EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr D Patira	**v**	**Lidl Great Britain Limited**

Heard at: **Central London Employment Tribunal**

On: **17 – 20 March 2025,**

21 March & 24 March 2025 (In Chambers)

Before: **Employment Judge Brown sitting alone**

Appearances:

For the Claimant: **in Person**
For the Respondents: **Mrs G Williams, Solicitor**

JUDGMENT

The judgment of the Tribunal is that:

1. **The Claimant was a disabled person by reason of anxiety and depression from 28 September 2021. The Respondent ought reasonably to have known the Claimant was a disabled person at that date.**
2. **The Claimant was not a disabled person by reason of keratoconus at any time during his employment.**
3. **Respondent did not subject the Claimant to direct disability discrimination, discrimination arising from disability, or disability harassment.**
4. **The Respondent did not fail to make reasonable adjustments for the Claimant.**
5. **The Respondent did not constructively dismiss the Claimant.**
6. **All the Claimant's claims fail and are dismissed.**

REASONS

Preliminary

1. By a claim form presented on 2 May 2024 the Claimant brought complaints of direct disability discrimination, discrimination arising from disability, failure to make

reasonable adjustments, disability harassment and constructive unfair dismissal against the Respondent, his former employer.

2. The Claimant relied on mental impairment, namely depression and anxiety, and physical impairment, namely keratoconus, in his disability discrimination complaints.

3. The parties had agreed a list of issues. The liability issues were as follows:

Time limits

1. Given the date the claim form was presented and the dates of early conciliation any complaint about something that happened before 21st November 2023 may not have been brought in time.

2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2 If not, was there conduct extending over a period?

2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.4.1 Why were the complaints not made to the Tribunal in time?

2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Disability pursuant to the Equality Act 2010, section 6

3. Was the Claimant disabled by reason of mental impairment, namely depression and anxiety, and physical impairment, keratoconus? The Tribunal will decide

3.1 Did he have a physical or mental impairment?

3.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

3.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without treatment or other measures?

4. Were the effects of the impairment long-term? The Tribunal will decide:

4.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.2 if not, were they likely to recur?

Direct Discrimination pursuant to the Equality Act 2010, sections 13

5. Did the Respondent do the following things:

5.1 Following the Claimant's return to work on 31st December 2020, did the Claimant informed Vytautas Patlaba (VP) and Alex Granville (AG) that he was under pressure, had stress at work and asked for further support to be provided, which was not forthcoming. The disability relied upon is depression and anxiety.

5.2 Fail to carry out a risk assessment after March 2021. The disability relied upon is depression and anxiety.

5.3 Fail to carry out a proper investigation into the Claimant's illness from March 2021. The disability relied upon is depression and anxiety.

5.4 Following the Claimant's return to work on 16th January 2022, offering two other colleagues [Claimant to provide names] alternative roles that required less heavy lifting. The disability relied upon is depression and anxiety. {Anna – in witness statement}

5.5 Following the commencement of the Claimant's new role as Night-time Store Assistant on 1st March 2022, the Respondent failed to support the Claimant or reduce his workload despite on more than one occasion announcing he could not handle the workload. The disability relied upon is his depression and anxiety.

5.6 From 5th April 2022, the Claimant was blocked by Paul Jaggs (PJ) on WhatsApp so he could not communicate with him. The disability relied upon is depression and anxiety.

5.7 When the Claimant returned to work from his sickness absence on 14th June 2023, the Night Manager, Richard, in response to the Claimant asking whether he could go home was told to push harder and that there was too much work to do. The disability relied upon is depression and anxiety.

5.8 On 15th June 2023, the Respondent pressured the Claimant to sign his new contract without having the opportunity to read the terms. The disability relied upon is his keratoconus.

5.9 On 15th June 2023, the Respondent failed to inform the Claimant that he would lose his contractual entitlements, including his holiday entitlement and sick pay when signing his new contract. The disability relied upon is keratoconus.

5.10 On 15th June 2023, the Respondent failed to adjourn the meeting despite it being blatantly clear that the Claimant was not in a position to read his new contract. The disability relied upon is keratoconus.

5.11 On 5th January 2024, the Claimant resigned with immediate effect such that his resignation constitutes a discriminatory constructive dismissal. The disabilities relied upon are keratoconus, depression and anxiety.

5.12 On 9th February 2024, the Claimant received a letter from the Respondent stating that the Claimant had owed them a sum of £934.25. The disability relied upon is depression and anxiety.

6. If so was that less favourable treatment.

7. The Tribunal will decide whether the Claimant was treated less favourable that the Respondent treated or would treat others in the same or similar circumstances.

7.1 The Claimant relies upon a hypothetical and/or actual comparator [C to identify actual comparator]. {the C has not identified any actual comparators apart from Anna} The Claimant says that another blond woman was offered that role. He had not said that previously in any document.

8. Has the Claimant been treated less favourably than said comparator in respect of the act/omission in question?

9. If so, was the less favourable treatment because of his alleged disability?

Discrimination arising from Disability pursuant to Equality Act 2010, section 15

10. Did the Respondent treat the Claimant unfavourably by:

10.1 When the Claimant returned to work from his sickness absence on 14th June 2023, in response to the Claimant asking whether he could go home was told to push harder and that there was too much work to do. The disability relied upon is depression and anxiety.

10.2 On 15th June 2023, the Respondent pressured the Claimant to sign his new contract without having the opportunity to read the terms. The disability relied upon is keratoconus.

10.3 On 15th June 2023, the Respondent failed to inform the Claimant that he would lose his contractual entitlements, including his holiday entitlement and sick pay, when signing his new contract. The disability relied upon is keratoconus.

10.4 On 15th June 2023, the Respondent failed to adjourn the meeting despite it being blatantly clear that the Claimant was not in a position to read his new contract. The disability relied upon is keratoconus.

10.5 The Claimant's contract of employment states that the Respondent may consider making a salary payment in full during a period of sickness inclusive of any SSP. The Respondent failed to consider paying the Claimant his salary in full or at a percentage since the Claimant's sickness absence was caused as a result of the Respondent's negligence. The disability relied upon is depression and anxiety.

10.6 On 5th January 2024, the Claimant resigned with immediate effect such that his resignation constitutes a discriminatory constructive dismissal. The disabilities relied upon are keratoconus, depression and anxiety.

10.7 On 9th February 2024, the Claimant received a letter from the Respondent stating that the Claimant had owed them a sum of £934.25. The disability relied upon is depression and anxiety.

11. Did the following things arise in consequence of the Claimant's disability:

11.1 The Claimant considers his absence to be something arising as a consequence of his disability .

12. Was the unfavourable treatment because of that sickness absence?

13. Was the treatment a proportionate means of achieving a legitimate aim?

14. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disabilities. From what dates?

Duty to make reasonable adjustments pursuant to Equality Act 2010, sections 20 and 21

15. Did the Respondent know or could it reasonably be expected to know that the Claimant had the disability. From what date?

16. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

16.1 Requiring employees to manage a substantial workload.

16.2 Requiring employees to manage a substantial workload without support.

16.3 Requiring or permitting staff to work such hours as are necessary to complete their work tasks.

16.4 Not investigating an employee's illness upon having knowledge of an employee's disability.

16.5 Not carrying out a risk assessment upon having knowledge of an employee's disability.

16.6 Not using their discretion to pay employee's salary in full or at a percentage during a sickness absence.

16.7 Not supporting employees during their period of sickness absence.

17. Did the above PCP place the Claimant at a substantial disadvantage as compared with others who are not disabled? The PCPs above:

17.1 Caused the Claimant additional stress and anxiety;

17.2 Meant the Claimant was unable to gain the support he needed;

17.3 Meant the Claimant's health was adversely affected;

17.4 Meant the Claimant struggled to complete his work and workload to a good standard when compared with employees who did not have his disability;

17.5 Meant he commenced sick leave;

17.6 Meant he was more likely to have sick leave;

17.7 Meant he suffered a reduction in pay; and

17.8 Meant he was constructively dismissed.

18. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at a disadvantage?

19. What steps could have been taken to avoid the disadvantage? The Claimant suggests that the Respondent could have:

19.1 Reduced the Claimant's workload and/or provided him with adequate support to undertake his role;

19.2 Not required the Claimant to work beyond his contractual hours;

19.3 Properly investigated the Claimant's illness;

19.4 Carried out a risk assessment of the workplace upon having knowledge of the Claimant's disability;

19.5 Supported the Claimant during his sickness absence; and

19.6 Used its discretion to pay the Claimant during his sickness absence caused as a result of the Respondent's negligence.

20. Was it reasonable for the Respondent to have to take those steps and when?

21. Did the Respondent fail to take those steps?

Harassment pursuant to the Equality Act 2010, section 26

22. Did the Respondent engage in unwanted conduct related to the Claimant's disability which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Did the Respondent do the following things:

22.1 The acts in paragraphs 5.1 to 5.12, 10.1 to 10.7, and 16.1 to 16.7, above.

22.2 From 11th March 2021 to 16th January 2022, the Claimant was required to attend monthly meetings with the Respondent, with two employees present which caused the Claimant further stress.

22.3 Failed to consider paying the Claimant during his sickness his salary in full or at a percentage.

23. If so, were any of the alleged acts unwanted conduct?

24. If so, did that they relate to the Claimant's disabilities?

25. If so, did the conduct have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and offensive environment for him?

26. If no, did it have that effect? The Employment Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for conduct to have had that effect.

Constructive and Unfair Dismissal pursuant to the Employment Rights Act 1996, sections 94 and 98

It is accepted that the Claimant resigned with immediate effect on 5th January 2024.

27. Did the Respondent commit a repudiatory breach of contract by:

27.1 The acts in paragraphs 5.1 to 5.12, 10.1 to 10.7, 16.1 to 16.7, 22.2 and 22.3 above.

27.2 Breach of duty of care by failing to adequately support the Claimant.

27.3 Failing to carry out a risk assessment to his workload.

27.4 Overworking the Claimant to the extent beyond his usual working hours.

27.5 Pressuring the Claimant to sign the contract that would reduce his working hours without consulting with the Claimant and explaining what this would entail; and

27.6 Failing to support the Claimant whilst on long-term sick leave.

28. If so, was there reasonable and proper cause for said conduct in the circumstances?

29. If not, was said conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent in the circumstances?

30. Did the Respondent's conduct, individually or cumulatively amount to a fundamental repudiatory breach of the Claimant's contract of employment?

31. If so, did the Claimant waive the breach and/or affirm the contract?

32. Did the Claimant resign in response to the alleged conduct?

33. Was any dismissal fair.

34. Should there be any deduction by reason or Polkey and or contribution.

4. The Tribunal heard evidence and submissions on the first 4 days. I made my decision in Chambers on 21 and 24 March 2025. I set a date for a provisional remedy hearing.

5. I heard evidence from the Claimant. I also heard evidence from: Paul Jaggs, Store Manager at the Respondent's Tottenham Court Road store; Richard Marshall, shift manager at the Tottenham Court Road store; Michael Scott, Area Manager for the Tottenham Court Road store; Harry Shulton, trainee Area Manager; and Shona Murray, the Respondent's Head of Payroll and Global Mobility. I read the witness statements of Vytas Patlaba, Assistant Team Manager at the Respondent's Regional Distribution Centre ("RDC") in Enfield and Alex Glanville, Assistant Team Manager at the RDC in Enfield. I attached little weight to their witness statements because they did not give evidence. Only where other evidence, including documentary evidence, corroborated their evidence, did I take their statements into account.

6. There was a bundle of documents. Page numbers in this Judgment refer to page numbers in the bundle.

7. The parties made submissions. I timetabled the case at the start of the hearing.

Findings of Fact – Substantive Claim

8. The Respondent is a supermarket retailer.

9. The Claimant started work for the Respondent as warehouse operative at the Respondent's Regional Distribution Centre ("RDC") in Enfield, working 35 hours per week, on 5 November 2019, p486. His role involved picking items from the warehouse, to be sent to stores.

10. His contract included the following terms:

> 5 Hours of Work
>
> …
>
> 5.2 In certain circumstances it may be necessary for you to work additional hours to the hours stated overleaf in order to ensure that your duties are properly performed.
>
> 7 Holidays
>
> 7.1 If you are employed full time your total annual holiday entitlement Is 30 days paid holiday per Holiday Year (inclusive of statutory and bank holidays), rising to 35 days per Holiday Year (inclusive of statutory and bank holidays) from the start of the Holiday Year following the date upon which you have completed four years continuous employment with the Company. If you are employed part time your holiday entitlement is reduced pro rata according to the number of days you work. Should you wish to take leave on a statutory and/or a bank holiday you will be required to submit a holiday request form, The requested holiday is only authorised once the holiday request form Is signed by your line Manager."
>
> 8 Sickness

8.1 ".. the Company may in its absolute discretion continue to pay your salary… during any period(s) of absence… as detailed below…: Length of Service …More than six months: 10 days. …

If you are employed part time your entitlement to Company Sick Pay is reduced pro rata according to the number of days you work.

…

14 Deductions

14.1 By signing this Agreement you authorise the Company to deduct from your salary (including holiday pay. sick pay. payment in lieu of notice) any amounts, which are owed by you to the Company (including, without limitation, any loans, excess holiday, expense float, overpayment, relocation assistance, fines, uniforms etc) …".

11. The Respondent also has a "Discretionary Sick Pay" policy. I accepted Ms Shona Murray's evidence that the Respondent rarely uses it, save , in exceptional, or extreme circumstances, such as end of life care, or a serious accident at work.

12. The policy provides,

> "Contractual Company Sickpay (CSP) provisions are the default for sickness payments and ensure fairness & consistency across Lidl GB.
>
> Deviations from contractual provisions / policy can only be made by submission of a DSP request for consideration via the E. Law Department where:
>
> There is a potentially serious accident at work that requires further investigation (e.g. to support a HSE/local authority visit)
>
> If there are unusual and exceptional circumstances (e.g. emergency admittance to ICU/life support, palliative care) …
>
> Where a situation does not fall under points 1 & 2 above, but as an RD you feel that discretion should be applied (e.g. ill health and significant unpaid time off and hardship for a loyal colleague), then any such request if made will be escalated to BoD HR for further consideration."

13. The Claimant did not cross examine any of the Respondent's witnesses about this Discretionary Sick Pay policy. He did not mention it in his closing submissions.

14. The Respondent has a Sickness Absence Policy, p430-436 and a Long Term Sickness Absence Policy, 437-447. The policies provide for welfare, sickness review or return to work meetings. The policies provide that, with the employee's consent, the Company might contact an employee's GP/Specialist/Consultant or Occupational Health, for a report, or guidance on adjustments to the employee's role, or for disability.

15. The Claimant was provided with training programme when he started work with the Respondent. He passed this and his probation, p521.

16. I accepted the Claimant's evidence that his 'pick rate' was good.

17. The Claimant signed a contractual change agreement on 3 February 2020, increasing his hours to 40 hours a week. As a result of this change, he was entitled to be paid for 8 hours' work for each day of his contractual holiday entitlement. On his 35 hour per week contract, he was entitled to be paid for 7 hours' work on each holiday day.

18. The Claimant had been diagnosed with Keratoconus in about 2015. Keratoconus is a non-inflammatory condition which affects the cornea at the front of the eye. The eye's ability to focus properly is impacted and this can cause low vision, distorted vision, swelling, redness, pain and sensitivity to light and glare. The way to manage the condition is to wear rigid gas permeable contact lenses. When the Claimant started working for the Respondent, he was able to wear these rigid gas permeable lenses for over 8 hours a day.

19. I accepted the Claimant's evidence that he told the warehouse supervisors about his Keratoconus condition. I accepted his evidence that, one day in early 2020, his lenses slipped and a supervisor had to escort him home, so that he could take off his lenses and put them back in again.

20. The Claimant told the Tribunal that after he had been wearing lenses for a long period of time, his eyes could get sore and he could have difficulty in seeing clearly, so that picking items for the store could take longer. He said that the supervisors would expect him to undertake a heavier workload than others and would not give him additional time to carry out his tasks. He told the Tribunal that, "Due to my increased workload and the fact that it took me longer to pick items for the store as a result of my vision, although my shifts were from 6am to 2:30pm, most of the time I would be working until 3:30pm."

21. The records of his shift start and finish times for his warehouse work showed that the Claimant did not, in fact, work many minutes over his rostered hours, p743 – 820. On many days, he worked fewer than his rostered hours. From the available timesheets, there was no occasion on which he worked from 6am until 3.30pm. From the available timesheets, he clocked out before 2.30pm more frequently than he clocked out after 2.30pm.

22. The Claimant confirmed, in evidence to the Tribunal, that he was never required to work any overtime which he did not wish to work.

23. There was no record of the Claimant ever having been warned or disciplined, or retrained, because of his work speed, or failure to complete work on time.

24. On all the evidence, I did not accept the Claimant's evidence that he was given a heavier workload than others, or that he worked longer hours, whether because of his eyesight, or because he was given more work. I make further findings about the Claimant's eyesight and disability below. However, in summary, I did not accept the Claimant's evidence that his eyes would become sore and that this affected his work rate. I did not accept the Claimant's evidence that his eyesight deteriorated during his

employment in the Respondent's warehouse. It was not supported by the available medical evidence.

25. The only record of any action being taken against the Claimant was in relation to an altercation he had with a supervisor, Valentin, on 4 April 2020. That day, the Claimant used a red truck to move items, instead of the required blue truck . Valentin, a supervisor, had challenged him about this. The Claimant was suspended and investigated for "The use of abusive language towards a member of Management whereby on 4th April 2020 when approached and questioned about by a Senior Operative about the correct use of Mechanical Handling Equipment (MHE), you responded using profanities", p522 – 525. During the investigation meeting, the Claimant said that other people used the wrong coloured trucks. The Claimant said of Valentin, "I was going for a quick break and he was checking what truck I had, he was rude. I cant take anymore as I think he's racist and said to him "don't fuck with me". P527. Following a disciplinary meeting, the Claimant was given a final written warning for 12 months on 27 April 2024, for his conduct, p544. He did not appeal.

26. The Claimant felt very stressed because of this. In evidence, he suggested that his unhappiness in work was triggered by this incident – he said, "Everything started after the meeting we had in the warehouse and the fact that I was the only one suspended – that was the trigger for everything."

27. The Claimant was signed off work, sick from 16 – 30 July 2020 and 30 November 2020 – 30 December 2020 with low back pain, pp 548, 766, 549, 781. He underwent counselling from September 2020.

28. The Claimant told the Tribunal that, " I returned to work on the 31st December 2020. When I returned, the workload was incredibly high and again I was expected to work long shifts with little to no support. My vision deteriorated and the stress and anxiety I felt meant that I did not feel as mentally strong, and my lack of sleep and difficulty eating was causing me to have difficulties in the workplace. I spoke to two supervisors during this time and asked for additional help due to my health and vision. I spoke to Valentin Jusopovs and Alex Glanville. Despite this, no further assistance was forthcoming. I began to suffer from nightmares and would wake up with panic attacks. After weeks and weeks living like this, this culminated in a mental breakdown and after visiting my GP, I was diagnosed with depression and anxiety."

29. However, while the Claimant told the Tribunal that he was expected to work 'long shifts', his time sheets for January 2021, p784, showed that he worked 14.34 fewer hours than he was contracted to work over that month. He worked an average of 7.22 hours per day, against an expected 8 hour daily shift.

30. Given that he was not fulfilling his contracted hours, I did not accept his evidence that his workload was incredibly high, or that he was expected to work long shifts with little or no support.

31. Furthermore, as set out below, given that the Claimant refused occupational health referrals when he went off work, sick, and refused other assistance from the Respondent when he was off sick, I considered that it was very unlikely that he asked for assistance while he was at work and the Respondent declined to give him any.

What happened in practice was the opposite – the Respondent tried to help the Claimant, but the Claimant refused help and did not cooperate with the Respondent.

32. In February 2021, the Claimant asked to reduce his working hours to 30 hours per week because of his University studies, p907. This was agreed and he signed a contractual variation form on 22 February 2021. Thereafter, the Claimant was entitled to pay for 6 hours for each holiday day.

33. The Claimant went off work, sick, from 11 March 2021. His GP sick notes recorded the reason for his absence as 'stress related problem' – 11 March 2021, p550 - and 'work related stress, burnout' -1 April 2021, p551.

34. On 25 May 2021 Vytas Patlaba and Sathees Perumal, Assistant Team Managers, conducted a welfare meeting with the Claimant, p552-558. The notes of the meeting were signed by all those who attended.

35. Welfare meetings are convened with employees who are on long periods of sickness absence, to discuss their sickness and establish any steps which can be put in place to help them get back to work.

36. The Claimant told Messrs Patlaba and Perumal that his condition had not improved, save that he was getting more sleep. He said that his absence was work-related and said that he was being treated differently by being required to pick more items. Mr Perumal replied, "We try to spread the work and we all have a task to finish and no one had to tell you, you have to finish before going home. It doesn't work like that. As long as you finish your contracted hours, that is all we need." P554.

37. The Claimant complained that he had not been given other work. Mr Patlaba responded, "There is a process and you can see job roles online, interviews and if you pass it you will get through." The Claimant replied further that since he had had an issue with Valentin, "nothing would work in a good way for me." P555. Mr Patlaba explained that the recruitment process was independent and commented that it appeared that the Claimant was making assumptions without making any effort.

38. The Claimant complained that Mr Patlaba had not helped him with his issues. Mr Patlaba pointed out that he had told the Claimant about the Respondent's Employee Support Programme. The Claimant commented, "At some point this programme will blame me and wont help me". He said that he had not tried it. P555.

39. The Claimant asked why he had never been asked to go to a different department. Mr Patlaba responded that he could have asked for this, p555.

40. Both Mr Patlaba and Mr Perumal asked the Claimant how they could help him. The Claimant responded, "I don't need your help. I want to be left alone for the period of my sickness." P556. Messrs Patlaba and Perumal asked the Claimant whether a different role might help. The Claimant replied, "I just want to clear my mind and when I feel better I will let you know." P556.

41. Mr Perumal said, "We potentially will have to do a GP report soon. When this occurs, we will need your consent and will you send you a form and contact your GP to ask about your conditions to see how we can support you as a business. " p556.

42. The Claimant replied," If I don't agree to give my consent then what. You can put already I don't want to consent." P557.

43. Mr Perumal said, "So lets think of some options for when you return. We can support you by reducing your hours, find an alternative department temporarily and change of shifts and hours." P557. The Claimant responded, "You think I am pretending. Everyday in the past few weeks I have had headaches."

44. From the notes of this meeting, I concluded that Mr Patlaba and Mr Perumal suggested the Employee Support Programme and that they could obtain a report from the Claimant's GP. The Claimant did not agree to either. They suggested reducing the Claimant's hours, changing his shifts and a temporary move to another department. Again, the Claimant did not agree to any of these options. He said he would think about reducing his hours.

45. The Claimant continued to be signed off work, sick. His 30 June 2021 Fit Note gave "Mixed anxiety and depressive disorder" as the reason for his absence for the first time, p573.

46. On 30 June 2021 he attended a further meeting with Joshua Bull, p562. The Claimant asked to be moved around more when he returned to work. Mr Bull agreed to look into this.

47. The Claimant mentioned that Mr Patlaba and Mr Perumal had suggested referring the Claimant to Occupational Health. He said, "It made me think this company doctor will get in my head and make me feel guilty".

48. Mr Bull replied, "No. the doctor does not work for Lidl, but simply has a better understanding of the work which you do, so could help more in what adjustments could be required." The Claimant responded, "I do not want this I don't want to see anybody. You can get in touch with my GP, you can get in touch with my psychologist." P570.

49. The Claimant asked about promotion. Mr Bull explained, "For any position that is available for a higher position or promotion anyone can apply it's on the MyLidlCareer website." When the Claimant said that jobs in the warehouse were advertised in the canteen, Mr Bull replied, " they are also always on the website". The Claimant commented that he believed that, once an employee had an 'issue' with someone, they would never get promotion. Mr Bull said, "I would tend not to agree with that. As the[re] recruitment process is managed by the recruitment team." P566.

50. The Claimant attended a further welfare meeting on 11 August 2021, p574, with Mr Perumal. He said that his health had not improved and that he was on the waiting list for therapy, p574. He said that he had not read the material his GP had sent to help him. The Claimant told Mr Perumal to telephone his GP and speak to them. Mr Perumal explained that Occupational Health, which was independent from the Respondent, would contact the Claimant's GP, with the Claimant's consent, p576.

51. The exchange went as follows, p576:

    SP (Sathees Perumal): Allow me to speak and explain

    DP (the Claimant): I am not interested

SP: I cannot call your doctor and Lidl cannot call your doctor. To obtain this information an independent doctor will contact your GP once you consent to it. They will ask you to visit them and asses your condition and what we can do to help assist with your situation to get you back to work.

The medical professionals are not employed by Lidl, they are independent. They will make recommendations for us on how we can accommodate you returning to work. Are you happy for me to give you the form to give us the consent?

DP: No. At the end of June / July, you can opt out with sharing your data with 3rd parties. I opted out on the website as I don't want my information shared with anyone. Its my privacy and my health. You don't know where that information will go.

SP: I respect your decision. However for us to support we need something from the independent assessor to tell us how we can support you.

DP: I told you that I don't need your support. It is enough from the psychiatrist and the therapy to help me. Its about privacy and my safety.

SP: So how do you think we can best support you?

DP: To leave me alone. Every letter or phone call. I just want to be left alone. I will be fine in the future. I don't want to think about Lidl.

52. Mr Perumal told the Claimant that there would be another welfare meeting in 4 weeks. The Claimant responded that there would not be another welfare meeting because he would return to work.

53. The Claimant returned to work between 13 and 27 September 2021, p805, before being signed off work sick, again, on 28 September 2021, for mixed anxiety and depressive disorder, p586.

54. The Claimant returned to work once more on 15 November 2021. At his return to work meeting in November 2021, he was asked, "… do you need any support, or are you happy to carry on as usual?" p590. The Claimant asked to start an hour later. This was agreed. In evidence at the Tribunal, the Claimant agreed that allowing him to start an hour later had been supportive.

55. In that meeting, the Claimant asked whether there were desk roles available. He was told, "At the moment there are no desk roles available, they have recently been filled You will need to keep an eye out for different roles on the website." P590.

56. The Claimant agreed in evidence that he had raised issues with his sick pay at this time and that the Respondent had investigated and remedied the issue, pp590 and 814.

57. The Claimant went off work again, sick, on 20 December 2021. He returned to work on 18 January 2022, but went off work sick again on 12 February 2022.

58. The Claimant told the Tribunal that, when he returned to work in the warehouse in 2022, "I was never offered the opportunity for a promotion. Other employees who were of the same nationality as the supervisors, Latvian, were promoted above me despite

the fact that I had worked there longer and was a more efficient employee. I believe one of the employees who was promoted above me was an employee called Ana. The promoted role would require less heavy lifting and less scanning and this would have been ideal for me given my vision impairment and my depression. I was devastated not to have been considered for this role which would have benefitted me due to my health condition. I believe I was overlooked because of my sickness."

59. The Claimant provided the name 'Ana' in his witness statement – having not provided any comparator details previously. In cross examination, he was asked if he meant Anna Pietrzak, a Polish warehouse operative, but he said not. He mentioned another "blonde lady" who had been given a role.

60. There was no clarity from the Claimant as to what was the title of the promoted role or what its duties were, or who the comparators were.

61. The Claimant transferred to the Lidl Tottenham Court Road store as a night shift store assistant from 1 March 2022. His contractual terms remained the same in all material respects, p605 – 616. Some terms had been renumbered, so that the clause allowing the Respondent to deduct overpayments was now clause 16, p613.

62. Night shift store assistants operate during a store's closing hours. The role involves collecting the stock which has been delivered onto the shop floor and restocking the shelves. Different types of deliveries arrive on different nights. Pallet sizes vary depending on the stock they contain. Some stock is heavier than others – boxes of biscuits are lighter, easier and quicker to unload, than wine. It is physical work.

63. Pallets are moved using a manual pump truck which the colleague has to pump, to raise the pallet off the ground.

64. The Claimant told the Tribunal that, in the store, the manual truck meant that there was an increase in the amount of heavy lifting he had to do and this was difficult because he was not sleeping well and was not eating.

65. The Claimant told the Tribunal that, on one occasion, he was approached by the night manager, Richard, who informed him that he would have to work harder and faster and that, in response, the Claimant unzipped his jacket to show him that his shirt was wet from sweat.

66. Mr Marshall gave evidence that the Claimant was undertaking a manual job and it would not be unexpected for an employee to sweat while doing so. Mr Marshall told the Tribunal that, when the Claimant started working in the store, the store gave him the easiest aisle to work on - ambient stock like biscuits and cakes. Mr Marshall told the Tribunal that the Claimant found it hard work, but that every new starter did.

67. The Claimant told the Tribunal that he was expected to transfer a minimum of 16 pallets per shift with each pallet, weighing between 300 and 500 kilograms. He said, "As I was using a manual pump truck, it was almost impossible for me to do this within an eight-hour shift. I began to have little interaction with my team and my working shifts became longer. I was finishing later and later and was feeling incredibly anxious at the end of each shift." He told the Tribunal, "I sought support from my manager and spoke

on several occasions about the fact that I could not cope with the workload. No support was provided, and I could not cope…".

68. The Claimant only worked for one month in the store, March 2022. The time sheet for that month, p822, did not show him working 'later and later'. In his first week of work, he clocked off at 07.07, 05.04, 08.12, 07.07. In his last week, he clocked off at 07.12, 07.09 and 07.05, for example. In the last 3 weeks of the month, he did not work any amount significantly over his rostered hours.

69. Mr Marshall agreed with the Claimant that the store was short staffed at the time and that it was likely that the Claimant would have been asked if he could work overtime. Mr Marshall told the Tribunal that the Claimant was always very specific that he had to leave on time. In evidence, the Claimant agreed that he was not required to work overtime if he did not want to. He gave evidence that he did not recall the Claimant asking for adjustments to help with his workload.

70. Mr Jaggs for the Respondent agreed that the Claimant might have been asked to move 16 pallets worth of stock during a shift, depending on the stock. He said that, generally, an employee would be expected to move 10 – 12 pallets a night.

71. The Respondent has "Optimal Pallet Times" for stocking from particular types of pallets, using the Respondent's 'Smart Ways to Work', p481. Store Management is encouraged to use these Optimal times to set 'challenging but realistic' targets. The optimal times range from 10 to 50 minutes. Clearly, if all the pallets which the Claimant had to unload had optimal times of between 10 and 30 minutes on an 8 hour shift, he would unload 16 in an 8 hour shift. If all had optimal times of between 10 and 20 minutes, he could easily do this.

72. On all the evidence, I decided that the Respondent required the Claimant to undertake the normal role of a nightshift store assistant. He was not required to work longer and longer hours and he was not required to work overtime. On all the evidence, he was required to unload pallets at a rate which the Respondent had assessed it was possible for employees to do. As this was manual work, it was expected that employees might sweat and find the work somewhat tiring. The Claimant did sweat and find the work tiring. I accepted the Respondent's evidence, however, that the Claimant was given easier tasks, like unloading biscuits, when he started. I found the Respondents' witnesses to be credible and compelling witnesses. They were dispassionate and understated in the evidence they gave. The Claimant's evidence was exaggerated and unreliable. It was not supported by the contemporaneous records. I rejected the Claimant's evidence that he asked for support, or changes to his job, but that the managers refused this.

73. The Claimant was signed off work with backache from 5 April 2022, p618, and with backache, anxiety and depression, from 29 April 2022, p619. He never returned to work, save for one day on 14 June 2023, when he went home because he said he felt unwell.

74. The Respondent sought to meet with the Claimant regularly during his sickness absence.

75. On 4 August 2022 the Claimant attended a welfare meeting with Paul Jaggs, p625 – 637. The Claimant said that he had not responded to 4 previous letters from the Respondent because he was just staying in bed, p626. He said he was taking medication for anxiety as well as sleeping tablets. He suggested that he might want to go back to the warehouse and the Respondent agreed to look into that if he would like to. The Claimant was non-committal and said, "Let's see what happens…". P631.

76. On 11 August 2022 Michael Scott, Area Manager, wrote to the Claimant confirming the support the Respondent would provide for the Claimant's return to work, p638-639: "At the meeting on 04/08/2022, you and Paul discussed the possibility of adjustments being made to your job to enable you to maintain a better level of attendance. Having considered the matter after the meeting, we have agreed that the following support and agreements will take place:

    - You will continue your absence to the end of your current fit note with a view to return to work in September

    - You have concerns over your workload, Paul outlined the changes to the stores operational structure including fresh deliveries being worked only at night taking pressure off of the night colleagues.

    - You will inform your line manager if you feel your health is deteriorating.

    …

    - You have agreed that your happy with your current contracted hours."

77. The Claimant continued to be signed off work, sick. On 27 September 2022, the Claimant's GP signed him off for a further 2 months for keratoconus and depression, p642.

78. The Claimant met Paul Jaggs, Store Manager, on 1 January 2023, for a welfare meeting. The meeting was conducted by Chris Langan, with Mr Jaggs taking notes, 652-657. Mr Lagan asked the Claimant about Occupational Health (OH). The Claimant stated he did not want his personal details shared. Chris explained that the OH process was to support him and contained medical professionals. The Claimant said "they can't help me. Only God can help me". The Claimant later said, "then no. I have a GP and a hospital, plus on the waiting list so three doctors already – so why would I?". Mr Langan reiterated it was just for the Respondent to work out support for the Claimant. The Claimant responded "if it's optional then no." The Claimant said that his vision was very poor and that he could only wear lenses for a short time.

79. Michael Scott, Area Manager, wrote to the Claimant on 25 January 2023, p894-896. He asked the Claimant to provide his consent for the Respondent to obtain a medical report from his GP. He enclosed a medical report consent form, and invited the Claimant to a follow up Sickness Absence Review meeting on 14 March 2023.

80. The Claimant refused consent for the Respondent to obtain a report and / or the Claimant's medical records from the Claimant's GP or specialist, p658.

81. By letter dated 20 February 2023, Mr Scott wrote further to the Claimant, asking him to reconsider, explaining the purpose of the request p659-660. The Claimant

responded on the same day, p661, by email. The Claimant reiterated his refusal of consent and asked Mr Scott to stop sending him emails and letters about it, and to think instead about how the Respondent could 'help him financially'. Mr Scott arranged for the Respondent to pay the Claimant the holiday entitlement which he had accrued, p679.

82. Mr Scott conducted a further welfare meeting on 14 March 2023, p678-680. At that meeting, the Claimant said that he wanted to reduce his hours to 20 hours per week if he came back to work, p679.

83. A further welfare meeting took place on 27 April 2023. The Claimant was asked if there was anything which could be done to help him return to work. He replied that there was not, p682. He said that he might return to work in June 2023, but said that he was thinking of coming back on reduced hours, p684.

84. In evidence at the Tribunal, the Claimant proudly maintained his objection to being referred to Occupational Health by the Respondent. He said that he had "read on the internet" that companies were their employees' medical information for profit.

85. The Claimant returned to work for one day on 14 June 2023. He worked a shorter shift, from 23.00 – 05.11. Mr Jaggs told him to build up slowly and see how the shift went.

86. The Claimant alleged that Mr Marshall told him to work harder, when the Claimant asked to go home early. However, the Claimant was very unclear about this in evidence and suggested that this might have happened in March 2022. I accepted Mr Marshall's evidence that he did not recall telling the Claimant to work harder that day and that the Claimant went home early anyway.

87. On 16 June 2023, the Claimant WhatsApp'd Mr Jaggs, saying, "Also like I mentioned yesterday from july I want to reduce my hours to 20 a week." P926. That day, Mr Jaggs send a photograph of a contractual change form, which he had drafted and printed out for the Claimant, p928, and the Claimant responded, thanking him, p929.

88. The Claimant came into work on 16 June 2023 and signed the contractual change document, reducing his hours from 30 to 20 each week, p686.

89. He told the Tribunal that he had been coerced into signing it, that his contact lenses had slipped below his eyelids and that his eyes were so painful and watering that he could not read the document. He said that the Respondent ought not to have allowed / forced him to sign the document that day.

90. I did not accept his evidence. I noted that he did not complain about having had to sign the document afterwards. He was exchanging numerous messages with Mr Jaggs at the time and he did not suggest to him that he had been too unwell to sign the document, or that he did not want to sign it, or that he wanted to reverse it. I noted that it had been the Claimant who had asked for the reduction in his hours and that he had been sent a copy of the contractual change document before he even attended the workplace to sign it.

91. I decided that the Claimant willingly, and in full knowledge of what he was doing, signed the contractual change to 20 hours per week.

92. I did not accept his evidence that he had been in pain and that he could not read the document. The Claimant was not a credible witness in this regard.

93. Mr Jaggs was pleased that the Claimant had signed the contractual reduction, p909.

94. The Claimant told the Tribunal that the Respondent had not made clear to him that he would lose contractual holiday entitlement as a result of signing the contractual change document. He said that this should have been explained to him.

95. The contractual terms of the Claimant's holiday entitlement were not changed. The Respondent pays each holiday day calculated on the basis of the number of hours an employee is contracted to work each week, divided by 5. When his contractual hours were reduced, the sum which the Respondent paid him for each holiday day was correspondingly reduced.

96. During the course of the hearing at the Tribunal, the Claimant accepted that this was correct and appropriate. His oral evidence was that it was obvious that the holiday daily amount would change as his weekly hours total altered.

97. The Claimant's case at the Tribunal hearing was that he believed that the Respondent was no longer paying him for holiday at all, following the reduction in his hours.

98. Later in 2023 the Respondent confirmed to the Claimant he would not actually receive payment for holiday he had accrued, because he was carrying forward "undertime" hours and had already been paid for more hours than he had worked over the course of his employment. His holiday pay accrued was therefore 'set off' against the hours he owed the Respondent, rather than being paid direct to him.

99. The Claimant submitted a grievance about this. The grievance outcome letter dated 4 January 2024, p723, explained that the Claimant's holiday pay had been set off against a rolling overpayment, which had continued since he had first gone off work sick.

100. In evidence at the Tribunal, Shona Murray explained that the overpayment to the Claimant was historic and had never been cleared. When employees first go off work, sick, they are paid their salary that month, but the overpayment is then recouped the following month. The Claimant had also historically worked fewer than his contracted hours – these are called 'bank' hours. He had never returned to work for long enough to make up the bank hours, nor the month's pay which he had received when he first went off sick. As a result, by 2023, there was a rolling overpayment which needed to be recouped, which had rolled over from one month to the next. The bank hours had also rolled over from one month to the next, and were owing to the Respondent.

101. As a result, the Claimant owed so much in bank and overpaid hours that the holiday pay he had accrued was less than the amount he owed, so he received nothing in his hand for holiday pay in late 2023 and at the end of his employment.

102. I accepted Ms Murray's evidence. It was clear from the payslips that the payment system was automated and the overpayments and bank hours simply rolled over from one month to the next.

103. I found that the Claimant continued to be entitled to holiday pay, but that the holiday pay did not exceed the amount he owed for overpayment and bank hours.

104. The Claimant told the tribunal that Mr Jaggs blocked him on WhatsApp.

105. Mr Jaggs provided a printout of all the messages he exchanged with the Claimant on Mr Jaggs' personal mobile phone, p912-950. Those numerous exchanges over many months showed that Mr Jaggs responded to the Claimant on a regular basis throughout 2022 and 2023, even on days when Mr Jaggs was not working.

106. The Claimant persisted in contacting Mr Jaggs, even when Mr Jaggs asked him to contact the store instead, for example when the Claimant contacted him on 1 September 2022, during Mr Jaggs' annual leave, p918.

107. I accepted Mr Jaggs' evidence that he felt that the Claimant was sending him too many messages on his personal phone, including during his free time, and appeared ungrateful even when Mr Jaggs tried to help him, so that Mr Jaggs occasionally blocked the Claimant's WhatsApps because of this, for example in November 2022, December 2022, April 2023 and June 2023, p921. I accepted Mr Jaggs' evidence that the Respondent expects sick notes to be emailed to Store Managers, or to Human Resources, and that employees can also telephone the store to speak to managers.

108. On 13 December 2023 the Claimant WhatsApp'd Mr Jaggs, saying… "I want to ask you something Why you did not said anything when I reduced my contract hours in regard to the fact that I won't be entitled to any holiday? Because clearly you knew Paul but you didn't want me to know otherwise I wouldn't have reduced it. That's why you sent that lady to chase through the store and make me sign the contract even though at that time I wasn't feeling well and one of my lenses got out of my eye."

109. Mr Jaggs replied, "Before you make accusations, please get some facts. You are entitled to holiday regardless of your contract length, so I don't know what you are talking about. Payment is less naturally as it's based on contract hours. I also spent 2 hours of my free time chasing payment for you as I was on a day off. I have done nothing but help you during this whole process." He then blocked the Claimant.

110. I found that this was an example of Mr Jaggs blocking the Claimant after the Claimant incorrectly accused him of ensuring that he would not be entitled to holiday pay, when Mr Jaggs had, in fact, spent time during his own holiday trying to help the Claimant.

111. On 5 January 2024, the Claimant resigned by email saying, "As Paul blocked me on whatsapp because he didn't want to provide me some answers to my question I want to inform you that I resign with immediate effect and I do not want the company to contact me anymore. Enough is enough! I've been told only lies for the last few months, I got in this situation because of some employees of Lidl, anyway I do not want to get into more details." P898.

112. The Claimant told the Tribunal that there had been a lot of factors in his resignation. He said that when he found out that he was not going to be paid for the holiday he had accrued, he felt that he had been cheated.

113. The Claimant's final payslip showed that he owed the Respondent £934.25, p877. I accepted Ms Murray's evidence that this was the net amount that he owed, taking into account overpayment of salary and bank hours, but having deducted the holidays he had accrued.

114. The Claimant received a letter from the Respondent on about 9 February 2024 requesting repayment of that amount.

115. I accepted Ms Murray's evidence that the Respondent's payroll system will automatically flag any leavers whose final payslip figure is in the negative. A standard letter requesting repayment will be auto-generated and sent out automatically. The details go into a standard template and the content of the letter is not scrutinised, other than to check personal details, such as the address, are correct. These letters go out to all employees who owe sums to the company when they leave, not just those on sickness absence.

116. The letter was sent to the Claimant seeking repayment of sums owing to the business was a standard one.

117. The Claimant was first paid Company Sick Pay (CSP) in August 2020, p765. The Claimant had a 40 hours per week contract at that time, having increased his weekly hours from 35 in March 2020, p906. The Claimant's hourly rate was £10.90. The Claimant was paid £612.27 in CSP, and £172.53 in SSP equating together to pay for 9 days of sickness absence. The Claimant was paid 1 further day of CSP in January 2021 for time off in December, p780. That exhausted his entitlement to CSP for that sickness year. He was not have entitled to more CSP until six months after his return to work.

118. The Claimant returned to work in January 2021. Although he was off sick again from 11 March 2021, he was not eligible for CSP at that time. He received statutory sick pay.

119. The Claimant was next paid CSP in October 2021. The Claimant had reduced his contractual hours to 30 per week, effective from 1 March 2021, p786-787; 908. The Claimant received 1 day of CSP in October 2021 based on a 6 hour day at £11.20 per hour, p804, and 9 days of CSP in November 2021, p807. As the Claimant had reduced his hours, his total CSP issued across the two months totalled £672.00. If the Claimant had been on 40 hours per week he would have received £896 in CSP because his sick pay would then have been based on an 8 hour day rather than a 6 hour day.

Disability – Additional Facts

120. The Respondent accepts that the Claimant now has depression/anxiety. It also accepts that the Claimant has the condition keratoconus.

121. The Claimant was assessed by the NHS Improving Access to Psychological Therapies service ("IAPT") in September 2020, p101. He reported low self-esteem

and depression symptoms since turning 30 and that the trigger for his attendance was a relationship breakup, p105. Cognitive Behavioural Therapy ("CBT") was suggested for his low mood and low self-esteem, p105.

122. The Claimant's GP prepared a brief report dated 8 October 2024 for the Tribunal. The report said, "The anxiety and depression have been reported to us since 2018 (apparently this was present since 2016), this appears to pre-date his current employment, but appears to have been aggravated by stress at work." P325.

123. The Claimant, however, strenuously denied, in evidence to the Tribunal, that he suffered from depression before September 2020. I found that the Claimant's evidence about his anxiety and depression at this time was not reliable. He was insistent that his symptoms were caused by stress at work, but that was not what he told the IAPT service. He also insisted that he was being put under intolerable pressure to work long hours at the time, which caused him stress - but that was not consistent with the work records. In fact, the Claimant appeared to have been very aggrieved about being given a formal written warning in April 2020. However, that warning appeared to have been entirely justified, given that he had used swear words to his supervisor, who had asked him a perfectly legitimate question about him using the wrong work equipment.

124. Given that the Claimant was not a reliable historian, either about his symptoms, or about the causes of them, I decided that the medical evidence was the best evidence of his illness and his symptoms.

125. The Claimant undertook some CBT sessions with IAPT between October and December 2020, but was recorded to have "Dropped out of Treatment" in December 2020, p99.

126. He was signed off work, sick from 16 – 30 July 2020 and 30 November 2020 – 30 December 2020, both with low back pain, pp 548, 766, 549, 781.

127. The Claimant consulted his GP in January 2021 concerning a mixed anxiety and depressive disorder, which the GP described as "new", p319. He undertook guided self-help with IAPT between March and July 2021, p115 - 120.

128. The Claimant went off work, sick, from 11 March 2021. His GP sick notes recorded the reason for his absence as 'stress related problem' – 11 March 2021, p550 - and 'work related stress, burnout' -1 April 2021, p551. He consulted his GP on 11 and 18 March 2021, 1 and 21 April, 30 June, 13 August , 28 September and 21 December 2021, all for "Mixed anxiety and depressive disorder". P316 – 319. He was prescribed antidepressant medication throughout this period. In the medical notes, he described poor sleep and inability to work, throughout this period.

129. The first time the GP recorded "Mixed anxiety and depressive disorder" as the reason for the Claimant's absence from work on his GP Fit Notes was on 30 June 2021, p573. The GP signed him off for a further 6 weeks, until 13 August 2021. That reason was also given on the GP Fit Notes, signing him off for further periods on 13 August 2021 (for 6 weeks), p585, and 28 September 2021 (for 4 weeks), p586.

130. The Claimant returned to work on 3 November 2021, p588. He was signed off work on 2 December 2022, for "Mixed anxiety and depressive disorder & Keratoconus"; p313 and again for "mixed anxiety and depressive disorder" on 21 December 2021, p595.

131. Having returned to work in February 2022, the Claimant was signed off work again with "low back pain, anxiety and depression" from 29 April 2022 to 6 June 2022, p315.

132. The Claimant did not describe himself as having a disability when he completed a night worker questionnaire for the Respondent in February 2022, p603.

133. The Claimant's GP's 8 October 2024 report stated that the Claimant has a history of keratoconus which affects his eyes, p325. It said, "His eye condition seems to have been diagnosed in 2015 and was then referred to the ophthalmologist for specialist review."

134. The Claimant wears rigid gas permeable contact lenses in both eyes for this condition.

135. The Claimant attended appointments in relation to his contact lenses at Moorfields Eye Hospital on 10 October 2018, p353, 27 March 2019, p354, 12 June 2019, p357. He showed his appointment letters to his supervisors in the warehouse.

136. A letter from Moorfields Eye Hospital to the Claimant's GP dated 12 June 2019, p357, said, "Mr Patira has excellent vision in his RGPs and no new problems. Surgery is not needed and at his age his keratoconus is very unlikely to progress. We do not need to routinely see him in the corneal department but are always on hand If there are any future concerns. Follow-up: 6 months in Contact lens clinic only."

137. The Claimant continued to have follow up appointments at Moorfields Contact lens clinic in 2019, 2020 and 2021, p362-3, 366, 368, 370.

138. On 9 September 2022, a letter from Moorfields Eye Hospital to the Claimant's GP reported that the Claimant reported being unable to wear his contact lenses for more than 4 hours and that he reported symptoms associated with dry eyes. The optometrist said that examination revealed bilateral dry eyes, caused by blockage of glands. She recommended the use of warm compresses, lid massage and lubricating eye drops, p372.

139. A further letter from Moorfields to the Claimant's GP on 9 March 2023, p375, said, "Mr Patira attended the Contact lens service today. He reports ongoing issues with eye pain and headaches with and without his contact lenses. He reports constant headaches in all areas of the head which does not relieve with pain medication. He also reports sharp eye pain which is not worsened with contact lens use. His visual acuity remains excellent and his eye pressures are within normal limits in both eyes. Anterior segment shows evidence of Keratoconus and he has a good ocular surface. Posterior eye examination found healthy optic nerves with distinct optic disc margins. His maculae and retinae were healthy in both eyes. His pain did not relieve with topical anaesthesia. Motility was full and smooth and pupil assessment was normal in both

eyes. Colour vision was normal." The letter asked the Claimant's GP to treat the Claimant for headaches and eye pain.

140. On 17 April 2023 his GP notes recorded, "Seen @ MEH (Moorfields Eye Hospital) by an optometrist who felt his eyes were completely normal I cannot really support his claim that keratoconus and a completely normal eye examination in an eye hospital requires an eMED3 (Fit Note) My impression is that he will be off work indefinitely regardless of our suggestions - if not his eye discomfort it will be something else Document eMED3 (2010) new statement issued, not fit for work 3 Fit Note Document (Diagnosis: Low mood; Duration 17-Apr-2023 - 1 5-May-2023", p311.

141. The Claimant's GP notes on 17 August 2023 recorded, "Adaments wants keratokonus on fit notes - however note consultation with RN - opthal exams unremarkable so not to be put of fit notes. PIP has been refused 3 times and now going to court for appeal.- I have concerns about this duration of off sick and refusing occ health reviews - will dw team about ongoing reviews of fit notes." P309. (sic)

142. The Claimant's evidence was that, "From 2020, I struggled to see and read letters and numbers clearly in the warehouse aisles, as my vision became blurred, and I experienced significant pain." However, in 2019, Moorfields had reported that his vision was excellent - and his keratoconus was unlikely to deteriorate. The medical evidence was also that, in 2023, the Claimant continued to have excellent eyesight.

143. The Claimant also told the Tribunal that, the keratoconus condition "has progressively worsened, and as of approximately September 2022, it has become so severe that I am now unable to wear my contact lenses for more than 2 to 3 hours per day due to the intense pain in my eyes."

144. Again this was at odds with the Moorfields letter of 9 March 2023, reporting a healthy eye and his GP's note of 17 April 2023, refusing to sign him off work for keratoconus, following a completely normal eye examination.

145. I accepted that the Claimant may have had some dry eye symptoms, resulting in some discomfort when wearing contact lenses, from about September 2022. However, in the contemporaneous medical evidence from March 2023 and August 2023 - during his employment with the Respondent - his GP did not accept that the Claimant's eye symptoms were significant. The GP rebuffed the Claimant's attempts to have keratoconus recorded as a clinically significant ailment on his Fit Notes. I did not consider that the Claimant's evidence regarding his eye symptoms was reliable.

146. The Claimant gave evidence that he had been told, in 2024, that his eyesight was so poor that no glasses/spectacles would be strong enough to correct his vision. That appeared to represent a very significant deterioration in his eye condition compared with the Moorfields' optometrists' examination of his eyes in 2019 and 2023.

147. A letter from Moorfields dated 30 October 2024, after the Claimant had left the Respondent's employment and after he had brought his claim, reported that, "Mr Patira was upset about letter written to GP at the last appointment as he feels it did not accurately demonstrate his issues." The optometrist advised that the Claimant use a combination of Omega 3 supplements, eyedrops prescribed, daily lid hygiene, hot compresses and eyelid massages. She said, "…our aim is to try and make the eyes

more comfortable so that he can function and wear the contact lenses for perhaps 8-10 hours which would allow him to lead a typical life." p330. The optometrist tried to assist the Claimant by showing him how to put soft lenses on top of the hard lenses, to help tolerance of his lenses, so he could wear them for longer. The Claimant became frustrated. She said, "I offered to rebook the teach so that he can try again on a different day where his eyes are less dry. … Mr Patira declined attending again for teach, so no soft lenses given."

148. I did not find that this letter, dated 30 October 2024, undermined the reliability of the 2023 Moorfields' letter. The tone of the 2024 letter suggested that the writer was under significant pressure from the Claimant to change the description of his symptoms. It was clear that the Claimant did not agree with the 2023 report. However, I noted that that 2023 report was written following a full examination. It also appeared that the Claimant was not interested, in 2024, in improving his eyesight to lead a "typical life" - in that he did not agree to return, to try soft lenses on top of his hard ones, to help him tolerate them. That was very surprising if the Claimant's symptoms of pain and limitation of vision really were as severe as he reported them to be in 2024. It appeared that the Claimant was not motivated to improve his symptoms. I considered that there was evidence, from the 2024 letter itself, that the Claimant was trying to influence the medical records, so that they recorded his symptoms as being worse than the previous, objective records had reported.

149. There was a sharp conflict of evidence between the Claimant and the Eye Hospital's assessment of the Claimant's eyes during his employment. I noted that the Claimant had given evidence that he could not read the contractual variation document in June 2023 and had been pressurised into signing it. I had not accepted his evidence about this. I noted that his GP refused to sign the Claimant off work for keratoconus, despite pressure from the Claimant. I noted that his GP felt that the Claimant would stay off work, notwithstanding any medical advice or input. I considered that the Claimant's evidence about his keratoconus was not supported by the medical evidence. I accepted his evidence that he had difficulty remembering things because of his depression and anxiety.

150. I did not accept the Claimant's evidence on the effects of his keratoconus during his employment. I did not accept that he was unable to wear his contact lenses for more than 2 – 3 hours a day. I did not accept that he suffered severe pain in his eyes, whether related to contact lens wearing, or not. I found that, during the Claimant's employment, his eyes were healthy. His eyes may have been dry on occasion, but there was no corroborating medical evidence that his eyes were sore or unhealthy as a result. I found that, throughout his employment, he was able to wear contact lenses and that, when he did, his vision was excellent.

Relevant Law

Discrimination

151. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Disability Law

152. By s6 Equality Act 2010, a person (P) has a disability if –

a. P has a physical or mental impairment, and

b. The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

153. The burden of proof is on the Claimant to show that he or she satisfies this definition.

154. Sch 1 para 12 EqA 2010 provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

155. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

156. *Goodwin v Post Office* [1999] ICR 302 established that the words of the s1 DDA 1995, which reflect the words of s6 EqA, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

a. Did the Claimant have a mental or physical impairment (the impairment condition)?

b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)

c. Was the adverse effect substantial? (the substantial condition)

d. Was the adverse effect long term? (the long-term condition).

Impairment

157. The EHRC Employment Code states that the Claimant need not show a medically diagnosed cause for their impairment, but that what is important is the effect of the condition, Appendix 1, para 7.

158. In *J v DLA Piper UK LLP* [2010] IRLR 936, [2010] ICR 1052. The EAT said that it would be legitimate for the Tribunal to consider, first, whether there has been a long-term adverse effect on normal day-to-day activities and then decide whether there is an impairment.

159. However, although the absence of an apparent cause for an impairment may not have legal significance, it may be evidentially significant: *Walker v SITA Information Networking Computing Ltd* [2013] CLY 964, EAT per Langstaff J at [17].

Adverse Effect on Normal Day to Day Activities

160. Section D of the 2011 Guidance gives guidance on adverse effects on normal day to day activities.

161. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

162. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

163. D22 states that an impairment may not directly prevent someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long-term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

164. The Tribunal should focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

165. However, the focus ought not to be on the restrictions an individual voluntarily imposes on themselves due to beliefs about what might trigger their condition. An individual's subjective belief around activities they can/cannot perform is not sufficient to establish a causal connection between the impairment and the adverse effect: *Primaz v Carl Room Restaurants Ltd t/a McDonald's Restaurants Ltd and* others [2022] IRLR 194, EAT per Auerbach J at §71-73.

Substantial

166. A substantial effect is one which is more than minor or trivial, s 212(1) EqA 2010. Section B of the Guidance addresses "substantial" adverse effect.

167. Account should be taken of how far a person can reasonably be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to reduce the effects of the impairment on normal day to day activities. Such a strategy might alter the effects of the impairment so that the person does not meet the definition of disability, Guidance para B7.

168. However, it would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, Guidance B8.

Long Term

169. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

170. "Likely" means, "could well happen".

171. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and Richmond Adult Community College v McDougall [2008] ICR 431, CA.

Progressive Conditions

172. Where P has a progressive condition and the condition has (or has had) an effect on P's ability to carry out normal day-to-day activities, but the effect is (or was) not substantial, "P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment," Para 8, Sch 1, EqA.

173. "Likely" means, "could well happen", Guidance para C3.

174. Para B19 of the Guidance explains that "Medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision."

175. Mere diagnosis of a progressive condition would not in itself be sufficient to meet the requirements of Schedule 1 para 8. A claimant must go on to show that it is likely that at some stage in the future there will be a substantial adverse effect on his ability to carry out normal day-to-day activities: *Mowat-Brown v University of Surrey* [2002] IRLR 235.

Effects of Treatment

176. If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question. EqA 2010 Sch 1 para 5 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for such measures, the impairment would be likely to have that effect.

177. Sight impairments giving rise to the wearing of spectacles or contact lenses are an exception to this. The degree of sight impairment experienced by a wearer of spectacles or contact lenses is measured by reference to the ability of the individual wearing such corrective measures, EqA 2010 Sch 1 para 5(3)(a)). In *Mart v Assessment Services Inc* [2019] IRLR 688, EAT, a Claimant relied upon her condition of diplopia – i.e. double vision. She used a contact lens which corrected the condition, but had side effects of being cosmetically unattractive and restricting her peripheral vision. Applying para 5(3), the EAT concluded that she was not disabled as the diplopia was correctable by use of the lens, and there was no indication that the side effects were such as to make its use unacceptable or unworkable.

Direct Discrimination

178. Direct discrimination is defined in *s13(1) EqA 2010:* **"**(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

179. Disability is a protected characteristics, *s4 EqA 2010.*

180. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

181. The ET must decide whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

182. However, if the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

183. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Harassment

184. s26 Eq A provides "

(1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

185. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was "on the grounds of" [now: "related to"] the claimant's race (or ethnic or national origins).

186. Under the *EqA*, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race or other protected characteristic. The EHRC Code of Practice on Employment (2011) at paras 7.9 and 7.10 states:

187. [7.9] Unwanted conduct "related to" a particular characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.

Burden of Proof

188. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

189. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

190. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

191. Unreasonable or unfair conduct is not, by itself, enough to trigger the transfer of the burden of proof— *Bahl v Law Society* [2003] IRLR 640, EAT per Elias J at [100], approved by the Court of Appeal at [2004] IRLR 799.

192. The warning that unreasonable treatment in itself cannot give rise to an inference of discriminatory conduct was repeated by the EAT in *Eagle Place Services Ltd v Rudd* [2010] IRLR 486. However, in that case, the EAT also said at [86], "A decision to dismiss the comparator on [the grounds found by the ET] would have been wholly unreasonable. It is simply not open to the respondent to say that it has not discriminated against the claimant because it would have behaved unreasonably in dismissing the comparator. It is unreasonable to suppose that it would in fact have dismissed the comparator for what amounts to an irrational reason. It is one thing to find, as in Bahl that a named individual has behaved unreasonably to both the claimant and named comparators; it is quite another to find that a corporate entity such as Nabarro or its service company would behave unreasonably to a hypothetical comparator when it had no good reason to do so."

193. Unreasonable treatment, therefore, can be a factor which can be taken into account in deciding whether the burden of proof shifts to an employer. A Tribunal should not simply assume, without evidence, that an employer would have behaved equally unreasonably towards a comparator.

194. If the burden of proof does shift, it is then for the Respondent to prove that the treatment of the Claimant was "*in no sense whatsoever*" because of the Claimant's protected characteristic (*Igen v Wong* [2005] IRLR 258, para 76(11), as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

Discrimination Arising from Disability

195. *s 15 EqA 2010* provides:

"(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".

196. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA.

197. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, Homer [2012] ICR 704.

Reasonable Adjustments

198. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

199. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

200. The EHRC Code of Practice on Employment (2011) at para 6.28 lists factors which might be taken into account when deciding if a step is a reasonable one to take:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;

b. the practicability of the step;

c. the financial and other costs of making the adjustment and the extent of any disruption caused;

d. the extent of the employer's financial or other resources;

e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

f. the type and size of the employer."

201. In *O'Hanlon v Comrs for HM Revenue & Customs [2007] EWCA Civ 283, [2007] IRLR 404*, [2007] ICR 1359 and *Meikle v Nottingham County Council* [2004] EWCA Civ 859, [2004] IRLR 703, [2005] ICR it was held that, while extending sick pay for a disabled employee can be a reasonable adjustment, it would be a rare and exceptional case where it would. In *O'Hanlon* the Court of Appeal said that the purpose of the legislation was to assist the disabled to obtain employment and to integrate them into the workforce and it was not simply to put more money into the wage packet of the disabled. The legislation was designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, rather than to treat them as objects of charity which might in fact sometimes and for some people tend to act as a positive disincentive to return to work.

202. The financial cost of making an adjustment and the impact on the employer's particular financial situation will go to the reasonableness of so doing, there being no objective measure available to balance the cost against the benefit to the employee, *Cordell v Foreign and Commonwealth Office* [2012] ICR 280, [2011] EqLR 1210; *Aleem v E-Act Academy Trust Ltd* UKEAT/0099/20 (28 July 2021, unreported)).

203. In *G4S Cash Solutions (UK) Ltd v Powell* [2016] IRLR 820 HHJ Richardson said, "I can see no reason in principle why section 20(3) should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage through disability. The question will always be whether it is reasonable for the employer to have to take that step'.' He concluded that whilst not anticipated to be 'an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent', there could be cases where this may be a reasonable adjustment for an employer to have to make as part of a package of adjustments to get an employee back to work or keep an employee in work. In *Aleem v E-Act Academy Trust Ltd* UKEAT/0099/20 (28 July 2021, unreported) Judge Auerbach noted that one striking fact in the G4S case was that the employee had been led to believe that preservation of his pay in the new role was indefinite.

204. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

Constructive Unfair Dismissal

205. By *s95(1)(c) ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

206. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

a. The employer has committed a repudiatory breach of contract. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9;

b. The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;

207. The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

208. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

209. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680, and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

210. The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

211. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

212. Where the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of employment, an employee who is disadvantaged by it can only challenge it by showing Wednesbury unreasonableness/irrationality*: IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4.The Court of Appeal held that, in order to decide whether an employer's decision in a given case satisfies that rationality test, the court may need to know what the employer's reasons were and may also need to know more about the decision-making process, so as to assess whether all relevant matters, and no irrelevant matters, were taken into account. The legal burden of proof lies with the claimants throughout. If, however, the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case, if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality.

213. In *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 the EAT (Morison J presiding) accepted that there was an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

214. In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703 the Court of Appeal held that the employee must resign in response, at least in part, to the fundamental breach by the employer; per Keene LJ: ''The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.'

215. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

216. So, if the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so, whether the dismissal was in fact fair under *s98(4) ERA.* In considering *s98(4),* the ET applies a neutral burden of proof. It is not for the Employment Tribunal to substitute its own decision for that of the employer.

Discussion and Decision

217. I took into account all my findings of fact and the relevant law before coming to my decision. However, in this judgment I have addressed the individual issues separately, for clarity.

218. I addressed the issue of disability first.

Decision – Disability, Including Effects of Disability

Depression and Anxiety

219. The Claimant's GP report states that the Claimant first reported anxiety and depression in 2016. However, the GP and the Claimant appear to agree that this did not have any significant or long-lasting effects on his ability to carry out normal day to day activities at that time.

220. I have decided, in my findings of fact above, that the medical notes are the best evidence of the Claimant's illness and its effects.

221. In September 2020 the Claimant sought help from the NHS Improving Access to Psychological Therapies service ("IAPT"), for low self-esteem and depression symptoms since turning 30 years of age. He reported that the trigger for his attendance was a relationship breakup, p105. He undertook Cognitive Behavioural Therapy ("CBT") his low mood and low self-esteem in autumn 2020, but did not complete the treatment. He was signed off work, sick from 16 – 30 July 2020 and 30 November 2020 – 30 December 2020, both with low back pain, pp 548, 766, 549, 781.

222. I considered that the Claimant did have some symptoms of anxiety and depression at the end of 2020, but that these did not prevent him from working. He was treated with therapy at the time. There was no indication in 2020, even if the effects of his depression on his ability to carry out normal day to day activities were more than minor, that they were likely to last 12 months or more. He was not a disabled person by reason of depression and anxiety in 2020.

223. However, the Claimant consulted his GP in January 2021 and was noted to have a mixed anxiety and depressive disorder. The Claimant went off work, sick, from 11 March 2021. He consulted his GP on 11 and 18 March 2021, 1 and 21 April, 30 June, 13 August , 28 September and 21 December 2021, all for "Mixed anxiety and depressive disorder". P316 – 319. He was prescribed antidepressant medication throughout this period. In the medical notes, he described poor sleep and inability to work, throughout this period.

224. While the first time the GP recorded "Mixed anxiety and depressive disorder" as the reason for the Claimant's absence from work on his GP Fit Notes was on 30 June 2021, I found that the Claimant had been being treated with antidepressants for anxiety and depression from March 2021.

225. On the Claimant's work history, he never worked for the Respondent for any sustained period after March 2021. The Claimant returned to work on 3 November 2021, p588, but was signed off work on 2 December 2022, for "Mixed anxiety and depressive disorder & Keratonus"; p313. He was signed off again for "mixed anxiety and depressive disorder" on 21 December 2021, p595. He returned to work on18 January 2022, but went off work sick again on 12 February 2022, again with anxiety and depression.

226. Having worked for a month at the Tottenham Court Road store, the Claimant was signed off work again with "low back pain, anxiety and depression" from 29 April 2022 to 6 June 2022.

227. Working is a normal day to day activity.

228. By March 2022, the Claimant had, at most, worked for 3 months of the previous 12. After March 2022, he worked for 1 day only until he resigned in January 2024. He was off work throughout that period with anxiety and depression symptoms.

229. I considered that the Claimant was diagnosed with anxiety and depression in January 2021. He has had that condition continuously since that time.

230. That mental impairment had a substantial adverse effect on his ability to work, which is a normal day to day activity, from 11 March 2021.

231. He was treated with antidepressants at that point. His GP described the condition as 'stress' on his Fit notes. I considered that there was no indication that his condition was considered likely, at that point, to last for 12 months. He was being treated with medication, to address, or cure his symptoms. The description 'Stress' did not indicate a long-lasting medical condition, as opposed to a reaction to current circumstances, which might well resolve.

232. However, on 30 June 2021, the GP stated anxiety and depression as the cause of work absence, p573 and signed him off for a further 6 weeks, until 13 August 2021. That reason was also given on the GP Fit Notes, signing him off for further periods on 13 August 2021, p585 (for 6 weeks), and 28 September 2021, p586 (for 4 weeks).

233. The GP changed the description of the Claimant's condition in June 2021, indicating a more long-lasting medical condition. The Claimant had been off work for more than 6 months by 28 September 2021. That is, his depression and anxiety had had a substantial adverse effect on his ability to carry out normal day to day activities (his ability to work) for over 6 months by 28 September 2021. I considered that, when the GP signed the Claimant off work for a further 4 weeks on 28 September 2021, it was likely that those substantial adverse effects would continue until after March 2022 – in the sense that that 'could well happen'. In other words, it could well happen that the Claimant's inability to work would continue, so as to last for at 12 months or more, from the date he first went off work in March 2021. There was nothing to indicate, at that point, that the Claimant's symptoms were improving. At a welfare meeting on 11 August 2021, p574, with Mr Perumal, the Claimant said that his health had not improved and that he was on the waiting list for therapy, p574. He said that he had not read the material his GP had sent to help him.

234. I therefore decided that the Claimant was a disabled person by reason of depression and anxiety from 28 September 2021.

235. I also decided that the Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled by reason of depression and anxiety by this date. It had received a number of Fit Notes, stating that the Claimant had depression and anxiety. It had conducted welfare meetings in which the Claimant said that his symptoms were not improving. It knew that the Claimant had been off work for a significant period of time because of depression and anxiety. While the Claimant refused consent for an Occupational Health report, the Respondent knew from the GP that the Claimant had the condition and was not fit to work.

236. I will return later to the issue of whether the Respondent could reasonably have been expected to know that the Claimant was likely to be put at any substantial disadvantage by any of the PCPs, particularly in light of the Claimant's refusal to consent to an Occupational Health report and, at various times, to the Respondent obtaining a GP report.

Decision – Disability, Including Effects of Disability

Keratoconus

237. The Respondent accepts that the Claimant as the physical condition Keratoconus and that, over time, keratoconus has had an adverse effect on the Claimant's ability to carry out day to day activities, and that the effect is currently substantial.

238. From the medical evidence, the keratoconus had been diagnosed since at least 2015. Accordingly, the Claimant had that physical impairment throughout his employment.

239. However, I did not accept the Claimant's evidence on the effects of his keratoconus during his employment, at all. I did not accept that he was unable to wear his contact lenses for more than 2 – 3 hours a day. I did not accept that he suffered severe pain in his eyes, whether related to contact lens wearing, or not. I found that, during the Claimant's employment, his eyes were healthy. His eyes may have been dry on occasion, but there was no corroborating medical evidence that his eyes were sore or unhealthy, as a result. I found that he was able to wear contact lenses throughout his employment and that, when he did, his vision was excellent.

240. The degree of impairment suffered by a wearer of spectacles or contact lenses is measured by reference to the ability of the individual wearing such corrective measures, EqA 2010 Sch 1 para 5(3)(a)).

241. All the medical evidence, during the Claimant's employment, was that the Claimant's eyesight in his lenses was excellent.

242. If the Claimant had been unable to wear his contact lenses for most of the day because of eye pain, as he contended, then I would have considered his disability taking account of his vision without contact lenses, *Mart v Assessment Services Inc* [2019] IRLR 688, EAT. I rejected his evidence on this as unreliable.

243. Accordingly, I found that, while the Claimant had the physical impairment of keratoconus, at no time during his employment did the keratoconus (or the effects of the lenses he wore to correct it) have a substantial adverse effect on his ability to carry out normal day to day activities which was likely to last for 12 months.

244. The Claimant's keratoconus was not progressive the Moorfields letter of 12 June 2019, p357, said, "Mr Patira has excellent vision in his RGPs and no new problems. Surgery is not needed and at his age his keratoconus is very unlikely to progress….".

245. The Claimant was not disabled by reason of keratoconus at any time during his employment by the Respondent.

Decision - Direct Discrimination, Discrimination Arising from Disability and Disability Harassment

246. Some of the Claimant's factual allegations were said to amount to more than one form of discrimination. I have not repeated the same words where the same factual issue arises under a different heading of discrimination, but I have stated all the forms of discrimination which are alleged.

5.1 Following the Claimant's return to work on 31st December 2020, the Claimant informed Vytautas Patlaba (VP) and Alex Granville (AG) that he was under pressure, had stress at work and asked for further support to be provided, which was not forthcoming. The disability relied upon is depression and anxiety. ***(Direct Disability Discrimination and Disability Harassment****)*

247. The Claimant was not a disabled person at this time, so these complaints of direct disability discrimination and harassment fail.

248. Furthermore, on my findings of fact, I did not accept the Claimant's evidence that, when he returned to work on 31 December 2010, his workload was incredibly high, or that he was expected to work long shifts with little or no support. I considered that it was very unlikely that the Claimant asked for assistance while he was at work and the Respondent declined to give him any. What happened in practice was the opposite – the Respondent tried to help the Claimant, but the Claimant refused help and did not cooperate with the Respondent.

249. Accordingly, even if the Claimant had been a disabled person at the time, I would have rejected this complaint on its facts. It did not happen.

5.2 Fail to carry out a risk assessment after March 2021. The disability relied upon is depression and anxiety. ***(Direct Disability Discrimination and Disability Harassment****)*

250. The Respondent did not carry out a risk assessment on the Claimant after March 2021.

251. The Claimant went off work, sick, in March 2021. He returned for some short periods in 2021 and 2022. There was no evidence that the Respondent carried out 'risk assessments' for its non-disabled employees who went off sick from work, rather than referring them to Occupational Health for advice. As there was no evidence of less favourable treatment of the Claimant, compared to non-disabled comparators in the same material circumstances, the direct disability discrimination complaint fails.

252. The Claimant was not a disabled person until 28 September 2021.

253. I accepted that a failure to carry out a risk assessment might be broadly related to the Claimant's disability as disability might be the context in which the possibility of a risk assessment arose.

254. However, I did not find that the failure to carry out a risk assessment was unwanted conduct, at any time. The Claimant never asked for a risk assessment. On the facts, he rebuffed the Respondent's offers of support. When he asked for changes to his work, for example to start times, or to reduce his contracted hours, the Respondent agreed. The Claimant refused to cooperate with an occupational health referral, which would have been best placed to advise on disadvantages posed by the workplace. For example,

a. On 25 May 2021, p552, Vytas Patlaba and Sathees Perumal suggested the Employee Support Programme and that they could obtain a report from the Claimant's GP. The Claimant did not agree to either. They suggested reducing the Claimant's hours, changing his shifts and a temporary move to another department. Again, the Claimant did not agree to any of these options. He said he would think about reducing his hours;

b. On 30 June 2021, p562, the Claimant refused to be referred to Occupational Health, even when Mr Bull explained that the OH doctor

would be independent and "… simply has a better understanding of the work which you do, so could help more in what adjustments could be required."

c. While the Claimant appeared to agree to the Respondent's managers contacting the Claimant's GP directly at that point, the Respondent explained its procedure in August 2021 –" To obtain this information an independent doctor will contact your GP once you consent to it. They will ask you to visit them and asses your condition and what we can do to help assist with your situation to get you back to work. The medical professionals are not employed by Lidl, they are independent. They will make recommendations for us on how we can accommodate you returning to work. Are you happy for me to give you the form to give us the consent?" The Claimant refused to consent and, when asked what support the Respondent could give, the Claimant said that he just wanted to be left alone, p576

d. When the Claimant returned to work on 15 November 2021, he was asked at his return to work meeting, "… do you need any support, or are you happy to carry on as usual?" p590. The Claimant asked to start an hour later and this was agreed.

e. On 1 January 2023, Mr Langan asked the Claimant to consent to an OH referral to work out support for him, and the Claimant responded, "if it's optional then no."

f. On 25 January 2023, p894-896 Mr Scott asked the Claimant to provide his consent for the Respondent to obtain a medical report from his GP. The Claimant refused consent for the Respondent to obtain a report and / or the Claimant's medical records from the Claimant's GP or specialist, p658.

g. On 20 February 2023, Mr Scott asked him to reconsider, explaining the purpose of a medical report p659-660. The Claimant responded on the same day, p661, by email, reiterating his refusal of consent and asking Mr Scott to stop sending him emails and letters about it.

h. At a further welfare meeting on 27 April 2023, the Claimant was asked if there was anything which could be done to help him return to work. He replied that there was not, p682.

255. In reality, the Claimant refused the Respondent's offers of assistance to help him work. The failure to carry out a risk assessment was not harassment because it was not unwanted.

5.3 Fail to carry out a proper investigation into the Claimant's illness from March 2021. The disability relied upon is depression and anxiety. ***(Direct Disability Discrimination and Disability Harassment****)*

256. As set out in my findings of fact, the Respondent held numerous, regular welfare meetings with the Claimant throughout his time off work sick, and on his return to work. At these meetings the Respondent asked the Claimant about his illness and what could be done to support him. The Respondent repeatedly tried to obtain the Claimant's consent to medical reports on the Claimant's illness.

257. There was no evidence that the Respondent would have treated a non-disabled employee any differently. The direct discrimination complaint fails.

258. Further, as set out above, the Claimant refused to consent to the Respondent obtaining medical reports and Occupational Health reports. The Respondent tried to investigate the Claimant's illness, but the Claimant did not want the Respondent to investigate his illness. Its failure was not unwanted and the harassment complaint fails.

5.4 Following the Claimant's return to work on 16th January 2022, offering two other colleagues [Claimant to provide names] alternative roles that required less heavy lifting. The disability relied upon is depression and anxiety. {Anna – in witness statement} ***(Direct Disability Discrimination and Disability Harassment****)*

259. There was no clarity from the Claimant as to what was the title of the promoted role or what its duties were, or who the comparators were. The burden of proof is on the Claimant to prove the primary facts. On the evidence, I was unable to find that any colleagues were offered any particular roles, with any particular duties, when the Claimant was not. This allegation fails on its facts.

5.5 Following the commencement of the Claimant's new role as Night-time Store Assistant on 1st March 2022, the Respondent failed to support the Claimant or reduce his workload despite on more than one occasion announcing he could not handle the workload. The disability relied upon is his depression and anxiety. ***(Direct Disability Discrimination and Disability Harassment****)*

260. I rejected the Claimant's evidence that he asked for support, or changes to his job, but that the managers refused this. This allegation fails on its facts.

5.6 From 5th April 2022, the Claimant was blocked by Paul Jaggs (PJ) on WhatsApp so he could not communicate with him. The disability relied upon is depression and anxiety. ***(Direct Disability Discrimination and Disability Harassment****)*

261. The Claimant was not blocked by Mr Jaggs on WhatsApp from 5 April 2022. The Claimant and Mr Jaggs exchanged many, many WhatsApp messages after that date, p912 – 950. Mr Jaggs occasionally blocked the Claimant's messages. When he did, the Claimant was able to send sick notes to human resources and to contact the store by telephone.

262. I accepted Mr Jaggs' evidence that he felt that the Claimant was sending him too many messages on his personal phone, including during Mr Jaggs' free time, and appeared ungrateful even when Mr Jaggs tried to help him, so that Mr Jaggs occasionally blocked the Claimant's WhatsApps because of this. I observe that Mr Jaggs was extremely responsive to the Claimant and tolerant of his frequent messaging to his personal phone, even when Mr Jaggs was on leave.

263. Mr Jaggs blocking the Claimant was nothing to do with the Claimant's disability. It was a normal human reaction to a demanding and unreasonable level of messaging. This was neither direct disability discrimination nor disability harassment.

*5.7 When the Claimant returned to work from his sickness absence on 14th June 2023, the Night Manager, Richard, in response to the Claimant asking whether he could go home was told to push harder and that there was too much work to do. The disability relied upon is depression and anxiety****. (Direct Disability Discrimination, Disability Harassment and Discrimination Arising from Disability)***

264. The Claimant returned to work for one day on 14 June 2023. He worked a shorter shift, from 23.00 – 05.11. Mr Jaggs told him to build up slowly and see how the shift went. I did not accept the Claimant's evidence that Mr Marshall told him to work harder – his evidence was vague and unconvincing. I accepted Mr Marshall's evidence that he did not recall telling the Claimant to work harder and that the Claimant went home early anyway.

265. This allegation failed on the facts.

5.8 On 15th June 2023, the Respondent pressured the Claimant to sign his new contract without having the opportunity to read the terms. The disability relied upon is his keratoconus.

5.9 On 15th June 2023, the Respondent failed to inform the Claimant that he would lose his contractual entitlements, including his holiday entitlement and sick pay when signing his new contract. The disability relied upon is keratoconus.

5.10 On 15th June 2023, the Respondent failed to adjourn the meeting despite it being blatantly clear that the Claimant was not in a position to read his new contract. The disability relied upon is keratoconus.

(All: Direct Disability Discrimination, Disability Harassment and Discrimination Arising from Disability)

266. On the facts, I decided that the Claimant willingly, and in full knowledge of what he was doing, signed the contractual change to 20 hours per week. On the facts, he had been sent the contractual change document before he signed it.

267. I did not accept his evidence that he had been in pain and that he could not read the document. The Claimant was not a credible witness in this regard.

268. On the facts, although his hours of work changed, the contractual terms regarding his entitlement to holiday pay and sick pay did not change.

269. The contractual term regarding holiday, for example, remained as follows: "If you are employed full time your total annual holiday entitlement Is 30 days paid holiday per Holiday Year (inclusive of statutory and bank holidays), rising to 35 days per Holiday Year (inclusive of statutory and bank holidays) from the start of the Holiday Year following the date upon which you have completed four years continuous employment with the Company. If you are employed part time your holiday entitlement is reduced pro rata according to the number of days you work." The Claimant was contractually entitled to a pro rata amount of holiday pay, calculated on the basis of his part time work.

270. Likewise, the contractual term regarding sick pay had always provided that sick pay was to be pro-rated for part time work.: " 8.1 .. the Company may in its absolute discretion continue to pay your salary… during any period(s) of absence… as detailed below…: Length of Service …More than six months: 10 days. …If you are employed part time your entitlement to Company Sick Pay is reduced pro rata according to the number of days you work."

271. The Claimant incorrectly thought that he had lost his entitlement to holiday pay. On the facts, he did not receive holiday pay in his hand because the rolled-over hours which he owed the Respondent considerably exceeded the hours he accrued in holiday pay. This was not related to signing the new contract.

272. All the factual allegations in 5.8 – 5.10 fail on their facts.

10.5 The Claimant's contract of employment states that the Respondent may consider making a salary payment in full during a period of sickness inclusive of any SSP. The Respondent failed to consider paying the Claimant his salary in full or at a percentage since the Claimant's sickness absence was caused as a result of the Respondent's negligence. The disability relied upon is depression and anxiety.

11.1 The Claimant considers his absence to be something arising as a consequence of his disability.

12 Was the unfavourable treatment because of that sickness absence? ***(Discrimination Arising From Disability)***

16.6 Not using their discretion to pay employee's salary in full or at a percentage during a sickness absence (PCP).

Meant he suffered a reduction in pay (substantial disadvantage); and

Reasonable Adjustment: (The Respondent should have) Used its discretion to pay the Claimant during his sickness absence caused as a result of the Respondent's negligence ***(Failure to Make Reasonable Adjustments)***

Also relied on as Disability Harassment: 22.3 *Failed to consider paying the Claimant during his sickness his salary in full or at a percentage.*

273. On my findings of fact, the Respondent ought reasonably to have known that the Claimant was a disabled person by reason of depression and anxiety from 28 September 2021. These claims could therefore arise from that date.

274. Both the discrimination arising from disability and the failure to make reasonable adjustment complaints are based on the Claimant's contention that the Respondent caused his sickness absence by its negligence.

275. On the facts, I find that the Claimant's sickness absence was not caused by the Respondent's negligence. The Respondent did not require the Claimant to work an unduly heavy workload, nor did it require him to work long shifts, with little or no support. I did not find that the Claimant asked for assistance while he was at work, nor did I find that the Respondent declined to give him assistance. As I have made clear, what happened in practice was the opposite – the Respondent tried to help the Claimant, but the Claimant refused help and did not cooperate with the Respondent.

276. The Respondent has sick pay policies. The Claimant's contract provides, 8.1 ".. the Company may in its absolute discretion continue to pay your salary… during any period(s) of absence… as detailed below…:". As the Claimant had worked for more than 6 months, he was contractually entitled to 10 days' sick pay in a year when working full time.

277. On my findings of fact, the Claimant received his entitlement to Company Sick Pay during his employment.

278. The Respondent also has a "Discretionary Sick Pay" policy. I accepted Ms Murray's evidence that the Respondent rarely uses it, save , in exceptional, or extreme circumstances, such as end of life care, or a serious accident at work.

279. Regarding the Claimant's reasonable adjustment complaint, I decided that the Respondent paid sick pay in accordance with its policies, which included not paying full pay for the whole of an employee's sickness absence. Not paying full pay during sickness absence was a PCP.

280. I accepted that not paying full pay might put a disabled person at a substantial disadvantage, compared to non-disabled people, as disabled people may be more likely to be off work sick than non-disabled people and they are more likely to suffer reduction in pay as a result.

281. It did not appear that the Claimant relied on any other substantial disadvantage in relation to this PCP. He did not give evidence of any other substantial disadvantage.

282. The Respondent did not contend that it lacked the resources to pay additional sick pay. As the Respondent is a large employer, with considerable resources, it would be surprising if it had. Paying the Claimant more sick pay would also have reduced the disadvantage to him. Therefore paying additional sick pay might have been a reasonable adjustment.

283. However, I considered that the Respondent had shown that it was not a reasonable adjustment to pay the Claimant any additional sick pay during his sickness absence. I considered that the Respondent had shown, through its policies, that it had

adopted a reasonable approach to sick pay for its employees. It provided 2 weeks' entitlement (10 days) per year and retained discretion to pay additional sick pay if there were circumstances which justified this, in particular circumstances.

284. As I have stated, the Claimant's contention was that the adjustment was reasonable because the Respondent had caused his absence. That was not the case. There were no other circumstances in this case which indicated that the balance which the Respondent adopted to sick pay in its policies should have been adjusted for the Claimant. There was no evidence that, for example, a short extension to sick pay might have allowed the Claimant to return to work. Indeed, there were facts which indicated strongly that it would not have been reasonable to make an adjustment to the policies in favour of the Claimant. The Claimant refused to be referred to Occupational Health, which might have facilitated a return to work. He told the Respondent to leave him alone, despite the Respondent conducting numerous welfare meetings, and asking repeatedly what support might help him to return to work. The Claimant's failure to engage with OH and with the Respondent obstructed a return to work. I considered that it would not have been a reasonable adjustment to pay him during his resulting absence.

285. This reasonable adjustment claim fails.

286. Regarding the Discrimination Arising from Disability claim, I did not find that the Respondent had failed to consider exercising its discretion to pay him during sick absence because the Claimant had been absent from work. There was no evidence that it failed to consider exercising its discretion because he was absent. As I have found, the Respondent did not cause the Claimant's absence, so the facts of his absence did not suggest that any discretion should be exercised. This discrimination arising from disability claim fails.

287. Regarding harassment, even if the failure to pay him was unwanted and even if the failure to pay was tangentially related to his absence because it coincided with his absence, I found that it was not harassment. There was absolutely no evidence that the purpose was to violate the Claimant's dignity and/or create an intimidating, hostile, degrading, humiliating and offensive environment for him.

288. Even if the Claimant perceived that the failure to pay him violated his dignity and/or create an intimidating, hostile, degrading, humiliating and offensive environment for him, it did not have that effect. It was not reasonable for it to have that effect, given that the Claimant was treated in accordance with the Respondent's standard sick pay policy and the circumstances did not justify a departure from it.

5.12 On 9th February 2024, the Claimant received a letter from the Respondent stating that the Claimant had owed them a sum of £934.25. The disability relied upon is depression and anxiety ***(Direct Disability Discrimination, Disability Harassment and Discrimination Arising from Disability)***

289. The Claimant received a letter from the Respondent on about 9 February 2024 requesting repayment of £934.25. That was the net overpayment which his final payslip showed was due from the Claimant to the Respondent.

290. Claimant's contract clause 16 allowed the Respondent to deduct overpayments, p613.

291. The Respondent's payroll system automatically flags any leaver whose final payslip figure is in the negative. A standard letter requesting repayment is auto-generated and sent out automatically. These letters go out to all employees who owe sums to the company when they leave, not just those on sickness absence. It is an automated system.

292. The Claimant was not treated differently to non-disabled employees who leave the Respondent's employment owing money. This was not direct disability discrimination.

293. Regarding harassment, the letter was unwanted by the Claimant. I accepted that he was very upset to be told that he owed money to the Respondent. The letter was related to sickness absence and, therefore, disability, because the overpayment was still owing because he had not returned to work to enable him to repay the salary overpaid in the first month of sick leave.

294. However, I decided that this was not harassment. As it was an automated letter, its purpose was not to violate the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him. Further, in all the circumstances of the case, I decided that it did not have the effect. As the Respondent was entitled to recover such sums under a contract which the Claimant had signed, it was not reasonable for the letter to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, no matter how the Claimant felt about it.

295. I also decided that this was not discrimination arising from disability. It was not unfavourable treatment to seek to recover overpayments which were due to the Respondent and which it was contractually entitled to recover.

296. The complaints in relation to the 9 February 2024 letter fail.

22.2 From 11th March 2021 to 16th January 2022, the Claimant was required to attend monthly meetings with the Respondent, with two employees present which caused the Claimant further stress. ***(Disability Harassment)***

297. The Respondent did hold welfare meetings with the Claimant regularly during his sickness absence from the warehouse. These meetings were not monthly, but they were regular. The Respondent's policy on sickness absence provided for such meetings.

298. I accepted that they were unwanted to some extent, in that the Claimant told the Respondent that he did not want help and wanted to be left alone - "I don't need your help. I want to be left alone for the period of my sickness." P556.

299. The meetings were related to his disability in that they were related to his absence, which arose from his disability.

300. However, I did not find that requiring the Claimant to attend regular meetings with 2 employees was an act of harassment. The meetings were in accordance with policy. On the record of the meetings, I found that they were conducted in a polite and calm manner, and were directed to establishing what support might help the Claimant return to work. They were clearly not intended to violate his dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him.

301. Furthermore, it did not have that effect. It was not reasonable for it to have that effect, in all the circumstances of the case, including the Claimant's perception. The Respondent's suggestions for helping the Claimant during the meetings - using its Employee Support Programme and seeking medical report, were kindly meant. The Claimant was reassured that all that was expected of him was to do his normal hours. The Respondent acted entirely reasonably and supportively.

Reasonable Adjustments and one Further Alleged Act of Harassment

Did the Respondent have the following PCPs

16.1 Requiring employees to manage a substantial workload.

16.2 Requiring employees to manage a substantial workload without support.

16.3 Requiring or permitting staff to work such hours as are necessary to complete their work tasks.

16.4 Not investigating an employee's illness upon having knowledge of an employee's disability.

16.5 Not carrying out a risk assessment upon having knowledge of an employee's disability.

16.6 Not using their discretion to pay employee's salary in full or at a percentage during a sickness absence.

16.7 Not supporting employees during their period of sickness absence.

302. Regarding 16.1: This PCP was applied. It was not entirely clear to me what 'substantial' meant in this context. However, I accepted that employees doing the same work as the Claimant were expected to undertake manual work, for a number of hours, which could be tiring, both in the warehouse and in the Tottenham Court Road Store. Even though I have <u>not</u> found that the Claimant was required to do more work than other employees, I accepted that this was a "substantial" workload, in the sense that it was more than minor or trivial work.

303. Regarding 16:2: This PCP was not applied. On the facts, I did not find that the Respondent required employees to undertake a substantial workload without support. The Claimant was provided with a training programme when he commenced work, which he passed, p521. I rejected the Claimant's evidence that he was not offered support, even though he asked for it. Managers did offer support at welfare meetings

but the Claimant obstructed this. Managers also offered support at return to work meetings.

304. Regarding 16.3: This PCP was not applied. The Respondent did not require employees to stay after their contracted hours to complete tasks. The warehouse hours evidence showed that the Claimant did not work any amount significantly over his rostered hours, p743 – 820. The Claimant was told in a welfare meeting that all the Respondent needed was for him to complete his contracted hours, p553. The Tottenham Court Road Store hours also showed that the Claimant did not work any amount significantly over his rostered hours, p822. The Claimant agreed in oral evidence was that he was not required to work overtime. Mr Marshall gave the same evidence.

305. Regarding 16.4: This PCP was not applied. The Respondent tried to investigate the Claimant's illness but the Claimant prevented it from doing so. The Claimant was invited to welfare meetings regularly to discuss his absence and the reasons for it. In these meetings, the Claimant was asked what support he required in the warehouse; and in the store. The Claimant was repeatedly offered an OH referral so that the Respondent could get specialist advice. He refused to give consent for that, or consent for the Respondent to contact his doctor.

306. Regarding 16.5: This PCP was applied, the Respondent did not carry out risk assessments. Its practice was to refer employees who were off sick to Occupational Health.

307. I have already addressed 16.6 above.

308. Regarding 16.7. This PCP was not applied, see 16.4 above.

309. I therefore decided that PCPs 16.1 and 16.5 were applied.

310. It was not clear whether the Claimant alleged that all the substantial disadvantages were caused by all the PCPs. He gave no evidence regarding any disadvantages caused by the PCPs. The alleged substantial disadvantages were also very generalised. Given that the Claimant was a litigant in person, I considered the available evidence and I found as follows.

311. The List of Issues asked whether 16.1 caused the Claimant additional stress and anxiety, leading to him struggling with his workload and going off sick and or losing sick pay and or being constructively dismissed. I did not accept, on the facts, that the Claimant's manual work caused him, or was likely to him, as a person who suffers from depression and anxiety, additional stress and anxiety. In fact, the Claimant was upset, not by his work, but by a perfectly legitimate decision to give him a final written warning for his conduct towards a supervisor - when he used swear words following the supervisor correctly questioning his use of the wrong equipment.

312. I did not accept, without evidence, that standard manual work in a warehouse or store was likely to cause additional stress to people who are disabled with depression and anxiety, or to make it likely that they go off work sick because they struggle with the work. Engaging regularly in standard manual work might well be therapeutic for people who are disabled by reason of depression and anxiety.

313. I therefore did not accept that the Claimant was likely to be put at the other substantial disadvantages either - it appeared that the loss of pay and/or constructive dismissal disadvantages would flow from the other alleged disadvantages.

314. The Respondent was therefore not under a duty to make adjustments to the PCP of requiring employees to manage a substantial workload.

315. In any event, even if the duty did arise, I did not find that the Respondent failed to make an adjustment of reducing the Claimant's workload and/or providing him with adequate support to undertake his role. As I have found above, the Respondent offered support and adjustments. Either the Claimant did not accept them, or the Respondent agreed to the Claimant's requests. When the Claimant asked to start an hour later, the Respondent agreed. Every time the Claimant asked to reduce his contractual hours, the Respondent allowed him to do so.

316. The Respondent did not fail to make a reasonable adjustment in respect of the PCP of requiring employees to manage a substantial workload.

317. The List of Issues also asked whether PCP 16.5, not carrying out risk assessments, was likely to put the Claimant at substantial disadvantages such as causing him stress and anxiety, struggling with workload and being more likely to go off sick.

318. As I have found that the Claimant did not want a risk assessment and did not cooperate with the Respondent's attempts to support him, or to arrange an occupational health assessment, I did not decide that the failure to conduct a risk assessment put him at such disadvantages. He was hardly likely to be put at a disadvantage by the Respondent failing to do something which he did not want it to do. In any event, there was no evidence as to what the risk assessment would have found, or recommended. In the absence of such evidence, it was impossible to conclude that failing to carry out a risk assessment was likely to put the Claimant at a substantial disadvantage.

319. However, even if he was likely to be put at all these disadvantages, I decided that the Respondent did not fail to make a reasonable adjustment by failing to carry out a risk assessment. It offered him several referrals to Occupational Health, for advice from a specialist Occupational Health doctor. I found that such a referral would be likely to have made whatever recommendations were appropriate for the Claimant's work. That was substantively the same as offering a risk assessment.

320. ***The Claimant also relied on the PCPs as acts of disability related harassment*** – *Issue 22.1*

321. Only PCPs 16.1 and 16.5 were applied. I have already found that failing to carry out a risk assessment was not an act of harassment.

322. I did not find that requiring the Claimant to undertake a substantial workload was an act of harassment. It was not related to his disability. As I have made clear in my findings of fact, he was given the same work as other employees doing the same jobs. In the warehouse, he was not given a heavier workload than others, nor did he work longer hours. In the Tottenham Court Road store, the Respondent required the

Claimant to undertake the normal role of a nightshift store assistant. He was not required to work longer and longer hours and he was not required to work overtime. He was required to unload pallets at a rate which the Respondent had assessed it was possible for employees to do.

Dismissal

*10.6 On 5th January 2024, the Claimant resigned with immediate effect such that his resignation constitutes a discriminatory constructive dismissal. The disabilities relied upon are keratoconus, depression and anxiety. (**Direct Disability Discrimination, Disability Harassment and Discrimination Arising from Disability)***

Constructive and Unfair Dismissal pursuant to the Employment Rights Act 1996, sections 94 and 98

It is accepted that the Claimant resigned with immediate effect on 5th January 2024.
27. Did the Respondent commit a repudiatory breach of contract by:
27.1 The acts in paragraphs 5.1 to 5.12, 10.1 to 10.7, 16.1 to 16.7, 22.2 and 22.3 above.
27.2 Breach of duty of care by failing to adequately support the Claimant.
27.3 Failing to carry out a risk assessment to his workload.
27.4 Overworking the Claimant to the extent beyond his usual working hours.
27.5 Pressuring the Claimant to sign the contract that would reduce his working hours without consulting with the Claimant and explaining what this would entail; and
27.6 Failing to support the Claimant whilst on long-term sick leave.
28. If so, was there reasonable and proper cause for said conduct in the circumstances?
29. If not, was said conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent in the circumstances?
30. Did the Respondent's conduct, individually or cumulatively amount to a fundamental repudiatory breach of the Claimant's contract of employment?

323. I have not found that the Respondent subjected the Claimant to any act of direct disability discrimination, disability harassment or discrimination arising from disability, nor did it fail to make reasonable adjustments, before he resigned.

324. He therefore was not entitled to resign as a result of any discriminatory act by the Respondent. There was no discriminatory constructive dismissal.

325. Insofar as the Claimant relies on the facts of those allegations of discrimination as amounting to a breach of the duty of trust and confidence (even if they are not acts of discrimination), I have found that many did not occur at all. In respect of the others, for the reasons I have given in rejecting the discrimination complaints, I find that the Respondent had reasonable and proper cause for doing them.

326. Addressing the specific matters the Claimant has relied on as amounting to a breach of the duty of trust and confidence and/or other repudiatory breach of contract:

327. 27.2 Breach of duty of care by failing to adequately support the Claimant: this did not happen. The Respondent made every effort to support the Claimant, but was rebuffed by him.

328. 27.3 Failing to carry out a risk assessment to his workload: The Respondent had reasonable and proper cause for this. It reasonably sought the Claimant's consent to refer him to Occupational Health on numerous occasions, but the Claimant refused. The Claimant did not engage with the Respondent.

329. 27.4 Overworking the Claimant to the extent beyond his usual working hours: This did not happen.

330. 27.5 Pressuring the Claimant to sign the contract that would reduce his working hours without consulting with the Claimant and explaining what this would entail: This did not happen.

331. 27.6 Failing to support the Claimant whilst on long-term sick leave: As above, the Respondent did not fail to do this.

332. In summary, on all the facts, the Respondent did not commit any repudiatory breach of contract. It had reasonable and proper cause for all its decisions and actions. In reality, the Respondent did all it could to help the Claimant. Its managers were supportive and sympathetic towards him.

333. For the avoidance of doubt. Mr Jaggs went out of his way to communicate with the Claimant and to help him. He only stopped communicating with the Claimant after excessive, demanding and unappreciative WhatsApps from the Claimant. Mr Jaggs had reasonable and proper cause for ceasing WhatsApp communication, especially given that the Claimant had other means of communication with the Respondent.

334. Furthermore, the Respondent's action in allocating holiday pay sums, to reduce the deficit owed by him to Respondent, was in accordance with the Claimant's contract of employment.

335. None of the Respondent's actions, whether separately or together, entitled the Claimant terminate his contract of employment.

336. The Respondent did not constructively dismiss the Claimant.

Conclusion

337. All the Claimant's claims fail. A remedy hearing will not be required.

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Employment Judge **Brown**

Date: 26 March 2025

Case Number: 2219445/2024

SENT to the PARTIES ON

9 April 2025

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FOR THE TRIBUNAL OFFICE