RESERVED **Case No: 6000726/2023**

EMPLOYMENT TRIBUNALS

Claimant: **Mr. S Taylor**

Respondent: **Asda Stores Limited**

Heard at: **Lincoln**

On: **3rd, 5th, 6th, 10th March 2025 (Hybrid on 10th March 2025 only)**
12th March 2025 (In Chambers in Nottingham)

Before: **Employment Judge Heap**

Members: **M. J Hallam**
Mr. J Purkis

Representation
Claimant: **Mrs. M Owen - Lay representative**
Respondent: **Ms. S Harty - Counsel**

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent. However, even had a fair procedure been followed the Claimant would nevertheless have been dismissed by the Respondent and any compensatory award is reduced by 100% to reflect that fact. The Claimant is entitled to a basic award but that should be able to be agreed between the parties without the need for a Remedy hearing.

2. The complaints of discrimination arising from disability all fail and are dismissed.

3. The complaints of harassment relying on the protected characteristic of disability all fail and are dismissed.

4. If a Remedy hearing is required where agreement as to the amount of the basic award cannot be reached the Claimant should inform the Tribunal within 8 weeks of the date that this Judgment is sent to the parties.

RESERVED REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mr. Shaun Taylor (hereinafter referred to as "The Claimant") against his now former employer, Asda Stores Limited (hereinafter referred to as "The Respondent"). The complaint is one of discrimination relying on the protected characteristic of disability and of unfair dismissal contrary to section 94 Employment Rights Act 1996 ("ERA 1996"). The complaints of disability discrimination are ones of discrimination arising from disability, a failure to make reasonable adjustments and harassment.

2. The Claim Form was presented on 23rd April 2023 following a period of early conciliation which took place between 24th February 2023 and 7th April 2023.

3. The Claim Form was relatively scant on detail and the Respondent requested in their ET3 Response that further particularisation be provided. The Claimant, having by that stage instructed solicitors, provided further information about the complaints that he was advancing.

4. The claim came before Employment Judge V Butler on 25th August 2023 for a Preliminary hearing for case management. Employment Judge Butler identified that the Claimant was advancing complaints of a failure to make reasonable adjustments, including the provision of auxiliary aids, discrimination arising from disability and unfair dismissal. She also granted a disputed application to amend the claim to include complaints of harassment relying on the protected characteristic of disability. A direction was made to finalise a list of issues before the hearing.

5. Although labelled as a draft in the hearing bundle before us, the parties confirmed at the outset of the hearing that the list of issues which is at pages 63 to 67 is agreed as being those that the Tribunal is required to determine. That was with the exception of one issue that we raised with Mrs. Owen in that it appeared that the "something arising" from disability as set out at paragraph 19 of the list of issues was not limited to the Claimant's sickness absence – the Claimant's case being that he was in fact able to return to work - but also his inability to return to driving duties. By agreement that was added to the issues that we were required to determine.

6. We also raised with the Claimant and Mrs. Owen that other that the complaint about a failure to provide auxiliary aids, the complaint of a failure to make reasonable adjustments appeared to have been overly and unnecessarily complicated. It appeared to us that the real issue was that the provision, criterion or practice ("PCP") was the requirement to return to work undertaking the role for which the Claimant was employed to do. That placed the Claimant at a substantial disadvantage because he was unable to do so on account of his visual disability and no longer having a driving licence and the reasonable adjustment was to provide him with an alternative role.

7. However, Mrs. Owen indicated that the Claimant wanted to stick with the claim as it was in the list of issues. The Claimant having been legally advised in that regard we obviously respected their decision and dealt with the claim as it featured in the list of issues.

8. We did also raised with Mrs. Owen before we heard any evidence that it would be necessary for her to identify, because it was not entirely clear in respect of the failure to make reasonable adjustments claim, which substantial disadvantage related to which PCP and what the reasonable adjustment was in each case which was said to ameliorate that disadvantage. That did not take place and so we have dealt with matters as best we can based on the evidence that we heard.

9. We also raised that the Claimant's witness statement did not deal with any issues as to jurisdiction in the event that we found that some of the discrimination complaints had been presented out of time. Ms. Harty agreed that she would deal with that matter in her cross examination so that we had the necessary evidence on the point.

10. It was agreed that we would deal in the first instance with liability only. We did not hear any evidence as to remedy but as we observe above that should be a matter capable of resolution between the parties without the need for a further hearing.

THE HEARING, WITNESSES AND CREDIBILITY

11. The hearing proceeded as an attended hearing on the dates set out above. All parties were physically in attendance with the exception of 10th March 2025 when Ms. Harty had applied to attend remotely via Cloud Video Platform as a result of the distance that she would otherwise have to travel to attend in person following the weekend break. There were no objections to that course and we proceeded accordingly. That remote attendance did not cause any difficulties.

12. After hearing evidence and submissions the Tribunal deliberated privately on the final day of hearing time, the parties having been advised that there would be likely to be insufficient time to deliver an oral Judgment within the time allocated. Accordingly, the decision was reserved and the patience of the parties in awaiting the same has been very much appreciated by Employment Judge Heap who has also had to attend to other cases and lengthy Judgments at the same time as this one.

13. The Claimant was legally represented until the point of the hearing before us. At some stage before the hearing he parted company with his representative and was represented at the hearing by his partner, Marie Owen. We are grateful to her for stepping in to assist the Claimant, including by way not only of navigating his statement and the bundle but also taking up the difficult task of representing him at the hearing, including cross examination of witnesses from the Respondent. We made adjustments to the process to assist Mrs. Owen as a lay representative recently taking up the mantle of representation. That included identifying issues that she had not covered in cross examination

and providing time for her to prepare questions about those matters where it was needed.

14. The Claimant's sight difficulties mean that he experiences problems with reading and writing. Accordingly, as an adjustment documents had to be read out loud. Mrs. Owen read out at our suggestion the Claimant's witness statement for him so that he could confirm that the same was accurate prior to the commencement of his evidence.

15. We made a further adjustment in that we did not require the Claimant to give evidence from the witness stand and he was able to remain next to Mrs. Owen to assist in navigation of the hearing bundle and so that documents could be read where necessary. Ms. Harty also assisted by reading the portion of a document that she wanted the Claimant to comment upon although we made it plain that if he wanted any further parts to be read out then he should say so.

16. Breaks were also offered as and when the need arose.

17. There was no indication from the Claimant or his representative that he had any difficulties during the hearing which were not remedied by the adjustments referred to above.

18. We heard from the Claimant on his own account. On behalf of the Respondent we heard from:

    a. Andrew Burkitt – one of the Claimant's former line managers;

    b. Samantha Mennell – later also one of the Claimant's former line managers;

    c. Christopher Noone-Wright – the manager who made the decision to dismiss the Claimant;

    d. Shannon Nelthorpe who dealt with the Claimant's appeal against the decision to terminate his employment and a grievance that he had raised.

19. We did not have any particular concerns with regard to the credibility of any of the witnesses from whom we heard and we considered that largely they were seeking to provide us with an accurate account. There were on occasions difficulties with recollections but that is not unusual given that the parties were being asked to provide detail regarding events which had occurred some number of months before the hearing. In some cases we did not accept all of the evidence of a party or preferred the evidence of one over another. Where that has happened we have given the reasons for that.

THE LAW

20. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be below.

21. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 15, 20, 21, 26 and 39.

22. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

"An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;
(b)as to the terms on which A offers B employment;
(c)by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a)as to B's terms of employment;
(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c)by dismissing B;
(d)by subjecting B to any other detriment.
(3) An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;
(b)as to the terms on which A offers B employment;
(c)by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—
(a)as to B's terms of employment;
(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c)by dismissing B;
(d)by subjecting B to any other detriment.

23. Section 15 deals with the question of discrimination arising from disability and provides as follows:-

"(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."

24. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can again be established that that unfavourable treatment was in consequence of something arising from disability. The Code assists in the interpretation of the term "unfavourable" treatment and provides that it requires the employee to have been "put at a disadvantage" (paragraph 5.7 of The Code).

25. It is not sufficient, however, to simply show that a person is disabled and receives unfavourable treatment, that unfavourable treatment must be in consequence of <u>something arising</u> from the disability.

26. Equally, the unfavourable treatment in question is not the disability itself but must arise in consequence of the employee's disability – such as disability related sickness absence. This means that there must be a connection between whatever led to the unfavourable treatment and the disability (paragraph 5.8 of The Code) and which can be referred to as the "causation" question.

27. The Employment Appeal Tribunal provided a useful analysis with regard to the causation question in the context of a Section 15 EqA 2010 claim in **<u>Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305</u>**. **<u>Weerasinghe</u>** sets out a two-stage approach and that, firstly, there must be something arising in consequence of the disability and secondly, the unfavourable treatment must be "because of" that "something".

28. Harassment is dealt with by way of the provisions of Section 26 EqA 2010, which provide as follows:

"(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".

29. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant. However, in respect of a complaint of harassment, the word "relate" has a broad meaning (see for example paragraph 7.10 of the EHRC Code).

30. As restated by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:

a. What was the conduct in question?

b. Was it unwanted?

c. Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?

d. Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?

e. Was the conduct related to the protected characteristic relied upon?

31. Section 20 and 21 EqA 2010 sets out the duty to make reasonable adjustments and provides that:

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

(2)The duty comprises the following three requirements.

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

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter

in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

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

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a)removing the physical feature in question,
(b)altering it, or
(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a)a feature arising from the design or construction of a building,
(b)a feature of an approach to, exit from or access to a building,
(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column".

"A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

32. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The EHRC Code of Practice).

33. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice ("PCP");
- A physical feature of the employer's premises; or
- An employer's failure to provide an auxiliary aid.

34. Where the claim relates to a PCP, this "*should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*" imposed by the employer (paragraph 6.10 of The EHRC Code of Practice).

35. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11**).

36. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps *as it is reasonable to take* (our emphasis) in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

Jurisdiction

37. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

"Proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it".

38. Therefore, Section 123 provides that proceedings must be brought *"within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".* That three month time limit is subject to an extension for the period of ACAS Early Conciliation which also "stops the clock" for period that the parties are engaged in that process.

39. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is "just and equitable" to allow time to be extended and allow the complaint(s) to proceed out of time.

40. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and will usually have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**). The burden is firmly upon a Claimant to persuade the Tribunal that it is just and equitable to extend time, not on the Respondent to show that it is not.

41. In considering whether to exercise their discretion, a Tribunal will often consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

42. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. The guidance above should not be used as a steadfast or rigid checklist. Instead, the best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular, the length of, and the reasons for, the delay (see **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23**).

43. The burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

The EHRC Code

44. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Unfair dismissal

45. Section 94 Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

46. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's capability. The burden is upon the employer to satisfy the Tribunal on that question and they must be satisfied that the reason advanced by the employer for dismissal is the reason asserted and which is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the dismissal of the employee. A reason for dismissal should be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

47. It is therefore for the employer to satisfy the Tribunal as to the reason for dismissal. If they are not able to do so, then a finding of unfair dismissal will follow.

48. However, if an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

49. The all-important question of fairness is contained with Section 98(4) ERA 1996 which provides as follows:

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was capability) *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

50. There are many reported authorities concerning termination of employment of employees suffering long-term ill health but for the most part they all illustrate the point made by Phillips J in one of the first such cases, **Spencer v Paragon Wallpapers Ltd [1977] ICR 301**, that:

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances."

51. It was also noted in the same case by Phillips J that the relevant circumstances include *"the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do".*

52. Cases of this nature are therefore inherently fact sensitive but key to the consideration of fairness in the context of a capability dismissal (once it has either been established that there was a potentially fair reason to dismiss on that basis or where it is not in dispute) is the process adopted by the employer before dismissing for that reason. The relevant considerations are whether the employer:

    a. Consulted with the employee concerned;

    b. Undertook a proper medical investigation so as to establish the nature of the illness and its prognosis; and

    c. Gave consideration to other options such as redeployment, adjustments to working arrangements or ill health retirement where the employee is incapable of continuing in their current position.

53. Again, guidance can be found in that regard from the decision in **Paragon Wallpapers** and the observations as follows:

    "In cases of ill health…usually, what is needed is a discussion of the position between the employer and the employee, so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover his health."

54. The burden is no longer upon the Respondent alone to establish that the requirements of Section 98(4) ERA 1996 were met in respect of the dismissal. This is now a neutral burden.

55. However, we remind ourselves that an Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges both the employer's processes and decision making by the yardstick of the reasonable employer and can only say that the dismissal was unfair if either falls outside the range of responses open to the reasonable employer. (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**). Put another way, could it be said that no reasonable employer would have done as this employer did?

56. As to compensation, there are factors which can affect the amount of any compensatory award which a Respondent may be Ordered to pay to a Claimant in a successful claim of unfair dismissal. One of those reductions is to reflect the likelihood that there would have been a fair dismissal in any event absent any procedural flaws (see **Polkey v AE Dayton Services Ltd [1987 IRLR 503**).

FINDINGS OF FACT

57. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have therefore invariably not made findings on each and every issue where the parties are in dispute with each other unless that is necessary for the proper determination of the complaints before us as to do otherwise would be both disproportionate and unnecessary.

58. The relevant findings of fact that we have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before us and which were before the witnesses.

The Claimant's role and employment with the Respondent

59. The Claimant was employed by the Respondent as a customer delivery driver between 12th August 2018 until his employment was terminated with effect from 13th February 2023. The role that the Claimant had involved collecting goods and groceries that had been picked and packed by other members of staff, loading them onto a van and delivering them to the Respondent's customers. There is no question that the Claimant was good at his job and was dedicated to it and he regularly worked long hours. We have no doubt at all from the evidence that we have heard that he was a valued member of staff and that the Respondent would have been more than happy for him to return to a driving role had he been able to do so.

60. The Claimant's role was based at one of two Asda stores in Grimsby. He was based at the superstore in the town with the other store being Corporation Road. The Claimant regularly and voluntarily worked long hours undertaking his driving role and we have no doubt that he was good at his job and a valued member of staff.

61. At the material time with which we are concerned the Claimant had three line managers, one of whom was Andrew Burkitt and another of whom was Samantha Mennell. Neither of those line managers had in fact ever worked alongside the Claimant before he became absent as a result of ill health. We come to the circumstances of that below but the first time that Mr. Burkitt met with the Claimant was when he came into the store after he had been discharged from hospital and introduced himself. Attending at the store in that way was something that the Claimant did regularly after he was released from inpatient care in the hospital. He would do that on average every month to six

weeks on the evidence that he gave to us. The purpose of those visits was to seek to make arrangements for a return to work.

62. It appeared to us that the line management structure which we have described above resulted in a lack of cohesion and accountability as to who was responsible for managing and engaging with the Claimant during his ill health absence and it was not clear to us who was supposed to be doing what. It was unlikely to assist that neither Mr. Burkitt nor Ms. Mennell had in fact worked with the Claimant before he fell ill and it is clear that he was failed in terms of proactive contact and discussion in the months prior to the termination of his employment.

Commencement of the Claimant's ill health absence

63. In July 2021 the Claimant had been experiencing stomach problems and was referred to the hospital for a gastroscopy and endoscopy. The Claimant was admitted to hospital after those procedures and sadly suffered two cardiac arrests. The Claimant was very ill and spent some time in the intensive care unit. Shortly before he was discharged approximately three weeks after his initial admittance, the Claimant suffered a stroke. As a result his eyesight was severely affected. He was subsequently diagnosed with visual cortex disorder. It is not in dispute that the Claimant could not at any stage and will not in the future be able to return to his role as a delivery driver. Indeed, his driving licence has been revoked by the DVLA because of his sight. He is also in receipt of personal independence payments and has a certificate registering him as blind.

Healthcare leave policy

64. The Respondent operates a healthcare leave policy which is only to be used for employees who have been diagnosed with a serious long term medical condition or a terminal illness which means that they will not be able to return to work for a long period of time, such as 12 months (see page 88 of the hearing bundle) and where it is not anticipated that they will be sufficiently recovered to return to work within a six month period (see page 90 of the hearing bundle).

65. As we understand it, the purpose of the policy is (other than in respect of terminal illnesses) to give the employee a chance for their condition to improve without the requirement to contemplate a return to work or to be managed through an attendance management or capability process.

66. There is a set process which is to be followed under the policy which involves meetings with the employee concerned, completion of a Healthcare Leave approval form, sending the employee a Healthcare leave letter by way of confirmation and three monthly reviews of the length of the leave period (see page 96 of the hearing bundle).

67. The policy provides that there should be contact between the employee and the relevant line manager and the section of the policy dealing with that says this:

> *"Contact should be kept up between the colleague and their Line Manager. Have a chat with the colleague to understand what contact is appropriate for the situation; it is generally every three to six months".*

68. Mr. Burkitt and another of the Claimant's then line managers, Aimee Brookes, met with the Claimant in January 2022 and placed him onto Healthcare Leave. This was the first time that Mr. Birkett had placed anyone onto Healthcare Leave

69. The Claimant was accompanied to the meeting by Mrs. Owen. That meeting, like others, was generated by the Claimant attending the store and asking to speak with Mr. Burkitt about his circumstances. Although the policy was not followed regarding meetings to discuss and agree Healthcare Leave with the Claimant, he did not object to being placed onto it and we accept that this was done as an attempt at a supportive measure to give the Claimant's eyesight an opportunity to improve. Had that step not been taken, the Claimant would no doubt have been the subject of earlier management absence proceedings and he accepted in his evidence that this gave him an opportunity to recuperate.

70. Mrs. Owen told us that there were handwritten minutes of that meeting which she had signed on the Claimant's behalf but which we did not have before us. The Respondent's position initially was that they did not believe that there were any minutes taken although Ms. Harty later made plain that she had no reason to doubt what Mrs. Owen had told us. They could not be located however despite a search by the Respondent. Although they would have no doubt been useful for a fuller indication of what was discussed it is not necessary for us to resolve if the minutes existed or not and if they cannot be found there was little that could be done about that.

71. The Claimant was on healthcare leave for the full 12 month period permitted under the policy. Mr. Burkitt did not follow policy and the Claimant received no follow up confirmation letter nor do there appear to have been reviews about the length of the required period.

72. As touched upon above, the policy required some level of contact to be maintained whilst an employee is on Healthcare Leave which should be every three to six months. It is common ground that Mr. Burkitt did not proactively maintain that contact with the Claimant, or indeed any contact at all.

73. However, the Claimant was keen to seek to return to work and frequently of his own volition attended the store to discuss that position. He would generally on those occasions speak to Mr. Burkitt (see page 184 of the hearing bundle). None of those meetings were documented or, if they were, we have not seen the notes. It is clear that the Claimant did not find Mr. Burkitt to have been helpful during those meetings (see page 184 of the hearing bundle) and that

was doubtless because he was focused on a return to work and that was not something that was being taken forward.

74. We do consider having heard the evidence that there was very poor management of the Claimant by Mr. Burkitt during his absence. The Healthcare leave was not properly documented and there was no contact with the Claimant other than when he initiated it. No pro-active steps were taken by Mr. Burkitt and the process as to discussion about alternative roles was not dealt with in a timely manner or indeed at all by Mr. Burkitt.

75. We accept the Claimant's evidence that during meetings Mr. Burkitt's focus was very much on what he was unable to do which we note from Mr. Burkitt's own evidence was based entirely on his own assessment of the Claimant rather than from reliance on any medical evidence. That assessment was at least incorrect in part on the basis that Mr. Burkitt understood that the Claimant was using the lift when in the store because of his visual impairment when in fact that was necessary for Mrs. Owen who accompanied him to meetings.

76. That said, we do accept that the Claimant was presenting as being seriously visually impaired. He had to be accompanied by Mrs. Owen who supported and guided him and signed all the notes of the recorded meetings on his behalf. The most telling issue as to the matter of the Claimant's visual impairment was when, as we shall come to, he had to move his face very close to Mr. Burkitt's during a meeting to be able to tell who he was.

77. At no time did Mr. Burkitt inform the Claimant of the fact that since before his ill health absence there had been a recruitment freeze at the Grimsby Superstore save as for certain roles such as seasonal vacancies and driving roles. We come to details of that freeze later but in fact it does not appear to be something that was ever fully and properly explained to the Claimant before the hearing before us. The best that happened was that the Claimant was told by Ms. Mennell at a later health and well-being meeting that the store in which he was based were not recruiting. We should observe that had that been properly explained and the Claimant's ill health absence much better managed by Mr. Burkitt, these proceedings might have been able to be avoided.

<u>Occupational health assessments</u>

78. On 22nd November 2021 the Claimant was referred for an occupational health assessment by one of the Claimant's line managers, Aimee Brookes.

79. The report produced after assessment of the Claimant provided the following management advice:

> *"Following today's consultation, I can conclude that Shaun is unfit for work at this time. A timeframe for return is anticipated in the next 1-2 weeks, depending on progress. On return, you may wish to consider redeployment to a non-driving role. I would recommend Shaun returns to a role on the shop floor or within the pod. As Shaun readjusts back to work and medication management I would recommend he completes day shifts only. A phased return to work would be beneficial after such*

> *a lengthy period of absence to rebuild his strength and stamina in the workplace I advise a phased return to work, initially working half the number of hours for the first week and gradually increasing the number of hours worked in the following three weeks respite, depending on progress. I leave it to you as the manager to decide if these recommendations are feasible for the business to support. I would also advise additional breaks of 5 minutes should his symptomology require support. Apart from an ongoing supportive approach, I have not been able to identify any further assistance that Management could provide that would be of any further benefit at this current time. Please note, Shaun has a long term medical condition where relapses in the future can occur; potentially leading to sickness absence. You may wish to take this into consideration when managing his future sickness absence. In the absence of change, the best predictor of future sickness absence is to review his past record."*

80. We find that the occupational health advice was clearly overly optimistic as to the timing of a potential return to work. We accept the evidence of Mr. Burkitt and Ms. Mennel that at the times that the Claimant presented at the store his vision was seriously impaired such as on one occasion he could not work out who Mr. Burkitt was without going up extremely close to his face. We note that the assessment was carried out over the telephone and without any physical assessment being made of the Claimant. It would therefore have been reliant on what the Claimant told the adviser and as we shall come to further below with regard to a second occupational health assessment, we consider it likely that he was not giving an entirely accurate picture because of a desire to return to work as soon as possible.

81. The content of the occupational health report was not shared with the Claimant at the time or discussed with him as it should have been. It is not clear what purpose it actually served or what, if anything, was in fact done with it.

Second occupational health report

82. There was a second occupational health assessment on 26th September 2022. We understand that to have been requested by Ms. Mennell although we have not as would usually be the case seen any of the actual referrals. We understand the referral to have been completed online with no copy being printed off or being capable of retrieval.

83. As to the state of his health at that time, the relevant part of the report recorded this:

> *"He states he was having physiotherapy 3 weeks from discharge [from hospital] to help with muscle wastage. He states that he has no problems now with walking to the local shops, getting in and out of the bath. He tells me that he is able to see his surroundings including the television, however, he is not able to read the fine details of the writing on the television as this blurs together. He tells me that he has applied for a device to clip on his glasses and it tells you what you are looking*

> *at via a (sic) ear plug but he is waiting to hear about whether he would be able to have this. He states that he has been discharged from the cardiologist, stroke unit and ophthalmology as there is not (sic) further requirement to monitor and his current medications are currently managing and controlling his conditions which is mainly in the morning and in the evening. He states that he feels that he could work in store and he states that this has not been discussed.*
>
> *……..*
>
> *Shaun has been discussing accessing some equipment that may help with his vision impairment however, he is unaware when or it (sic) this will happen. Shaun is currently able to carry out many day to day activities such as his personal hygiene and walking to the shops. However, he is not able to read or drive a car. I have not identified any adjustments or modifications to his role at present as this requires a workplace assessment as listed below."*

84. There is a stark contrast between what the Claimant told the occupational health advisers and what he later told an assessor from Focus for the purpose of claiming carers allowance (which we refer to later as the "Focus Report"). The occupational health adviser conducted the assessment over the telephone and did not physically see the Claimant. They were essentially relying on what they were told by him and we consider it likely that he gave a much more positive impression than the reality of the situation because of his desire to return to work.

85. As set out above, the occupational health report recommended that the Claimant required a workplace needs assessment before there could be any return to work. The opinion was that he was otherwise fit for work but not in a driving role, that there were no adjustments that could be made to enable him to undertake that role and before any return to work the workplace assessment would be required to understand what adjustments may be required to any alternative role.

86. That report was not discussed with the Claimant or shared with him either until much later in the process when it was provided by Ms. Mennell. No particular account appears to have been taken of it at any stage and there was no active discussion about it.

Workplace needs assessment

87. The workplace needs assessment took place on 14th November 2022. This was the first assessment which took place face to face rather than over the telephone.

88. It confirmed that the Claimant could not return to a driving role but was keen to return in some capacity. It also set out that the Claimant had a number of transferrable skills which would allow him to return to a supermarket role but that that would require management on a graded approach (see page 165 of the hearing bundle) and that if he was to work on the supermarket floor then

he would require a "buddy" to work alongside him for the first few weeks to ensure that difficulties were identified and strategies put in place.

89. Again, that Workplace Needs Assessment findings and conclusions were in stark contrast to what was set out in the Focus Report.

Access to work

90. The Claimant had contacted Access to Work who are part of the Department of Work & Pensions and provide support to enable people with disabilities in the workplace. That includes grants to help pay for adjustments to be put into place. He was made aware of the existence of Access to Work via the Stroke Association. The Respondent was not involved in that process.

91. The Claimant was awarded such a grant to assist with the purchase of face to face disability awareness training, for a handheld magnifier and for an OrCam MyEye Pro which is a device which assists people with vision difficulties to have text read to them. In relation to the latter pieces of equipment we accept that they would only have been of benefit to the Claimant in the workplace – which is what they were designed for – in the event that there was an alternative role that he would have been able to be redeployed into either with or without adjustments. As we shall come to, there were no such roles.

92. It is not in dispute that the Access to Work grant was not actioned and it expired on 14th February 2023 just before the termination of the Claimant's employment. However, as we have already observed above, the equipment would only have been of assistance to the Claimant in the event that there was a role available which would enable him to use it.

The October 2022 meeting

93. At some point on a date which no one has any recollection of but which is said to be around October 2022 there was a meeting between the Claimant, Ms. Mennell and Mr. Burkitt. Mrs. Owen was also present.

94. The meeting took place in a presentation room which was being used by someone else at the time. The meeting was not pre-planned and only took place because the Claimant had called into the store to seek to discuss a return to work.

95. The participants in the earlier meeting departed but left behind some powerpoint documents which had been referred to during that presentation. At the meeting the Claimant said that he could not read and we accept his evidence that he was passed one of the slides by Ms. Mennell who asked him if he could read it. Whilst she did not recall doing that, she accepted in cross examination that it may have happened and so we accept the Claimant's evidence that it did.

96. We accept that the context of that would have been to gauge the level of the Claimant's reading ability following his visual problems. We make no finding that the Claimant found this in any way offensive or objectionable. There is

no suggestion that he or Mrs. Owen raised any concern at the time, it did not feature in the Claimant's grievance which was directed solely at Mr. Burkitt. Nor did it feature in discussions with Mr. Nelthorpe where the Claimant expanded upon his grievance. It was not even in the Claimant's Claim Form and had to be included by way of amendment after he obtained legal representation. We find that having taken that advice earlier matters which had no previous significance took on a new context and as with other complaints which are said to amount to harassment we did not accept the Claimant's evidence as to the upset that he says that such matters caused him at the time.

97. During the course of the meeting issues were discussed about the Claimant returning to work. We accept that as part of that Ms. Mennell made some comment to the effect that if there was a picking role available the Claimant would be held to the same standards and to account if he did not meet the same targets as other colleagues. We again do not accept that the Claimant was offended by that remark at the time as now claimed. It was not raised at the time. It was not raised in the Claimant's grievance in respect of which he was in fact quite complimentary about Ms. Mennell. We do not consider that he would have been had he considered that she had harassed him. It was not raised in the discussions about the grievance which further explored concerns and it was not raised in the Claim Form. Like the other complaint above and others that we come to below, it was only something raised as an amendment after the Claimant had sought legal advice and we consider that again it is something which took on new significance.

98. What we would say, however, is that the comment and much of the evidence of Ms. Mennell and Mr. Burkitt generally did surprise us in relation to an apparent lack of knowledge about the duty to make reasonable adjustments. The focus was firmly on the needs of the business without any apparent understanding of how that may need to be modified to take into account the needs of those with disabilities. That was all the more surprising given that we understand that they had attended some equalities training albeit that again surprisingly for an organisation such as the Respondent to be an hour online refresher.

99. As part of those discussions it was also discussed as to whether the Claimant could work in "the pod" which we understand to be a place where picked orders for home shopping deliveries are collated and collected by delivery drivers before taking them to customers. As we shall come to below in the context of the Claimant's later grievance, the pod is a busy and fast paced environment which posed a number of potential health and safety risks to those with a visual impairment such as the Claimant. We are satisfied that Mr. Burkitt did say at the meeting that work in the pod would be unsuitable for the Claimant because it was his genuine belief. As we shall come to further below we can see how that did raise a concern.

100. Again, this is not a matter about which the Claimant raised complaint at the time. Although it was raised in a grievance (the details of which we come to below) that was in the context of the Claimant complaining that he had not been able to return to work. The issue was not raised in the Claimant's Claim Form and again was not referred to in the context of these proceedings until the application to amend the claim was made once the Claimant had received legal advice. We are satisfied that this matter had again by then taken on a new significance with a view to seeking to strengthen the claim.

101. We also accept that during the meeting Mr. Burkitt made comment to the effect that the Claimant would not be able to stack shelves as he would need to be able to climb ladders to access the upper shelves. That is supported by comments that he made during the course of an investigation into a later grievance raised by the Claimant. Again, for exactly the same reasons as given above regarding the pod we do not accept that the Claimant was offended at the time by this comment and that again matters have taken on a new significance after dismissal and particularly after obtaining legal advice.

Meet and greet

102. On 11th January 2023 the Claimant attended a meet and greet with Ms. Mennell. That was prompted by the Claimant sending Ms. Mennell a Facebook message because he was nearing the end of his Healthcare leave rather than any proactive step taken by the Respondent.

103. The Claimant's health was discussed in general terms. Ms. Mennell indicated that she wanted a report from his General Practitioner ("GP") but she did not in fact take that forward and no report was ever requested. It was Ms. Mennell's responsibility to deal with that and not leave it to the Claimant.

104. It was agreed that the Claimant would be paid for accrued holiday but little else was achieved during the meeting.

105. On the same day a health and well being case was opened for the Claimant with Human Resources ("HR"). The advice was that a health and well being meeting should be arranged with consent to a further occupational health report being obtained. Although the meeting was arranged, the second suggestion was not actioned and there was no further occupational health input nor as we have already touched upon above did Ms. Mennell seek advice from the Claimant's GP. However, there is nothing to say that that would have made any difference to the situation given that, as we shall come to, there was never any role available that the Claimant could have undertaken and in all events he accepted at a later capability meeting that no further occupational health input was required.

Health and well being meetings

106. On the same day as the meet and greet took place Ms. Mennell wrote to the Claimant inviting him to the health and well-being meeting that had been suggested by HR (see page 179 of the hearing bundle).

107. That meeting took place very shortly after the letter was sent on 16th January 2023. The meeting was dealt with by Ms. Mennell and the Claimant attended accompanied by Mrs. Owen. She had also been present at the other informal meetings that the Claimant had attended which we have referred to above.

108. The Claimant's health and what had caused his vision problems was discussed. He confirmed that he could see all around him but had problems reading and writing (see page 183 of the hearing bundle). His mobility was also discussed along with the day to day activities that he was able to undertake at home such as cleaning, loading the dishwasher and attending to personal hygiene all of which the Claimant said that he was able to do.

109. Until the meeting, Ms. Mennell was not aware of the first occupational health report and indicated that she would seek to obtain a copy and obtain further advice. She also indicated that she would investigate what vacancies were available in the two Grimsby stores and revert to him as soon as possible.

110. That was the first time that anything pro-active had been done to look for vacancies for the Claimant and he accepted in his evidence that Ms. Mennell was seeking at that stage to explore redeployment options. He also accepted that even had that process begun earlier a role would not have been available which he was able to undertake.

111. The Claimant made suggestions at the meeting that he would be prepared to work across various departments or as a buddy for new drivers. We accept that in respect of the latter suggestion that was not feasible because it was not a role that existed and would be covered on a temporary basis as and when required by existing delivery drivers for a short period of time. Indeed, the Claimant's own evidence was that this would be for a couple of days only. We also accept that such a role would require the buddy to be fit to drive which of course the Claimant was not.

112. Ms. Mennell contacted the Store Manager at Corporation Road (the other store in Grimsby) the following day. He confirmed that he had had two security vacancies but they had now been filled. As we come to further below, the Claimant accepted in his evidence that those would not have been suitable vacancies because of his visual impairment and so even had the enquiries been made earlier that would not have made any difference and found the Claimant a role.

113. Ms. Mennell arranged a further health and well being meeting with the Claimant on 23rd January 2023. At the meeting Ms. Mennell explained the position with the vacancies at Corporation Road and that she had emailed again that day to see if the position had changed but had not yet heard back. She also explained that at the store at which the Claimant was based there were no vacancies other than delivery drivers which both were agreed were unsuitable.

114. Ms. Mennell apologised to the Claimant that the correct process had not been adhered to. She referred to there having been a failed process and that learning would be taken by managers. The main issue for that failing in Ms.

Mennell's view was the delay in between occupational health assessments and the lack of contact with the Claimant.

115. The issue of delay was also discussed in the context of a return to work and it was explained to the Claimant that had he been able to return earlier than was now being discussed the only vacancies had been temporary roles. As we come to further below, we accept that those vacancies were not suitable. It was explained that there were not any temporary workers still employed at the store and the Claimant confirmed that he was still limited to the two Grimsby stores. The next closest store was Scunthorpe which was about thirty miles away and unsuitable as the Claimant was reliant on Mrs. Owen or public transport to get to work.

116. The Claimant raised the issue of the equipment covered by the Access to Work grant. Ms. Mennell confirmed that she had sought advice and that would only be funded by the Respondent if there was a role which the Claimant could fill. Whilst no doubt disappointing to the Claimant, we accept that that was a logical position for the Respondent to only fund equipment that would be used to allow the Claimant to remain in employment with them. Indeed, that is what Access to Work is all about.

117. The Claimant enquired what would happen if there were no available roles. Ms. Mennell indicated that she would adjourn the meeting to determine if there had been any response to her email about Corporation Road vacancies. There had not so Ms. Mennell telephoned the store manager at that branch who confirmed that there were no vacancies and the security roles had been filled (see page 195 of the hearing bundle).

118. Ms. Mennell adjourned again to seek further advice and then confirmed to the Claimant that because he was unable to fulfil his role and there were no vacancies then she would be referring the matter to an ill health capability manager (see page 196 of the hearing bundle). She indicated that she would keep the Claimant informed if the position as to vacancies changed.

119. What was not discussed was extending the period before the referral to the capability manager to see if any vacancies arose other than driving roles. We consider that that should have been done to the end of the quarter, although we accept that in reality it would not have made any difference because no vacancies have actually arisen even to the date of the hearing before us.

120. We have the notes of the health and well being meetings. They were signed by Ms. Owen. They were not signed by the Claimant because we accept that he was unable to do so as a result of his visual impairment.

121. Ms. Mennell confirmed the position to the Claimant in a letter following the meeting. The position with regard to alternative vacancies was confirmed and those were to be considered up to the point of the final meeting (see page 202 of the hearing bundle). There does not, however, appear to have been any mention of the "recruitment freeze", merely that there were no vacancies at that stage.

Capability meeting

122. The Claimant was invited to a capability meeting by letter dated 9th February 2023. The meeting was to take place on 13th February 2023 and it was made clear that one outcome might be the termination of the Claimant's employment (see page 204 of the hearing bundle).

123. The capability meeting was dealt with by Christopher Noone-Wright. The Claimant was again accompanied by Ms. Owen who signed the notes on his behalf.

124. The Claimant's health position was discussed and he explained that he suffered with his peripheral vision and with reading and writing as a result of his medical condition. It was not disputed by the Claimant at the meeting that he was unable to return to a delivery driver role but he raised that he had applied for the Access to Work grant and felt that there had been a missed opportunity to use that and facilitate a return to work when the Respondent was recruiting for seasonal vacancies.

125. After an adjournment Mr. Noone-Wright apologised for the fact that that had not been looked into but confirmed that he could not deal with matters retrospectively and only on the basis of the position before him at that time. He also confirmed that the temporary vacancies would only have been for a period of four weeks. We understand the temporary contract hours to be approximately 8 hours per week.

126. Mr. Noone-Wright also confirmed that the only vacancies in the store were for delivery drivers which the Claimant could not do and that Ms. Mennell had made enquiries of Corporation Road but there were no vacancies there either.

127. Mr. Noone-Wright enquired of the Claimant whether there were any other roles which he thought he could do which had not already been explored. The Claimant did not give details of any other roles other than a reference to buddying up which we deal with elsewhere. The Claimant – understandably given the circumstances – expressed his disappointment with the lack of contact that he had from the Respondent and the fact that he had essentially had to do all the running. Mr. Noone-Wright apologised to the Claimant and acknowledged that there had been failings on the Respondent's part.

128. Before an adjournment to consider his decision, Mr. Noone-Wright asked the Claimant if there were any further reasonable adjustments that could be put in place. The Claimant confirmed that the only adjustment would be the Access to Work but given that there were no vacancies described the situation as him being between a "rock and a hard place".

129. Mr. Noone-Wright adjourned the hearing to consider his decision and upon returning confirmed that he had decided to terminate the Claimant's employment. He delivered his rationale which included the following:

> *"I have unfortunately decided to dismiss you on the grounds of ill health capability.*

This is due to you being unable to fulfil your role as a Customer Delivery Driver with no reasonable adjustments possible to make it safe and legal.

We have considered alternative roles for you but unfortunately there are none at this store or at nearby stores that would be suitable.

We considered your suggestion of a buddy role for drivers but this was discounted due to their being no such role and it not being operationally feasible".

130. The Claimant was told that he would receive four weeks notice with his employment coming to an end on 13th March 2024. The Claimant was advised of his right of appeal against the decision and how that should be exercised.

131. Mr. Noone-Wright followed up after the meeting with an outcome letter confirming the termination of his employment. The relevant part of the letter, which mirrored what the Claimant had been told at the capability meeting, said this:

"I told you that I had taken into account the details of your absence and had reached the following conclusions:

- *You are contracted as a customer delivery driver and have been off work since 07/08/21.*
- *Occupational health and yourself have both agreed you can no longer carry out your role due to your visual impairment*
- *There are currently no vacancies in this store or any nearby stores to move you into a different role*
- *You have suggested a buddy scheme training new drivers, however this is not a role that exists and we would not create this role due to operational reasons.*
- *There are no reasonable adjustments that can be made at present to facilitate your return to work".*

132. The letter confirmed the Claimant's notice period and his right of appeal and invited him to contact the Respondent in the event of any change in his health.

Roles at the Grimsby stores

133. As we have observed above, the store in which the Claimant was based was in Grimsby. There are two Asda stores in that town, the superstore in which the Claimant worked and a second store on Corporation Road. It is accepted by the Claimant that in terms of alternative employment he was limited to Grimsby because he can no longer drive and would be reliant on his partner or public transport to get to and from work. The other nearest store outside Grimsby was Scunthorpe which the Claimant had described as being "out of

the question" at the health and well-being meeting (see page 184 of the hearing bundle).

134. Until the involvement of Ms. Mennell nothing was done in terms of seeking to locate alternative employment for the Claimant although we note that for 12 months of that time, he was on Healthcare leave when that would not routinely have occurred in all events.

135. It does not appear to be disputed, and in all events we accept, that save as for a small number of key roles there was a recruitment freeze within the Grimsby stores which started well before the Claimant fell ill and was still in play as at the date of the hearing before us. The freeze was based on financial issues and whether or not any recruitment was permitted other than for key roles was dependant upon the performance of the store.

136. As we understand it from the evidence of Ms. Mennell each quarter the store is informed what hours can be allocated (from which existing hours are taken and to see if there is any scope for recruitment) following a meeting with a senior director to discuss sales, costs and store performance. The only roles falling outside the scope of the freeze are critical ones such as drivers, security, pharmacy and optical and seasonal vacancies at Christmas and Easter where there is a business need and that can be authorised at General Store Manager and Senior Director level.

137. The store numbers are also decreasing through natural wastage and we accept the evidence of Ms. Mennell that there has not been additional recruitment when individuals leave employment. That has seen area numbers since she began in July 2021 decrease from 210 to 190 and then down to 150 at the time of the hearing before us.

138. In the store in which the Claimant was based the following roles were available which he had located on a recruitment website:

    a. Night section manager – this was a salaried management position above the Claimant's pay grade and which we accept that he was not qualified or able to perform;

    b. Online service colleague working nights – we accept that this was a temporary Christmas position and for the reasons given below none of those type of temporary positions were suitable;

    c. Pharmacist – the Claimant accepted in his evidence that he was not qualified to perform that role and that accordingly it was not suitable;

    d. Section leader x 2 – again these were salaried management positions above the Claimant's pay grade and which we accept that he was not qualified or able to perform;

    e. Store assistant checkout operator – the Claimant accepted that his disability meant that he would not have been able to undertake this role and in all events it was a further seasonal Christmas vacancy;

f. Store assistant fresh produce – again, this was a temporary seasonal vacancy over the Christmas period; and

g. Store assistant ambient produce - again, this was a temporary seasonal vacancy over the Christmas period.

139. As we have observed, a number of the roles were temporary seasonal ones to cover the busy festive period. We accept that those roles were not suitable for the Claimant because they would have involved taking away his permanent contract and placing him on a temporary contract which would have ended – or separated as the Respondent terms it - and did end on Christmas Eve once the seasonal need had passed. Any temporary posts were then not reactivated until there was further seasonal need at Easter and lasted in practice for no more than eight weeks a year at eight hours per week.

140. The only available roles at the other Grimsby store were two security vacancies. It is not in dispute that the Claimant would not have been able to carry out those roles because of his visual impairment given the nature of the role and he candidly accepted that in his evidence.

141. We should observe that much of the case concentrated on the Claimant's ability to return to work on the shopfloor or within the pod which was an area as we understand it where deliveries are placed waiting for collection by delivery drivers. Mr. Burkitt had formed the view that such roles would not be suitable. Whilst his concern was for health and safety given that the pod particularly is a busy area, that was not a decision that he should have made without obtaining input from occupational health or another suitably qualified medical practitioner.

142. However, the fact remains that there were no such vacancies arising and there was in the circumstances no obligation on the Respondent to create a role for the Claimant.

143. We should observe that there has been much talk in these proceedings of "Try Me Days". The Respondent denies that this concept existed. The Claimant says that it does. It does not really matter for the purposes of our determination because there was never any substantive vacancy which the Claimant would have been able to try out.

144. Finally in the context of the issue of suitable alternative roles the Claimant provided a copy of an email sent to Mrs. Owen by Daisy Ashworth who is a Department for Work & Pensions adviser who was assisting him. That email suggests that there are roles which Mr. Birkett was going to allow the Claimant to trial. We accept Mr. Burkett's evidence that that is not what he said – because there were no roles to trial - and that it is likely that Ms. Ashworth had "got the wrong end of the stick".

Contract pause

145. The Claimant raised more than once in his evidence that the Respondent should have "paused" his contract of employment, presumably pending any vacancy becoming available in the future. This appears to have arisen in the context of seasonal contracts being paused when the Christmas period was over to be reactivated at Easter for four weeks on each occasion. That is not the process used for permanent contracts and we accept would not have been suitable nor would it have assisted the Claimant in obtaining a return to work because even at the date of the hearing before us the recruitment freeze was still in place and he was not able to return to a critical role not affected by it.

Appeal against dismissal

146. The Claimant duly exercised his right of appeal with assistance from Ms. Owen on 19th February 2023 (see page 217 of the hearing bundle). It is not necessary for us to set out the content of the appeal letter in full but it made the following points:

- That the Claimant felt that he had been unfairly dismissed and discriminated against;
- That whilst he could no longer be a delivery driver he would be quite capable of fulfilling other roles within the store;
- That there had been no communication with the Respondent other than when the Claimant had instigated it and that any attempt to return to work had been thwarted;
- Each time that he had attempted to speak to Mr. Burkitt he had been told that it was inconvenient and asked on the last occasion to make an appointment and that had it not been for Ms. Mennell he would have been ignored;
- That he had been informed by Occupational Health that he would be fit in November 2021 to return to work within a few weeks but nothing was forthcoming and that he was aware of people who had left whose role he could have undertaken if provided with reasonable adjustments;
- That he had lost the Access to Work grant and that he could have taken a seasonal role to allow his capabilities to be assessed;
- That it was only due to Ms. Mennell that meetings had taken place and that he considered that Mr. Burkitt had treated him unfairly and unprofessionally;
- That Mr. Burkitt had not attempted to facilitate any return to work for him and that he felt that there must have been something in the last 14 months that would have been suitable for him to do; and
- That he would be contacting ACAS to take matters further.

147. Shannon Nelthorpe was tasked with dealing with the Claimant's appeal and he wrote to him on 21st February 2023 to invite him to an appeal meeting on 24th February 2023 (see page 220 of the hearing bundle). The meeting took place as scheduled and the Claimant was again accompanied by Mrs. Owen who signed the notes of the meeting as an accurate record on his behalf.

148. The same day as the appeal meeting the Claimant had also raised a grievance which we deal with further below. Mr. Nelthorpe confirmed that both processes would be dealt with separately and on that occasion he would be focusing on the appeal.

149. The Claimant went over his grounds of appeal including that no reasonable adjustments had been made other than permitting Mrs. Owen to accompany him to meetings and that he had lost his Access to Work grant because he now had no job.

150. He also raised as he had in his appeal letter that people had left and that he could have been allocated their role. The Claimant named one such employee by the name of Dean. Mr. Nelthorpe indicated that Dean was a seasonal worker who had left to go back to college and that he had not been replaced due to the volume in store and a reduction in hours there (see page 222 of the hearing bundle). Mr. Nelthorpe was able to confirm that point because he worked at the same store as the Claimant and was the line manager of Mr. Burkitt and others on the same grade.

151. Mr. Nelthorpe also confirmed that no permanent posts had been filled at the store since 2021 other than for drivers. That was consistent with the Respondent's evidence before us at the hearing and the documentation that we have dealt with above save as for three salaried management positions and the role of a pharmacist. We have dealt with the Claimant's ability to undertake those roles above.

152. Mr. Nelthorpe asked the Claimant if he was basing his appeal on the procedure adopted and the Claimant confirmed that to be the case. He said that he had documentation to prove that there had been admissions that procedure had not been followed (doubtless those from Ms. Mennell and Mr. Noone-Wright), that he had not been invited in for a "Try-Me" day (we come to that further below) and that there had been no contact at all. Mr. Nelthorpe apologised to the Claimant for the lack of communication before adjourning to make his decision.

153. He reconvened the hearing approximately 40 minutes later and confirmed that he had decided to uphold the decision to dismiss and gave his rationale as follows:

> *"This is due to you being unable to fulfill (sic) your role as a Customer Delivery Driver with no reasonable adjustments possible to make it safe and legal to do so.*

Any vacancies that may have been available during your absence were only Temporary or Seasonal positions, no permanent roles were available.

I apologise again for the lack of communication with yourself, throughout your time of absence".

154. Mr. Nelthorpe confirmed that his decision would be communicated to the Claimant in writing and that there was no further right of appeal.

155. Mr. Nelthorpe confirmed his decision by letter the same day (see page 227 of the hearing bundle). The content is consistent with the rationale which we have set out above and there is therefore no need to repeat that again here.

Grievance against Mr. Burkitt

156. As we have already touched upon above, on 24th February 2023 the Claimant raised a grievance against Mr. Burkitt. The subject matter of the grievance was mainly the topics which the Claimant had raised in his appeal against his dismissal and were these:

- That Mr. Burkitt had had a negative attitude towards him from the start;
- That he had been deliberately unhelpful when the Claimant had sought to arrange a return to work, stating that he was too busy to meet and telling him to telephone to arrange an appointment;
- He had made no attempt to keep communication open;
- He had not made any reasonable adjustments such as Try Me Days so as to assess his capabilities;
- No occupational health reports had been forwarded to him or acted upon;
- That Mr. Burkitt had been contacted by the DWP regarding the Access to Work grant and had said that he had no knowledge of the Claimant's case;
- That there had been no action taken in relation to the Access to Work grant which had then expired and had that been done there could have been a return to work;
- There had been no consideration of temporary seasonal jobs and that Mr. Burkitt had already made up his mind that the Claimant was not capable of working;
- That when he had spoken with Mr. Burkitt about roles in the pod he had told him that they were not suitable due to their being 50 people in there at any one time and that the Claimant would not be able to get out of the way due to his eyesight;

- That he had made assumptions about his health and capabilities; and
- That he had spoken about procedures being followed but did not follow them himself.

157. The Claimant ended his grievance by proffering his opinion that Mr. Burkitt was not management material and had done the Respondent and himself a disservice.

158. The grievance, like the appeal, was addressed to the General Manager of the Grimsby Superstore who acknowledged receipt of the grievance on 28th February 2023.

159. The grievance was passed to Mr. Nelthorpe for determination. Our view is that is should have been allocated to someone else given that Mr. Nelthorpe had already determined very similar issues when dealing with the appeal and was also Mr. Burkett's line manager and thus not entirely independent. Having someone else deal with the grievance would have ensured that it could be considered with a fresh pair of eyes.

160. Mr. Nelthorpe invited the Claimant to a grievance meeting which took place on 9th March 2023. The Claimant was again accompanied by Mrs. Owen who signed the notes on his behalf. As well as the other points raised in his grievance letter the Claimant told Mr. Nelthorpe that Mr. Burkitt had told his NHS Clinician over the telephone that the Claimant could not see more than 30 centimetres away from the end of his nose. The Claimant gave the name of the clinician who he said was told in that regard. That differed from the Claimant's position in these proceedings which was that the comment had been made during the October 2022 meeting. The Claimant maintained in evidence that he could not recall making that comment at the grievance meeting but he must have done so as otherwise the notes doubtless would not have been signed as being accurate by Mrs. Owen. The Claimant's evidence on this point was confused and unclear. His position was firstly that it had been said at the meeting and that he was "sticking to" that but then that it had been said both at that meeting and to the clinician.

161. Despite those discrepancies we find that a comment along those lines was made about the Claimant at some point although given the discrepancies it is impossible to say when and to who, but that that was simply in the context of the fact that at one meeting he had had to go very close up to Mr. Burkitt's face because his vision was such that he could not recognise him.

162. That was not a point that had been raised in the grievance itself and only came from expansion at the meeting with Mr. Nelthorpe. Whenever this issue arose, the Claimant did not complain about it at the time. It was also not raised in the Claimant's Claim Form. Again, like the powerpoint document issue, we are satisfied that this took on a new significance after the Claimant's dismissal and we do not accept that the Claimant was offended by it at the time. Indeed, he referred in his evidence to it only having been raised at the grievance meeting as an "ad hoc remark".

163. The Claimant also raised the point that he considered Mr. Burkitt to have been abrupt and rude during the meeting which he had attended with him and Ms. Mennell and that when she had left the room he had not spoken and had spent time looking at his phone. We accept the evidence of Mr. Burkitt that that is what would usually happen during a break in a meeting so that nothing was missed by the exiting party and that if he was looking at his phone then it would have been to deal with any incoming work emails for a short period of time.

164. The position about working in the pod as outlined in the Claimant's grievance was also discussed. We accept that it had been Mr. Burkitt's view given what he had observed of the Claimant in store that the pod would not have been a suitable or safe working environment. We do not consider in the circumstances that that was an unreasonable assessment. The pod was a busy and fast paced environment with people frequently entering and existing via large swing doors which would have been a hazard to anyone with a visual impairment. Whilst Mrs. Owen put in cross examination that people could have for example shouted "mind out of the way Shaun", that is simply not practical in what would have been a noisy and fast paced environment. It would essentially have been an accident waiting to happen. That is all the more apparent given the conclusions reached in the Focus Report which we come to below.

165. Mr. Nelthorpe also met with Mr. Burkitt on 10th March 2023. Mr. Burkitt opined that he felt that he had done everything in his power to help the Claimant return to work although having considered his involvement it is difficult for us to see how he managed to come to that conclusion. His only involvement in reality was placing the Claimant on Healthcare Leave and in respect of which he still failed to follow the Respondent's recognised procedure.

166. Insofar as the issue as to making reasonable adjustments was concerned, Mr. Burkitt's position was that the Claimant was unable to go up and down stairs or push or pull loads. That was entirely of Mr. Burkitt's own opinion and he had not sought or obtained and medical opinion from occupational health or elsewhere so as to form that view.

167. Mr. Nelthorpe reconvened the grievance meeting with the Claimant on 17th March 2023. The purpose of the meeting was to deliver the grievance outcome meeting. However, the meeting did not take place because sadly Mrs. Owen suffered a bereavement and the Claimant needed to be available to support her. It was therefore determined that the outcome would be put in writing.

168. The Claimant's grievance was not upheld. The reasons for that do not differ materially from the appeal outcome and so it is not necessary to set out Mr. Nelthorpe's conclusions here.

Commencement of proceedings

169. Prior to the conclusion of the internal processes the Claimant commenced a period of early conciliation which took place between 24th February 2023 and 7th April 2023. His Claim Form was then presented on 23rd April 2023.

170. Although the Claimant had previously spoken to ACAS for advice, we are satisfied that he did not intend to issue proceedings and was concentrating on a return to work. Had that been able to be facilitated that would have resolved matters and we find that the Claimant would not have brought these proceedings at all and that earlier matters, after seeking advice, took on a new significance for the Claimant. We say more about that below in our conclusions.

Certification as to visual impairment and report for carers allowance

171. In May 2023 the Claimant had a face to face appointment with a key worker for the purposes of a claim for carers allowance which had been made in respect of Mrs. Owen. We shall call that the "Focus Report" as it was referred to at the hearing before us. As we have already touched upon above, the Focus Report conclusions were in direct contradiction of the occupational health reports and Workplace Needs Assessment.

172. The Claimant's evidence was that that report was "totally wrong" and he did not agree with it. He has at no stage, however, challenged it and we find it more likely than not that it paints the more accurate picture as to his visual impairment than the other reports where the Claimant painted an over optimistic picture because his focus was on seeking to return to work at the earliest opportunity. The assessment appears to have been a face to face assessment and although it took place after the material time with which we are concerned we are satisfied that the Claimant's vision had not deteriorated as at that date and the report painted an accurate picture of his impairment since his stroke in August 2021.

173. The relevant parts of the report said this:

> *"Shaun wanted to go back to work but realises that this is not going to happen. It is 2 years since he had the stroke and is realistic that 'this is as good as it gets'. He is grateful for Marie and realises he could not function independently.*
>
> *Mr. Taylor, Shaun, lives with his partner/carer Marie Owen in a house in Cleethorpes. Shaun was a delivery Driver for Asda, he told me that from day one he did double shifts and he enjoyed his role which he had for around 4 years. 2 years ago he told me that he went to bed and when he woke he was in Scunthorpe hospital, he was told that he had had 2 cardiac arrests and 2 days later he had a stroke. He was also in kidney failure only having 4% kidney function. He was transferred to Hull where he was put on dialysis for 3 weeks and then his kidney function increases, omitting any further treatment. Shaun returned home with IC @ home. He was at that time off sick but Asda put him*

on welfare leave for 1 year. Shaun was keen to go back to work and contacted Access to Work who agreed that he could still work and they would provide 2/3 of funding for an Orcam to enable him to do an alternative role in the store. The stroke had affected his sight he was no longer able to drive but believed with the Orcam he could be useful. At first Asda was working with Access to work and Employability but then went back on their word. Shaun states that they would not make any reasonable adjustment for Shaun and dismissed him. He is now taking Asda to a tribunal and is hopeful he will win his case. He [has] ACAS to support him. I have advised him to contact the RNIB for further support regarding employment law around disability.

Shaun's partner has had to give up work as a teacher to support him, she took early retirement. Shauns (sic) *only income is Disability Living Allowance. He is not eligible for any financial support because Marie has a pension.*

Shauns (sic) *told me that his vision has come back but he has no perception of where things are, he goes to pick something up but it is not there. He said looking at me I was constantly flickering. He told me that when he makes a drink he has to connect with his cup but then because he still has right side weakness he struggles. I have issued him with a liquid level indicator so he knows when his cup is full. Marie states she does not like him to be in the kitchen alone and she has to supervise him at all times, he is not safe with knives and glasses. He does try to make a hot drink but then overflows the cup. Shaun is unable to read, even with magnifiers as everything disappears. Magnifiers are of no support whatsoever, Marie has to read his mail to him now. I did show them the reading apps that can be downloaded onto mobiles and tablets that both were amazed with.*

Shaun is able to complete his personal care but he needs support to shave as he cannot hold the razor safely so Marie supports him. He also struggles to clean his teeth.

Shaun goes out with Marie, he is able to get to the local shop in the next street, using the controlled crossing. I told him about the conical buttons under the yellow box, he was unaware of this and thought they would be useful.

Marie shops on line (sic) *for a big shop.*

Shaun told me that he is able to cut the grass with a cordless mower as he just has to walk with it.

Marie has to support Shaun to attend meetings to ensure he knows what is going on and he can read the reports. Marie also sorts out his medication.

Shaun has difficulties with glare indoors and out he has sunglasses for outdoors but they are too dark for indoors, I have issued him with a paid of very light grey uv (sic) *shields which were very useful.*

Shaun needs support with all aspects of daily living because of his sight perception and right side tremor".

174. On 11th May 2023 the Claimant was registered as blind and was issued a certificate to that effect (see page 526 of the hearing bundle). Although post dating the material time with which we are concerned we are satisfied that that certification arose from the same stroke which caused the Claimant's visual cortex disorder and that that condition had not deteriorated to see his vision being worse in May 2023 than it had been at the material time with which we are concerned.

CONCLUSIONS

175. Insofar as we have not already done so we now turn to our conclusions in respect of each of the complaints before us.

Unfair dismissal

176. We begin with the complaint of unfair dismissal.

177. Our first consideration is whether we are persuaded by the Respondent that there was a potentially fair reason to dismiss the Claimant by reason of capability. We stress here for the Claimant's benefit that capability dismissals do not only relate to situations where an employee is not performing well in their role or essentially are not up to the job. There is no suggestion of that here and we have no doubt that that is important to the Claimant given his considerable skills and experience and sense of professional pride. However, capability situations can also arise where an employee is incapacitated by illness or ill health from performing their role. That is the situation which arises here.

178. We can deal with this question in short order given that it was accepted by the Claimant that capability (on health grounds) was the reason why his employment was terminated when discussing the issues at the outset of the hearing. Even had that entirely sensible concession not have been made we would have found that capability was the reason for dismissal. That is consistent with the evidence of Mr. Noone-Wright and the relevant parts of the dismissal letter which we have set out above.

179. However, that is not the end of the matter as we must go on to consider whether the Claimant's dismissal was fair or unfair having regard to the provisions of Section 98(4) Employment Rights Act 1996.

180. We are entirely satisfied that the Claimant's dismissal was unfair. There were a significant number of failings of the Respondent in that regard. Firstly, there was no discussion with the Claimant in respect of either of

the occupational health reports which the Respondent had obtained. It does not appear that even the Respondent bothered to look at them let alone provide a copy to the Claimant upon receipt and discuss the content with him.

181. Secondly, the Respondent should have started the search for alternative employment much sooner when the Claimant was coming into store seeking advice about returning to work. However, as we shall come to below even if they had done so we have nothing before us to say that that would have made any difference at all to the outcome given the recruitment freeze and the only available vacancies being ones that were not suitable for the Claimant for the reasons given above.

182. Thirdly, the contact that the Respondent had with the Claimant was woeful. Mr. Burkitt took no proactive steps to meet with the Claimant to discuss his absence, his prognosis or any potential for a return to work. What meetings did take place were only on the basis of the Claimant attending at the store and were entirely reactive on Mr. Burkitt's part.

183. Even when Ms. Mennell took over there was still no discussion with the Claimant about the occupational health report which she commissioned or anything about the recruitment freeze and how that might impact a return to work. Her involvement was also reactionary. The meet and greet was only brought about by the Claimant sending her a Facebook message and the health and well-being meeting only in the context of being directed to do that by HR.

184. We also take into account the speed at which the process from the health and well-being meeting to the Claimant's dismissal took place. It was only a period of one week from the health and well-being meeting taking place to Ms. Mennell determining that she was going to refer the Claimant for a capability hearing which brought about the termination of his employment. During that time minimal steps were taken to determine – for the first time – whether there might be suitable vacancies elsewhere. That consisted of two emails and one telephone call. Nothing had been done before that and it does not appear that any consideration was given to waiting before referring via the capability process to see if any other vacancies might arose at Corporation Road or there was a change in the recruitment freeze in the next quarter which would have been in April and so only a matter of a few weeks away.

185. The lack of action in the 18 months of the Claimant's ill health absence was in marked contrast to the speed at which the capability process took place following the health and well-being meeting.

186. Finally, and as we have already touched upon the Claimant never received any information from the Respondent – it appears until this hearing before us – about the recruitment freeze and how that would impact him and the ability to return to work in an alternative role.

187. All of those matters lead to the conclusion that there was no proper and meaningful consultation with the Claimant or due medical investigation into his condition beyond obtaining occupational health reports which do not appear to have been read let alone taken into account with medically unqualified observation taking precedence. We find that all of those things fell outside the band of reasonable response and therefore have little hesitation in concluding that the Claimant's dismissal was unfair.

188. However, as we have just touched upon we then need to consider the question of what would have happened if the Respondent had operated a fair procedure and what effect, if any, that would have had on whether the Claimant would have remained in employment with the Respondent. We need to consider in this context the picture that was before Mr. Noone-Wright at the time that he took his decision to dismiss the Claimant.

189. The inescapable problem for the Claimant in this regard is that other than temporary seasonal vacancies which would not have allowed him to remain in employment any longer than Christmas 2022 and were accordingly not suitable re-deployment options, specific roles which the Claimant could not have undertaken for the reasons set out above and driving roles which he similarly could no longer do, there were no vacancies. That had been the position before the Claimant's ill health absence and persisted until his dismissal. Indeed, it still remained the case at the hearing before us and we remind ourselves that save as in exceptional circumstances which do not apply here there was no obligation on the Respondent to create a role for the Claimant which did not otherwise exist.

190. Therefore, even if the Respondent had taken all of the steps which we have criticised them above for not taking it would have made absolutely no difference and the Claimant would still have been dismissed. This is a case where we can say with certainty based on the evidence before us that there was a 100% likelihood that the Claimant's employment would nevertheless have been terminated for capability reasons because there was no role that he could have been redeployed into, either with or without adjustments.

191. We are therefore satisfied that any compensatory award sought by the Claimant should be reduced by 100% to reflect that. We have considered in that context our finding that the Claimant's dismissal should have been held off to the end of the quarter at least to enable there to be further enquiry about alternative vacancies in case the picture changed with regard to the recruitment freeze. However, that would not change the position with the compensatory award because the Claimant was by that stage no longer in receipt of any pay from the Respondent because he had exhausted his entitlement to any sickness pay. Accordingly, that makes no difference to our conclusions as to reduction to the compensatory award.

192. We should say that we have a considerable amount of sympathy for the Claimant who has lost a job that he was very good at and enjoyed through no fault of his own and it is a great shame that his health was such that he was unable to return to his role and there were no other suitable positions available. We do not doubt that if there had been a suitable vacancy the Claimant would have been deployed into it and that if he had been fit to return in a driving role then he would have been welcomed with open arms.

Discrimination complaints

The question of disability

193. We begin with the issue of disability. The Respondent has conceded that the Claimant was a disabled person within the meaning of Section 6 Equality Act 2010 but only with effect from 31st August 2022. The rationale for that as set out by the Respondent is as follows:

"It is unclear from the medical records on what date the Claimant was diagnosed with 'visual cortex disorder' specifically, however it is noted that the Claimant's visual impairments began on 31 August 2021 and continue to date. As such, it is accepted that the Claimant was disabled with effect from 31 August 2022, when the impairment became 'long term' and therefore the requirements within s.6 were met."

194. We can deal with this matter in short order. In our view it matters not that the Claimant's visual cortex disorder was not immediately diagnosed. In complex cases that is not unusual. The disorder was caused by the stroke that the Claimant had in August 2021. Whilst some of the medical records to which the Claimant was taken in cross examination are hopeful as to a resolution, that has in fact not happened. The Claimant's vision has not deteriorated since he had the stroke.

195. Moreover, there cannot reasonably be any suggestion that the Claimant's visual impairment was not likely to be long term. We have in mind there the Respondent's own evidence that it was obvious when the Claimant attended the store that he was significantly visually impaired and the decision to place him on 12 months of Healthcare leave which of itself envisages that the condition from which the employee suffers will be long term and require time to improve. The Respondent, it appears to us, seeks to have matters both ways by saying on the one hand that the condition was severe from the get go, but on the other that for a significant period of time after his stoke the Claimant was not disabled.

196. We reject that suggestion and are satisfied that the Claimant was at all material times a disabled person within the meaning of Section 6 Equality Act 2010.

197. The list of issues contains a question as to whether the Respondent had knowledge of the Claimant's disability and the material time. There can

be no question that that needs to be answered in the affirmative. The Claimant kept them informed throughout, there was occupational health advice (albeit we are not convinced that anyone actually read it) and we have of course the evidence of Mr. Burkitt and Ms. Mennell about the Claimant's presentation when they saw him.

198. We turn then to consider the specific allegations of discrimination and made by the Claimant. In reaching our conclusions in respect of the claim before us we have considered the whole picture of the matter but deal with each individual act complained of separately.

Discrimination arising from disability

199. We begin with the complaints of discrimination arising from disability.

200. The first complaint is at paragraph 17 of the list of issues agreed between the parties. It is expressed in a somewhat convoluted way but in short the act of unfavourable treatment is "*the failure to consider any re-deployment opportunities and thus implement a phased return to work as stated in the Claimant's first occupational health report dated 22nd November 2022*".

201. The "something arising" from the Claimant's disability is the inability to drive a delivery van and therefore perform his substantive role. It is the Claimant's case that the failure to consider any re-deployment opportunities was because of his inability to drive a delivery van.

202. The first question is whether the Claimant was subjected to unfavourable treatment. There can be no question that there was a failure, until the health and well-being meeting at least, to consider any re-deployment opportunities and implement a phased return to work. That was unfavourable treatment. It placed the Claimant at a disadvantage because he very much wanted to return to work not only for financial reasons but also as he expressed to the Respondent to ensure some structure and routine.

203. We turn then to the "something arising" question. We are entirely satisfied that the Claimant's inability to drive was something arising from his disability. As a result of that disability he no longer holds a driving licence and it has not been suggested that that was for any other reason other than because of visual cortex disorder.

204. The final question is whether that inability to drive was the reason for the unfavourable treatment. It is clear that it was not. The Respondent did not fail to consider redeployment opportunities because the Claimant could not drive. The reason for that treatment was because there were no redeployment options which were suitable for the Claimant for the reasons set out in our findings of fact above at any stage before the termination of his employment.

205. It follows that this complaint of discrimination arising from disability fails and is dismissed.

206. The second complaint of discrimination arising from disability appears at paragraph 18 of the list of issues. The act of alleged unfavourable treatment is refusing to engage with the Claimant from November 2021 to January 2023 in line with the Respondent's own internal policies. The "something arising" from the Claimant's disability is said to be his period of absence from work due to incapacity. There can be no question that the Claimant's absence arose from his disability.

207. Factually, there was no refusal to engage with the Claimant but we do not wish to constrain the scope of this part of the claim with an issue of semantics and have treated matters so as to engage a failure to engage. It was clear that there was a failure to proactively engage with the Claimant and, for example, to arrange the necessary meetings with him during the period of Healthcare Leave. We are not satisfied, however, that that caused the Claimant any detriment because he regularly went into the store of his own volition and had meetings with Mr. Burkitt when he was available. Those were in reality probably more frequent than would have been the case if the Respondent had arranged them under the policy.

208. However, even if we had found that that had amounted to unfavourable treatment, the reason for that was not because the Claimant was absent on capability grounds. It was bad management practice on the part of Mr. Burkitt and a reliance on the fact that the Claimant was proactive in attending the store to seek to discuss a return to work.

209. This complaint of discrimination arising from disability also fails and is dismissed.

210. The final act of discrimination arising from disability is set out at paragraph 19 of the list of issues. The act of unfavourable treatment is the Claimant's dismissal on the grounds of capability. The "something arising" from disability was the Claimant's sickness absence and also his inability to return to his substantive role. There can be no question that both that absence and inability to return to his substantive role were "something arising" from the Claimant's disability.

211. There can also be no reasonable suggestion that dismissing the Claimant was not an act of unfavourable treatment given that it brought his employment to an end. There can similarly be no issue that the Claimant was not dismissed because of his absence and inability to return to his substantive role. The Claimant was therefore on the face of it discriminated against as a result of something arising from his disability.

212. The question is now one of justification. The legitimate aim relied upon by the Respondent is the aim of managing long term capability absence so as to save cost and management time and to allow the Respondent to plan

its workforce and operational need with certainty. That is clearly a legitimate aim and it has not been suggested otherwise.

213. The question then is whether dismissal was proportionate in the circumstances. We are satisfied that it was. There was no prospect of the Claimant returning to a driving role, there was a recruitment freeze meaning that the prospect of finding an alternative role was slim at best (indeed there have been no other roles that have been made available and were suitable since the Claimant's dismissal) and what roles were vacant were not able to be undertaken by him for the reasons that we have already given above. Accordingly, we are satisfied that the Respondent is able to objectively justify the treatment of the Claimant so that this complaint also fails and is dismissed.

Failure to make reasonable adjustments

214. We turn then to the complaint of a failure to make reasonable adjustments. The Claimant, as confirmed by Mrs. Owen at the outset of the hearing, relies on the following PCP's:

(a) The provision of failing to allow the Claimant to take part in any trial shifts for a new role;

(b) The failure to consider redeployment of the Claimant into any alternative temporary, seasonal or permanent work;

(c) The practice of placing the Claimant on Welfare leave (which must in this context by Healthcare Leave) but failing to assist the Claimant in returning to work;

(d) The failure to provide disability awareness training to all staff; and

(e) The refusal to contribute to the Access to Work grant to provide equipment for the Claimant on the basis that the Respondent was not offering the Claimant a new role.

215. The difficulty with all of those PCP's as we identified with Mrs. Owen at the outset of the hearing is that essentially they are all personal to the Claimant. They are not things which are applied to the wider workforce as a policy or practice and which place people with the Claimant's disability at a substantial disadvantage. The identified matters not properly being PCP's they cannot found a complaint of a failure to make reasonable adjustments and all complaints of that nature therefore fail.

216. However, we have nevertheless gone on to consider if they had amounted to PCP's whether they placed the Claimant at a substantial disadvantage and whether we would have found that the Respondent failed to make a reasonable adjustment.

217. The first issue relied on is the provision of failing to allow the Claimant to take part in any trial shifts for a new role. We are not satisfied that that would have placed the Claimant at a substantial disadvantage because of his disability even had it amounted to a PCP. It would similarly have disadvantaged anyone who was unable for whatever reason to continue in their primary role and even if that was not the case, it cannot be said that there was a failure to make the reasonable adjustment claimed (which we understand from the list of issues to be redeployment into a new role) because there was no new role which could have been the subject of a trial shift.

218. The second issue relied on is the failure to consider redeployment of the Claimant into any alternative temporary, seasonal or permanent work. There was no permanent work available and so that part of the complaint would also have failed even if that was a PCP for precisely the same reasons as given immediately above. As to the failure to consider the Claimant for a seasonal role, that would not have placed him at a substantial disadvantage as those roles would have come to an end before Christmas and before his employment actually ended but in all events it could not be a reasonable adjustment to remove a permanent contract and to replace it with one which would only see the Claimant having worked a maximum of 8 weeks per year for 8 hours per week.

219. The third issue is practice of placing the Claimant on Welfare leave but failing to assist him in returning to work. We do not accept that this placed the Claimant at a substantial disadvantage. It in fact assisted in terms of time for rehabilitation without the need for invocation of the capability process and was agreed to by the Claimant. Moreover, not facilitating a return to work in these circumstances could not be a failure to make a reasonable adjustment as there were no suitable roles that he could be redeployed to for the reasons already given.

220. The next matter relied upon is the failure to provide disability awareness training to all staff. The only substantial disadvantage identified within the list of issues that could possibly be applicable to this alleged PCP (had we found it to be one) is that the "Claimant was harassed due to employees misunderstanding the Claimant's disability and its impact which would not have incurred (sic) had training being implemented". The difficulty with this part of the claim is that the only alleged harassment that the Claimant has identified (which we come to separately below) was at the October 2022 meeting and the awareness training which is relied upon is that which was to be provided under the Access to Work grant. That grant was not referred to by the Claimant until after that meeting had already occurred. In all events, even if that was not the case as we shall come to further below we do not find that the Claimant was harassed at that meeting.

221. The final matter relied on is the refusal to contribute to the Access to Work grant to provide equipment for the Claimant on the basis that the Respondent was not offering him a new role. This is not a PCP case and as we have already observed there was no evidence of any wider practice of this nature. What this is in fact about is the failure to provide an auxiliary aid which has been wrongly categorised as a PCP, although it is later pleaded in the list of issues (paragraph 25) in the alternative.

222. However, even framing it in that way the purpose of the grant was to enable the Claimant to remain in employment in an adjusted role. It cannot be a failure to make a reasonable adjustment on the part of the Respondent where there was no role which required that equipment and the failure to do so in the circumstances did not place the Claimant at a substantial disadvantage.

223. For all of those reasons all complaints of a failure to make reasonable adjustments therefore fail and are dismissed.

Harassment

224. There are five acts which are said by the Claimant to amount to harassment. They all arise from the meeting in October 2022 with Mr. Burkitt and Ms. Mennell. They are, in short terms, as follows:

(a) Ms. Mennell asking the Claimant if he could read a powerpoint slide when he had stated that he was unable to read;

(b) Mr. Burkitt stating that the Claimant could not see 30 centimetres beyond the end of his nose;

(c) Mr. Burkitt stating that the Claimant would be unable to stack shelves as he would need to be able to climb ladders to access upper shelves;

(d) Being told by Ms. Mennell that if a picking role became available the Claimant would be held to account if he did not meet the same targets as his other colleagues; and

(e) Being told that he was unsuitable to be working in the pod by Mr. Burkitt.

225. We can deal with all of those complaints together and in fairly short order. Whilst we have in mind the test in **Nazir** above, in these circumstances and having identified in each case that the conduct did occur, we can move straight to consideration of whether that conduct had the purpose of effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

226. We are satisfied that it did not have the purpose of doing so. All of those matters arose in the context of discussion of what the Claimant could or could not do in relation to a possible return to work in the event that a vacancy arose save as for the 30cm comment which clearly came as a result of the real observation when the Claimant had had to put his face very close to Mr. Burkitt's because he could not see who he was. None of those things were therefore done with the purpose of creating the proscribed environment.

227. We are also satisfied that none of those things had the effect of creating that environment. The Claimant made no comment or complaint about them at the time and they were not even mentioned in his Claim Form. We have found that those events took on a new significance after the Claimant had sought legal advice and were included as amendments with a view to seeking to strengthen the claim. In short, we do not find that the conduct complained of found the Claimant being placed in an intimidating, hostile, degrading, humiliating or offensive environment. We have already rejected his evidence on those points for the reasons given above.

228. It follows that the complaints of harassment all fail and are dismissed.

Jurisdiction

229. As we have dismissed all of the complaints of disability discrimination for the reasons that we have already given, it is not strictly necessary to address the matter of jurisdiction. However, if we had not done so and we had found any well founded complaint to have been made within the time limit set out in Section 123 Equality Act 2010 then we would have extended time to determine it. That is because it was clear that the Claimant's focus was on securing a return to work and no on litigation. There was therefore a valid reason for the delay.

230. It is also clear that the balance of prejudice would in circumstances where we had found an out of time complaint to be well founded fall on the Claimant in not extending time. The Respondent cannot reasonably point to any prejudice that they would have suffered in time being extended in respect of any out of time complaint and have of course been able to present evidence, including witness evidence, on each of the complaints of discrimination advanced.

REMEDY

231. Given our findings of fact above and the fact that the calculation of the Claimant's basic award in relation to the successful unfair dismissal claim should be a straightforward matter that can be agreed between the parties we do not consider that it is necessary at this stage to list a Remedy hearing.

232. If the parties are unable to agree the basic award then the Claimant should apply within 8 weeks of this Judgment being sent to the parties for a Remedy hearing to be listed.

Approved by:

Joint Acting Regional Employment Judge Heap

Date: **8th June 2025**

JUDGMENT SENT TO THE PARTIES ON

.....09 June 2025.....

.....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/