have led to her employment being confirmed. In other words, they have accepted that she would have remained in employment beyond the end of the extended probationary period. However, we think it is highly probable that, based on the evidence we have, that the Claimant would have remained off sick and therefore only receiving Statutory Sick Pay throughout that period. There is no evidence to which it is right to give weight from which we can find on the balance of probabilities the Claimant would have been able, successfully, to return to work and would have been paid full pay at any point.

115. We accept the Respondent's argument that, when Statutory Sick Pay came to an end, that is probably when the Respondent would have been able to terminate her employment in a way that was not discriminatory. They would have needed to meet and consult with the Claimant but that could be done within the period covered by SSP.

116. An online search suggests that the weekly payment of Statutory Sick Pay in 2023-2024 was £109.40 per week, that is certainly what was paid for the week in June 2023. 26 weeks at £109.40 is £2,844.40. That is the Claimant's financial loss caused by the discriminatory acts.

117. We have heard some evidence about benefits received since the end of her employment and it is possible that some were received for a period starting in August 2023. However, the evidence we have is that a package of benefits received by the family prior to the end of her employment was replaced by a package of benefits received by the family after the termination of her employment and in those circumstances we do not have clear evidence that there are benefits that she has received as a consequence of the dismissal that it is right to set against the Statutory Sick Pay she would have received had she not been dismissed.

118. We think it right to award interest on the financial losses. The Statutory Sick Pay would have been paid between 26 May and 27 November 2023 so interest should be calculated from the mid-point between those two dates. That mid-point is 27 August 2023. From 27 August 2023 to today's date, 6 November 2024, is 438 days . The annual interest payable on a figure of £2,844.40 is £227.55 (found by multiplying it by the judgment rate of 8%). £227.55 divided by 365 gives daily interest of £0.62 per day. 438 days at £0.62 per day is £271.56. The total loss, including interest, is £2,844.40 + £271.56 = £3,115.00.

119. Injury to feelings awards are intended to compensate the Claimant for anger, distress and upset caused by unlawful treatment. In the present case they are to compensate her for feelings of anger, distress and upset caused by dismissal, by the failure to make reasonable adjustments prior to dismissal and by a failure to follow the probationary period. In effect, the way in which the Respondents failed to follow the policy was by dismissing the Claimant when they should have discuss her attendance with her. Similarly, the steps that it would have been reasonable for the Respondent to have to take were to talk to the Claimant and find out the reasons for her absence and then see whether time could be given for her to recover rather than moving straight to dismissal. The failure by the Respondent to take the opportunities to try alternative courses of action probably exacerbated the Claimant's feelings of hurt to some extent when she reflected on the dismissal. However, the non-dismissal unlawful treatment does not cause an identifiably separate hurt. Those three separate several unlawful acts do not cause three identifiably separate injuries. For that reason we are going to award a global figure for injury caused by all of the acts of discrimination.

120. The Claimant lost a job that she enjoyed. She enjoyed interacting with and helping the customers. She speaks, in particular, of a customer bringing flowers and a card to thank her for exceptional service. She clearly took pride in this and enjoyed it. The loss of a job that she placed value on increased her feelings of hurt.

121. She did have pre-existing health conditions and the absences were not caused by the Respondent's actions. We accept that she has needed to seek medical support for exacerbation of her depression following dismissal and that should be recognised. However, she would have lost the work in any event so the amount of injury to feelings for which the Respondents are responsible should be limited by that fact. Given that she would have been dismissed by the end of November 2023 in any event, some of the feelings of grief and low mood caused by being out of work would have occurred in any event. The Claimant's long term unemployment is caused by underlying ill health. We have enormous sympathy for the difficulties experienced by Mrs Baker, by Mr Baker and no doubt by the whole family because of that ill health but it is not something that there are grounds to order the Respondent to compensate her for within these employment proceedings.

122. However, dismissal where the employer has acted supportively and reached the point where there are no alternatives is likely to be very much less hurtful and cause very much less anger than one decided on without consideration of the Claimant's personal circumstances and without trying all reasonable alternatives. We accept that Mrs Baker is likely to experience some ongoing feeling of hurt even now, 18 months later, because of having received discriminatory treatment. For that reason, we are of the view that an award in the middle Vento bracket is appropriate namely between £11,200 and £33,700.

123. We need to bear in mind the real world value of awards, it is important they should compensate but they should not be so low as to diminish respect in the level of awards and in the process, the framework by which discrimination and antidiscrimination legislation is enforced. They are compensatory, not punitive and should not be inflated by any feelings of indignation on the conduct of the discriminator.

124. Taking all of those things into account we think a suitable award for the losses experienced by the Claimant is towards the lower end of the middle bracket. We award £14,000.00 and interest should be awarded on that.

125. Although some acts pre-date dismissal the main part of the injury to feelings we consider to have been caused by the failure to follow probationary policy by dismissing her from 26 May 2023. Therefore, that is the date on which the losses were suffered and interest from 26 May to 6 November should be awarded which is 531 days. At the judgment rate of 8% that is £3.07 per day making a total interest award of £1,630.17 and the total compensation for injury to feelings is £15,630.17.

126. Adding that to the financial loss is awarded in the sum of £3,115.96 makes a total award for disability discrimination of £18,746.13.

127. We do not think this is a suitable case for an award of aggravated damages. Applying the case of the Metropolitan Police Commissioner v Shaw, we have to consider whether the act was done in an exceptionally upsetting way that can be described as high handed, malicious, insulting or oppressive. Here the failure to follow procedure is a discriminatory act in itself which has been compensated as such and not a separate aggravating feature. In any event, it is not so bad as to meet the threshold of aggravated damages.

128. The comment by Miss Brennan that she wished the Claimant good luck in securing suitable alternative employment, we accept the Claimant regarded as insensitive. However, that does not meet the test for high-handed behaviour, nor can the conduct be said to be based upon spite or to be particularly vindictive. In any event, there is a real risk of double recovery with aggravated damages in cases of this sort and the way that the impact on the Claimant has been described does not lead to a finding of a separate identifiable suffering by any of the allegedly aggravating features.

129. We do not think that the ACAS Code of Practice on grievance is applicable to the present case. Even if the Claimant did enter complaints into the performance review, those are not about matters which are the subject of this claim given its present scope. Additionally, we are not satisfied it was a grievance within the meaning of the ACAS Code of conduct, it wasn't formalised whether in writing or orally and a request had not been made, even for matters to be dealt with at an informal stage.

_____
Employment Judge George

Date: …3 January 2025…….

Sent to the parties on: 13/1/2025

N Gotecha
For the Tribunal Office.