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EMPLOYMENT TRIBUNALS

Claimant: Mrs S Mallick
Respondent: Iceland Foods Limited
Heard at: East London Hearing Centre
On: 6, 7, 8, 12, and, in Chambers, on 13 and 15 June 2018
Before: Employment Judge A Ross
Members: Mr D Kendall
Mrs BK Saund

Representation

Claimant: Mr Kashif Mallick, a trade union representative
Respondent: Mr. Richard Hignett, Counsel

JUDGMENT

1. The complaints of race discrimination, age discrimination and sex discrimination are dismissed on withdrawal by the Claimant.
2. The complaints of disability discrimination are dismissed.
3. The complaint of unfair dismissal is well-founded.
4. The compensatory award is reduced under section 123(1) Employment Rights Act 1996 by 100% after 22 June 2018.

REASONS

1. The Claimant was continuously employed by the Respondent as a sales assistant from June 2009 until her dismissal without notice in June 2017, when she received the dismissal letter dated 11 April 2017.

2. The Claimant complied with the statutory requirement for Early Conciliation. Early Conciliation was applied for on 15 July 2017 and a Certificate issued by ACAS on 15 August 2017. The Claim was presented on 7 September 2017.

Complaints and Issues

3. The complaints and issues for determination are set out in the revised list of issues in the Appendix to this set of Reasons. A list was initially prepared by the parties. In that list, the Respondent stated that it conceded that the Claimant was disabled from February 2017.
4. On the first day of the hearing, the Claimant withdrew the complaints of race discrimination by harassment and indirect race discrimination. The Claimant had withdrawn the complaints of age discrimination, sex discrimination and direct race discrimination in February 2018. The Tribunal dismissed these complaints on withdrawal.
5. The list of issues was then revised by the Tribunal, to save time and costs and promote the overriding objective. This list was subsequently agreed by the parties, with minor amendment, although Mr. Hignett contended that issue 9 was unnecessary and that he would not make submissions in respect of it. The Tribunal agreed; but this issue was left in the list because the parties had addressed their written submissions using the numbering in the revised list.
6. At the submissions stage of the hearing, the Respondent conceded that the unfair dismissal complaint was brought in time, and that the complaint of discrimination at issue 23.7 was in time. The Respondent contended all other complaints of disability discrimination were out of time. The Respondent further conceded that the Claimant was a disabled person from late 2016 (on the basis that only at that stage could it be said that her condition had become long-term) and that the Respondent had knowledge only of an impairment in March 2016 when the Claimant self-certified with a frozen shoulder (p.142).
7. The Respondent denied having knowledge that the Claimant's impairment had substantial adverse effect until, at the earliest, the welfare meeting on 20 May 2016; but contended that, at that stage, it was not known whether the impairment was likely to last 12 months. The Respondent contended the knowledge that it was a long-term condition might be reasonably inferred when the 6 month period (referred to by the Claimant in the May 2016 meeting) came and went, without the Claimant recovering and still suffering adverse effects.

The Evidence

8. There was an agreed bundle prepared by the Respondent. Page references in this set of Reasons refer to pages in that bundle.
9. During the hearing, on 8 June, Mr. Mallick contended that he had not received copies of the documents which had been added to the original bundle and given numbering with "a", "b", etc added. He did not have such documents with him at the Tribunal, which became apparent during cross-examination of Mr. Finnegan;

the Respondent contended it had provided them in April 2018. In the interests of furthering the overriding objective, the Tribunal directed that those documents be taken from the clean witness bundle, to be copied by the Tribunal, and given to the Claimant. Time was also allowed for Mr. Mallick to read these documents.

10. In addition, at the direction of the Tribunal, the Respondent disclosed the relevant policies from the material time covered by the allegations; the ones in the bundle post-dated dismissal. These arrived in two sets, which were labelled R1 and R2. The relevant "Long Term Sickness Procedure" and the relevant "Absence Policy", which states that they are to be read together, are contained in R2. (The Absence Policy was amended to become the Respondent's "Attendance Policy" from October 2017, see p. 98).
11. Mr. Mallick wrote a note formally withdrawing the remaining complaints of race discrimination, which I recorded as C1, and produced a note with two letters from the Tribunal attached to it, which I recorded as C2.
12. The parties both produced chronologies; Mr. Hignett's version helpfully had colour coding. Neither chronology was agreed.
13. The Tribunal read witness statements from the following witnesses, who gave oral evidence:
 - 13.1. The Claimant;
 - 13.2. Kashif Mallick, Divisional Secretary of the National Education Union, and part-time teacher;
 - 13.3. Peter Finnegan, Area Manager (previously Store Manager at the Iceland Ilford store until March 2017);
 - 13.4. Nichola Panter, Human Resources manager (now with a different employer);
 - 13.5. Matthew Sheldrake, Regional Manager;
 - 13.6. Marc Fensome, Regional Manager.
14. The Claimant gave evidence throughout with an interpreter.
15. The Tribunal also took the statement of Misbah Mallick as read, because the Respondent did not seek to cross-examine upon it.

Findings of Fact

16. The Claimant worked at the Respondent's Ilford store. A central part of her duties was work at the till. The Store Manager at the material times was Peter Finnegan.

17. The Respondent is part of a group of three businesses, with a turnover of three billion pounds, and an approximate profit of £150,000,000. It has 23,000 employees.
18. The Respondent's policies are available on the company's intranet, known as "Nexus". Each employee has a username and password. Access to the policies is obtained by logging in. The policies are summarised in a Handbook. The Claimant received an amended Handbook on 27 October 2016.

Findings in respect of impairment

19. On 4 July 2015, during the course of her work on the till, a thief entered the store and snatched money from the Claimant's till. An incident report was completed by the security guard on the day. This is at page 274A.
20. In the course of this incident, the Claimant sustained injury to her upper body, including her right shoulder. She had no impairment to her right shoulder before that date.
21. The Claimant attended Accident and Emergency on 4 July 2015. She was provided with painkillers and told that she had pulled muscle.
22. The Claimant's evidence of this injury is corroborated by her GP records. She attended her GP on Monday 6 July 2015. The medical notes (at p.152) record a series of specific injuries, as follows:

30-Jul-2015

GP Surgery (St Clements Surgery) SOLOMON, Winston (Dr)

Document: eMED3 (2010) new statement issued, not fit for work Fit Note

Document (Diagnosis: assault at work pain in both shoulders, Duration 10/07/2015

– 01/02/2015) Additional: Rheumatoid arthritis annual review

06-Jul-2015

GP Surgery (St Clements Surgery) SINGARAVELOU, Bharathi (Dr)

History: unprovoked attack at work, says she was scratched in the arm and was grabbed from back, to get to the till, has been having pain the arms, more in the right arm, back and chest, o/e alert, chest is clear, cvs nad, has tenderness over the pectoral muscles in the anterior part of the chest, also c/o right shoulder pain, no swelling noted, but shoulder movements mildly restricted, says that police was involved and she has already been to the hospital, plan; try naproxen with ppi and review. Also noted low vitamin b12 in the recent blood test, has got h/o vitamin b12 deficiency, plan: advised on vitamin b12 injection – loading dose, (6 injections in 2 weeks), then to have once in 3 months and review if any concerns

Medication: Hydroxocobalamin 1mg/1ml solution for injection ampoules use as directed 6 ampoules

23. Therefore, it is clear to us that the Claimant did complain of right shoulder pain shortly after the injury occurred, when she attended her GP on 6 July 2015.

24. The GP did not prescribe medication, but advised the Claimant to take over-the-counter pain relief.
25. The self-certificate at p.140 (which is a poor copy), apparently dated July 2015, does state "*upper body pain*", and was relied on by the Respondent as being inconsistent with the Claimant's case. The Tribunal, however, attached little weight to this document given the Claimant did not fill it in (although she signed it) and the Claimant did not have the form interpreted for her, and because the form was not inconsistent with her complaints to her GP and his evidence on examination in any event.
26. Moreover, on the certificate at page 140, in answer to the question "*Was your sickness caused by an accident at work or an industrial disease?*", the "yes" box has been ticked.
27. On attending the GP on 30 July 2015, the Claimant complained of pain in both shoulders (see page 152). She was certified as not fit to work.
28. The GP told the Claimant that she had pulled a muscle and it would get better. The Claimant was advised to take painkillers and the pain would go.
29. The Claimant was initially off work for about one month due to impairments arising from events on 4 July 2015. The Claimant's evidence about pain relief at that time, and its effect, was as follows:

What pain relief taken in 2015, and how often?

I do not recall memory of medicine; I took paracetamol and cocodomol

Not suggest in note he prescribed?

Not prescribed, but he said could get over counter.

How often taken in rest 2015?

Sometimes after 4 hours, sometimes 8 hours depending on intensity; Night time I must take.

Taken Every day, week?

Initially taken every day. Then taken after gaps, depending when get pain.

How big gaps?

Mostly pain worse at night; normally one day gap.

Biggest gap?

1 day, 2 days maybe.

I took it quite a lot when I go to work."

30. After the incident on 4 July 2015, there was no evidence that the symptoms in the right shoulder went away for any time other than during these gaps. On the contrary, from the evidence, we found that the Claimant's symptoms became worse over time, as we explain below.

31. Moreover, from the above passage of evidence, we inferred that the Claimant could not sleep unless she took pain relief.
32. In addition, we inferred that the Claimant took pain relief “*quite a lot*” when she went to work to reduce the pain generated by work tasks, so as to enable her to attend work.
33. The Claimant returned to work on 3 August 2015. The Claimant was in pain, but did not tell Human Resources or any manager. This was because she feared losing her job. She managed the pain using painkillers.
34. Because of continuing right shoulder pain, the Claimant went to see her GP again 22 February 2016. She was not challenged on the statement at paragraph 9 of her witness statement that the pain “*got so bad that I was in distress and I could not put my coat on*”. Her evidence about this is corroborated by the GP notes which read:

*“22-Feb-2016, GP Surgery (St Clements Surgery) SOLOMON, Winston (Dr)
History: 8 month hx of right shoulder pain, worse for last few months, also weakness for 1 month. Pain is over anterior shoulder and upper arm, pain is worse at night no other Sx
Examination: No abnormalities on inspection or palpation
ROM normal – painful in all directions
Comment: advised likely early frozen shoulder symptoms”*
35. These notes also corroborate the Claimant’s evidence that the pain was worse at night, when she needed medication for pain relief.
36. On 22 March 2016, the Claimant provided a SSP Statement of Sickness form (p.143). This is difficult to read. The Tribunal found that it stated, so far as it could tell:
“Frozen shoulder, difficulty to lift [illegible] very painful”
37. On 24 March 2016, the Claimant had an injection administered by her GP for pain relief, which corroborated the Claimant’s evidence that her symptoms had progressed and needed to be addressed by further pain relief.
38. The SSP form at p.142 was not completed by the Claimant. This was relied upon by the Respondent as being inconsistent with Claimant’s claim that the impairment that she visited her GP with in February 2016 was not that which she had in July 2015. We found the document was not inconsistent with her case because, quite apart from the fact that we heard no evidence about who had completed it nor in what circumstances, the Claimant had not had an accident at work on 4 July 2015, even if her right shoulder impairment arose from a crime which occurred during working hours on that day.
39. The GP referred the Claimant for an MRI scan. The Diagnostic Report MRI, 24 April 2016 (p.155) states:
‘There is an approximately 3mm articular surface partial thickness tear through the distal supraspinatus tendon. There is no significant fatty infiltration or atrophy of the supraspinatus muscle. There are also findings consistent with impingement of the

tendon between the humeral head and the coracoacromial arch with fluid in the subacromial subdeltoid bursa'

40. The advice given was that the Claimant should be referred to Orthopaedics. A referral to the Orthopaedic clinic was made, which is at p.157:

“Problem being referred

Dear Doctor

I'd be grateful for your review of this pleasant lady who has been having ongoing pain in the right shoulder with a reduced range of movement for several months, An MRI was requested and found there to be a partial tear and advised this further referral. I appreciate your expert opinion in the management and care of this patient.

*Kind Regards
Dr V Solomon”*

41. The referral explains the medication that is prescribed at that time.
42. As shown at p.160, the Claimant was admitted to hospital 20 July 2016 for an arthroscopy. The treatment received is as per the discharge note. The ongoing pain relief and medication is listed at p.160.
43. On review by Mr. Khan, the Claimant's shoulder was found to be dislocated. This dislocation occurred after the operation on 20 July 2016. We accepted the following evidence of the Claimant:

“Confirm 1st operation: 20.7.16 for torn tendon in shoulder?

9.8.17: 2nd operation for dislocated shoulder?

– so dislocation happened after 20.7.16 operation with physio?

Yes, it happened after 1st operation; I do not know how it happened.”

44. As a result, Mr. Khan arranged an emergency operation on the Claimant's right shoulder. This is all set out in the document at p.166. The significant reduction in movement is explained.
45. Events thereafter are set out in the referral letter, 9 August 2016, at p.166. This is a referral by her Consultant Orthopaedic Surgeon, Mr. Khan, to a shoulder specialist, Mr. Falworth.
46. On review by her Consultant, he sent a letter to the GP, dated 21 September 2016, stating the Claimant was unable to return to work for 6 months at least.
47. The Claimant's restriction in the range of movement of her right shoulder and ongoing pain is set out in a letter from physiotherapy to her Consultant 23 November 2016, p.164.

48. A GP report in February 2017 following the request of the Respondent ahead of a proposed welfare meeting states (p.247-248):

“Thank you for your letter and request of medical information regarding the above named patient, which on our records is known as Shalia Mallick, but you know her as Rehana Malik.

Her diagnosis is of a Tendon Tear in the shoulder, which caused reduced range of movement. Prognosis is hard to say, as she has limited improvement in her range following surgery, and is still under the Specialist Mr A Khan, Consultant Orthopaedic Surgeon

Unknown when she can return to work

On returning to work this should be a phased return with light duties, no heavy lifting. Any lifting requiring two hands should be avoided, no time known for this, depends on her progress once returns.

She would likely be on pain relief on returning to work. This has a possible sedative side effect, but has not experienced this side effect with her medication

This condition could reoccur if she was to experience any further trauma like the incident at work which caused the condition.

For further information regarding her ongoing condition and likely progress, her Orthopaedic Surgeon, is the best person to ask. His contact details are on the enclosed letters explaining her present issues.

49. There was no estimate as to when the Claimant could return to work in any of the medical evidence; the prognosis was guarded.
50. The Claimant's evidence was that she could have returned to light duties by the end of 2017. She was not challenged on this.

Adverse effect:

51. After the impairment arose on 4 July 2015, the Claimant could do household work, but only with pain. She could comb her hair, but with difficulty.
52. As we have found, the Claimant could not sleep without pain relief from July 2015.
53. By February 2016, the pain had got worse; she could not put her coat on and was not able to dress properly. She had a constant pain to the side of her shoulder.
54. The reason that she did not go back to GP before February 2016 was because she had been told that she had a pulled muscle and it would get better.
55. The Claimant's evidence of adverse effect included the following, all of which we accepted:

*“See number 4, p.47: when did these effects on your ability begin: eg. unable to dress, unable to sign letters, unable to use fingers to write- 2016 or 2018?
This was Feb 2016; because hands and fingers swollen.*

3.8.15: *Returned to work – did you return because reduction in symptoms?
Yes, symptoms were reduced to some extent, because before state shock.*

*Without pain relief, would you have been able to travel to work? continue to work?
Yes, I would not be able to travel or work without medicine.*

17.3.16: *Absent sick – p.141 cold/flu – is it your case this is wrongly recorded? Or
that it was cold/flu then had frozen shoulder?
This is written wrong: I called them and said lot pain in shoulder could not put on
my coat.
I could not lift up my hand.”*

Was the adverse effect substantial?

56. The Tribunal concluded that the right shoulder impairment had a substantial adverse effect on the Claimant's day-to-day activities from 4 July 2015 onwards. The effects of the impairment were clearly more than minor or trivial once the deduced effect of the pain relief medication was considered, because without pain relief it was likely that she was unable to do at least the following, or could only have done them with difficulty:
- (a) to sleep;
 - (b) to travel to work;
 - (c) to do the type of tasks her sales assistant work required.

Was the substantial adverse effect long-term?

57. The Tribunal found as a fact that Claimant's right shoulder impairment amounted to a progressive condition, with symptoms that increased in number and intensity over time, leading to her return to the GP in February and March 2016.
58. Moreover, the Tribunal concluded that, once the incident occurred, the Claimant's right shoulder impairment could well have lasted 12 months from 4 July 2015, given the nature of the impairment. It is irrelevant that neither the staff at Accident and Emergency nor the GP realised this.

Return to work

59. The Tribunal broadly preferred the evidence of the Claimant about her meeting with Mr. Finnegan at the store on 3 August 2015, although it did not completely accept her recollection as to what was said. There was no return to work meeting in his office, and there was no viewing of the CCTV with the Claimant present. There was a brief discussion on the shop floor as the Claimant stated. Our reasons for preferring the Claimant's evidence on this dispute are as follows:
- 59.1. We noted that the alleged CCTV viewing and meeting was not referred to in the p.130 note on Nexus (which is headed "Performance"), which we found to be an extraordinary omission if Mr. Finnegan's evidence was correct.

- 59.2. The date was wrong on the entry at p.130, which was inconsistent if a 30 minute return to work meeting had been conducted together, as Mr. Finnegan alleged. The entry at p.130 suggested a brief meeting more in the nature of that described by the Claimant, which took place on the shop floor.
- 59.3. The heading "Performance" at p.130 is inconsistent to an alleged return to work meeting.
- 59.4. The Long-Term Sickness Absence procedure (applicable because the Claimant was away from work for just over four weeks), at R2, states that the meeting should cover five points. The note of the meeting at p.130 does not cover these. Irrespective of which procedure applied, the note at p.130 had no relevance to a return to work meeting after sickness absence.
- 59.5. The Claimant kept requesting to view the CCTV. We accepted that she would not have forgotten that she had already viewed it, if this were in fact the case.
60. Mr Finnegan did not, however, state that the Claimant would be sacked on the spot, as she alleged. It was likely that the Claimant was mistaken about the words used given the length time and events since. It was more likely that Mr Finnegan stated that it was fortunate for the Claimant that the Respondent got the money back, because if the money had not been recovered, she would have been subject to the disciplinary procedure and could have been dismissed.
61. Mr Finnegan said this because the amount of money in the till was greater than £100. The Respondent's cash policy imposes a maximum limit of £100 in notes in the till (see p.109).
62. There was no evidence that the Claimant was told money would have been recovered from her wages, nor that she was told that it was her fault for trying to prevent the incident, although this may have been her perception. For example, in cross examination, the Claimant's evidence was:
- Q. Mr. Finnegan never said you responsible for injury, no one at Respondent said it?*
- A. He is indirectly telling me. He not ask me how I am, more concerned about money. What would I think in regard to this?*
63. What Mr Finnegan said at that meeting on the shop floor on 3 August 2015 was not said with purpose of creating an intimidating or hostile, or humiliating or offensive environment.
64. The Claimant perceived what Mr Finnegan said as hostile and intimidating. His actions and approach are described by her at paragraphs 7-8 of her witness statement.

65. The entry on Nexus at p.130 is related to a Performance issue, not a welfare issue. The Tribunal found that Mr Finnegan acted as he did due to his perception of her performance; his actions were not related to her disability at all.

The Respondent's knowledge of disability

66. On receipt of the SSP form at page 143, the Respondent, including Mr. Finnegan, knew or could reasonably be expected to know that the Claimant had a right shoulder impairment likely to cause more than minor or trivial effect on her daily activities. This states "*Frozen shoulder*", to which has been added in pen, "*Torn ligament. Right shoulder*".
67. This information before the Respondent must be taken with the information received by Mr Finnegan at the welfare meeting on 20 May 2016. This included the information provided at page 173:

"SM – Very painful, ligament torn, right shoulder. Doctors done MRI scan, first they said it was frozen shoulder originally but now they say I got torn ligaments when I first spoke to the doctor they gave me an injection, also gave me strong painkillers still hurting. I asked for a scan"

68. In addition, the Claimant stated that she had been referred to a specialist. When asked what her doctor thinks about her situation, she responded:
"Not sure, sometimes they say 6 months..."
69. After the 20 May 2016 welfare meeting, Mr Finnegan and Respondent knew both the shoulder impairment and its adverse effect were likely to last at least twelve months. This was both on the balance probabilities and in the sense that they "could well" last twelve months. When deciding to dismiss the Claimant, Ms. Panter had an even greater degree of knowledge, because by this stage the Claimant had been absent sick for more than 12 months.

Claimant's Grievance

70. A grievance was filed on 9 November 2016 by Kashif Mallick on behalf of the Claimant (p.193). This states:

"1. Against Peter her Manager at the Iceland High rd, Ilford Store.

The basis of her grievance is that his bullying nature and words intimidated her to such an extent she was worried she would lose her job even though she felt unfit and unwell to attend work. This is the best illustrated by the words he spoke after the robbery at the store.

"If the money had not been recovered I would have sacked you on the spot"

Instead of showing concerns for his employee state of mind and health he was only concerned with intimidating her.

2. Secondly, she has a grievance with the store in regards to her pay being cut, and not receiving full pay. The assault sustained was at work; this resulted in a very serious debilitating injury. The store should have recognised this as an industrial injury and not stopped her pay.

Please forward any relevant grievance policy that would have to be followed by the company, and please acknowledge receipt of this email. Please note Mrs Mallick will be claiming damages occasioned by the behaviour and actions of the Managers and representatives of Iceland Store”.

71. The manager hearing the grievance was Mr. Sheldrake. He interviewed the Claimant with Mr Mallick representing her, on 28 November 2016. The notes of this meeting (from p.201) are accurate if not verbatim. In the course of the grievance meeting, Mr Mallick and the Claimant requested a copy of the CCTV of the incident where money was stolen from the till. The Claimant’s case was that, at that time, money was not going into the counter cache, and that she had rung the bell at her till many times; Mr Finnegan had informed her that the CCTV did not show this.
72. Mr Finnegan had made copy of the CCTV, burned to a disc, which had been given to the police. He did not make and retain a further copy on disc. The reason for this was that he had retained a copy on the store CCTV system. Unfortunately, this was lost when the system was upgraded. His explanation was not challenged on this point.
73. Mr. Sheldrake did not have copy of CCTV. He made inquiries to obtain it, as set out in paragraph 32 of his witness statement. In summary:
- 73.1. He contacted the CCTV/Security team at Head Office, but was informed that the footage could not be recovered.
 - 73.2. He attended Ilford Police Station on three occasions trying to retrieve the disc provided to the police.
 - 73.3. He contacted CID but was informed that the CCTV footage could not be released because the matter was being investigated and progressed through the Courts.
74. Mr Sheldrake provided the explanation in the grievance decision letter, 20 December 2016 (p.222-223), as to why the Respondent could not provide her with CCTV from the incident:
- “On your statement of sickness dated 22/03/2016 you stated you were off with frozen shoulder with difficulty to lift your left arm. On this form you ticked the box to confirm this was not caused by an accident at work or industrial disease. In relation to your pay received I can confirm as per your contract of employment, you have received 8 weeks’ company sick pay and 20 weeks’ statutory sick pay. You are not entitled to any further sick pay.*

It is your right to make a claim for personal injury should you feel you need to. If you wish to do so, please contact Aileen Spencer in our legal team c/o Deeside

Head Office. Overall, for the reasons given above, I do not uphold this point of your grievance”.

75. As shown by this extract, the grievance decision at p.223 informs the Claimant why she did not receive any further sick pay. We saw no evidence to suggest that the summary of the Claimant’s sick pay entitlement at p.223 was incorrect.
76. Marc Fensome conducted the grievance appeal. The Tribunal accepted Mr. Fensome’s evidence which details the steps that he took to obtain a copy of the CCTV footage and that he interviewed staff who had viewed it.
77. Mr. Fensome interviewed Mr. Finnegan on 13 January 2017 (p.238M). In this interview, Mr Finnegan explained which staff had seen the CCTV. Mr Finnegan was informed that he should have burned and kept a copy of the CCTV for reference.
78. At this meeting, Mr Finnegan explained that he had planned to give the Claimant her discount card and Christmas vouchers at the Welfare Meeting in November, but that this did not take place because of the approach of Kashif Mallick at that meeting, and that he had walked out. We accepted Mr Finnegan’s evidence as to the reasons why he did not provide these items to the Claimant.
79. We accepted Mr. Fensome’s evidence at paragraph 41 of his witness statement, upon which he was not challenged: he gave the Claimant details of the Criminal Injuries Compensation Authority and informed her that the Respondent would not consider paying her compensation at that stage.
80. By his Grievance appeal decision, 23 January 2017, at p.244, on the issue of compensation for injury, Mr. Fensome stated:

“You have requested that Iceland pay compensation for your industrial injury I understand that you/your Union Representative believe that Iceland should be paying compensation for the injury you sustained during the till snatch in July 2015. However, for Iceland to pay you compensation, there must be an element of negligence on the company’s behalf. From my investigations I cannot determine as to how Iceland Foods has been negligent i.e. what could we have done differently to ensure that this particular incident didn’t take place. Having spoken to Aileen Spencer, Head of Risk in our legal department, she has suggested that you may be entitled to claim compensation from the Criminal Injuries Compensation Authority. This agency was set up to assist people who have been physically or mentally injured because they were a blameless victim of a violent crime. They can be contacted on www.gov.uk/government/organisations/criminal-injuries-compensation-authority

If you would like any advice around this, please contact her directly on 01244 842708. Due to the above I can confirm that Iceland won’t be paying compensation as Iceland has not been negligent in my opinion”.

81. The appeal decision letter also records that the discount card and Christmas vouchers had been sent to the Claimant on 5 January 2017. There was no allegation that this did not occur; we find that they were sent on or about that date.
82. As shown by the above findings in respect of the grievance, the Respondent did not refuse to confirm how much sick pay the Claimant would receive. Moreover, Mr. Fensome stated that he could not see how the Respondent was negligent, and made it clear that the Respondent would not be paying compensation.
83. We find that the Claimant suffered no unfavourable treatment as alleged at issue 23.5 because confirmation and explanations as to why she would receive no further sick pay and no compensation are given.
84. We find that the Claimant suffered no unfavourable treatment as alleged at issue 23.6. The Respondent did not inform the Claimant of all her “rights” after suffering an injury whilst at work. There was no evidence that there was any such duty upon the Respondent, and no such legal duty exists. But the Respondent did provide relevant advice to the Claimant:
 - 84.1. Advice about CICA and an offer to advise her further about this;
 - 84.2. Advice that the Claimant had right to claim personal injury and suggested that she contact their legal team if she wished to do so.
85. It was patently not unfavourable treatment for the employer not to advise the Claimant on all her rights in law.
86. There was no evidence from the Claimant to show that the Respondent failed to explain “*relevant health and safety at work protocols*”. Indeed, there was no evidence as to what such protocols were, nor that she requested any explanation of them. This allegation in issue 23.6 could not amount to less favourable treatment.
87. The Tribunal found that the Respondent’s procedures were on Nexus, software which could be accessed through the Respondent’s intranet, which the Claimant could access.

The Welfare Meetings

88. Step Two of the Respondent’s Long-Term Sickness Absence procedure is to conduct a welfare meeting.
89. Mr Finnegan conducted a welfare meeting with the Claimant on 7 July 2016. The notes of this are at p.176-178, which are accurate but not verbatim. At this meeting, the Claimant stated that she was still unable to move her right shoulder, but her operation had been delayed to 20 July.
90. The next welfare meeting was planned for 8 September 2016, but the Claimant was unable to attend.

91. On 30 September 2016, Mr Mallick, the Claimant's brother-in-law, informed Human Resources that he was now representing the Claimant, asking for all communication to be forwarded to him.
92. The Claimant was invited to a further welfare meeting on 15 October 2016. Mr Mallick attended with no identification to show that he was an accredited trade union representative. He admitted in evidence that he had no identification card, which the Tribunal found to be very unusual, and inconsistent with his role as divisional secretary of a large teaching union.
93. Mr Mallick produced at the meeting two sheets printed from Google website, which he claimed showed he was a trade union divisional secretary. Mr. Finnegan told him that this was not appropriate identification; and he left the room to try to verify Mr Mallick's identity.
94. Mr. Finnegan was unable to verify Kashif Mallick's identity. After some argument, Mr Mallick told the Claimant to leave with him. They left and the meeting ended.
95. Mr. Finnegan attempted to arrange a further welfare meeting on 1 November 2016. He informed the Claimant that Kashif Mallick should not accompany her to this meeting (page 192). Subsequently, the Claimant filed the grievance referred to above, against Mr Finnegan, and, as a result, Mr Finnegan's role in arranging welfare meetings came to an end. It was taken over by Human Resources Manager, Nicky Panter.
96. By letter dated 5 December 2016, Ms Panter invited the Claimant to a welfare meeting on 13 December 2016. The Claimant did not attend and the meeting did not go ahead.
97. Ms Panter wrote to the Claimant again on 19 December, pointing out the failure to attend and asking permission to obtain a medical report. Ms Panter sought a medical report because there was a lack of understanding about the shoulder condition and the prognosis for it.
98. On 22 December, the consent form for the medical report was returned complete by the Claimant.
99. A letter of instruction for the report was sent to the Claimant's GP, Dr. Solomon.
100. By an email dated 12 January 2017, sent to Mr Mallick, Ms Panter sought to arrange a further welfare meeting by proposing three alternative dates, 19, 20 or 25 January (see page 237). There was no response to this.
101. A further invitation was sent to Mr Mallick on 6.2.17 inviting the Claimant to attend a welfare meeting on 13 February 2017. Ms Panter explained that she had not heard from the Claimant and wished to arrange a welfare meeting with her. The Claimant did not attend this meeting.
102. On or around 21 February 2017, the Respondent received a copy of the medical report of Dr. Solomon, which is dated 3 February 2017. The delay in receipt is

probably due to the fact that it was sent to the Claimant first for her consideration. The letter was accompanied by letters from the physiotherapist and Consultant (see page 249-251).

103. By letter of 27 February 2017, sent directly to the Claimant, a further invitation for a welfare meeting was given. The meeting proposed was on 7 March 2017, to discuss the contents of the medical report from Dr. Solomon, which we refer to above. Ms. Panter had noted that the report did not suggest any likely date for the Claimant's return to work, and suggested light duties be considered when she was able to return. Her interpretation of this evidence was that it was unlikely that the shoulder would heal for some time.

104. The invitation letter of 27 February (page 272) included the following:

"I would like to have another opportunity to meet with you to discuss your current health situation and to see if there is anything the Company can do to support you during her period of absence. We may also discuss, if appropriate, when you may be ready to re-enter the workplace and agree a return to work plan with you. I confirm I have now received your medical report from your doctor which I would also like to discuss"

105. Ms. Panter could not understand why the Claimant would not engage with the Respondent at all, and simply wanted to talk to her and had not considered dismissal. She had no objection to Mr Mallick attending meetings.

106. The Claimant did not confirm that she would attend the meeting planned for 7 March, and she did not attend.

107. As a result, by letter dated 23 March 2017, Ms Panter wrote to the Claimant again, inviting her to a meeting on 31 March. This letter (page 254) stated as follows:

"The purpose of conducting a welfare meeting with you is to:

- *discuss the medical report received*
- *understand any reasonable adjustments the business could consider; and*
- *discuss any foreseeable return to work.*

I have now made arrangements for us to meet again as per the below:

Date: 07/04/2017

Time: 09:00

Venue: Iceland Foods, Whalebone Lane Store

Stuart Ware, HR Manager will be present as Company Representative during the meeting.

I must make you aware that if you are unable to return to your role and we are unable to identify any reasonable adjustments or alternative roles that may be suitable, one possible outcome of this meeting may be dismissal, with notice on the grounds of incapability through continued ill-health. It is therefore my strong preference that you attend this meeting. If you are unable to attend then you may

make a written submission, any submission should be received by 6th April 2017. If you choose this option please send this FAO myself c/o HR Services, Iceland Foods, Second Avenue, Deeside, CH2 1AQ or by e-mail to nichola.panter@iceland.co.uk. I would note however, that if you fail to attend this meeting a decision will be made in your absence based on the information available to me.

As this is a formal meeting, you have the right to be accompanied to the meeting by a work colleague or a trade union representative. Additionally, if you require any reasonable adjustments to enable you to attend the meeting, please contact me so that I can make appropriate arrangements....”

108. The response of Mr Mallick to this letter, at page 258 – 259 (email timed at 0249), was not at all helpful, not addressing any of the points that Ms Panter indicated the Respondent wanted to discuss. Moreover, it stated that the Claimant would only attend a meeting arranged by the Respondent when it accepted that she was entitled to “*industrial injury compensation and sick pay since that incident*” or provided a copy of the CCTV footage.
109. The Claimant has limited skills in English. We found that she did not understand the term “dismissal” in Ms. Panter’s invitation letter. She relied on Mr Mallick for advice, which was that she should not to attend the meeting on 7 April 2017.
110. The Claimant failed to attend the meeting on 31 March 2017.
111. Ms. Panter responded in a reasonable and measured way later on 31 March (at page 258), explaining the purpose of the proposed welfare meeting. She concluded by stating:

“To make you aware I will now be writing to Shaila to invite her to a further welfare meeting on 7 April 2017, and it would be my strong preference that she attends this meeting. Shaila will also have the right to be accompanied at this meeting should she wish.”

112. Ms. Panter invited the Claimant to a welfare meeting on 7 April 2017. The invitation letter (page 254) includes the following:

“The purpose of conducting a welfare meeting with you is to:

- *discuss the medical report received*
- *understand any reasonable adjustments the business could consider; and*
- *discuss any foreseeable return to work.*

I have now made arrangements for us to meet again as per the below:

Date: 07/04/2017

Time: 09:00

Venue: Iceland Foods, Whalebone Lane Store

Stuart Ware, HR Manager will be present as Company Representative during the meeting.

I must make you aware that if you are unable to return to your role and we are unable to identify any reasonable adjustments or alternative roles that may be suitable, one possible outcome of this meeting may be dismissal, with notice on the grounds of incapability through continued ill-health. It is therefore my strong preference that you attend this meeting. If you are unable to attend then you may make a written submission, any submission should be received by 6th April 2017. If you choose this option please send this FAO myself c/o HR Services, Iceland Foods, Second Avenue, Deeside, CH2 1AQ or by e-mail to nichola.panter@iceland.co.uk. I would note however, that if you fail to attend this meeting a decision will be made in your absence based on the information available to me.

As this is a formal meeting, you have the right to be accompanied to the meeting by a work colleague or a trade union representative. Additionally, if you require any reasonable adjustments to enable you to attend the meeting, please contact me so that I can make appropriate arrangements....”

113. We accepted that the purpose of the proposed welfare meeting was as specified in this letter. Mr Mallick did not challenge the evidence of Ms Panter about this in her statement.
114. In response to this invitation, Mr Mallick did not put in any written submissions ahead of the meeting on 7 April. He responded as shown by emails at p.256-257, which were not constructive, ending “*See you in Court*”. Ms Panter had referred Mr Mallick to the fact that the Respondent had already advised the Claimant to consider a claim to the Criminal Injuries Compensation Authority, and that it was her strong preference that the Claimant attend the 7 April meeting (see email of 4 April at 1203 page 257).
115. We accepted that Ms Panter could not understand why the Claimant would not meet to discuss her absence nor could she understand Mr Mallick’s response, given what had been explained in the grievance and appeal outcomes.

The decision to dismiss

116. On 7 April, neither the Claimant nor Mr Mallick attended. This is recorded by Ms Panter’s notes at page 260, which forms the basis of the dismissal letter.
117. We note that Step three of the Long-Term Sickness Procedure, “Manage the sickness absence” provides as follows:

“STEP THREE: Manage the sickness absence

At each stage of managing the absence, any of the following may be the appropriate next step:

- continue the colleague’s long-term sickness leave and invite them to another meeting in due course;
- support the colleague’s return to work;
- support the colleague’s return to work with reasonable adjustments; or
- support the colleague’s return to work on a structured, phased return basis.

If the above options are not applicable, you may need to consider terminating a colleague’s employment on the grounds of ill health”

118. The meeting was not a welfare meeting, however, but a formal meeting as the invitation letter stated; but welfare meetings under the Respondent's procedure cannot be formal meetings: see the Long-Term Sickness Procedure at R2.
119. Although the Claimant was absent, Ms Panter decided to continue with the meeting. Ms Panter decided to dismiss the Claimant. She made the decision to dismiss because of:
 - 119.1. The length of the Claimant's absence (from 13 March 2016);
 - 119.2. The Claimant's lack of engagement in the welfare meetings process since October 2015;
 - 119.3. Dr. Solomon's medical report contained evidence that he was unable to give any likely return to work date;
 - 119.4. The medical evidence showed the Claimant's shoulder was still poorly with very limited movement.
120. We found that the reason or principal reason for dismissal was a reason relating to the Claimant's ill-health. This is evidenced by the dismissal letter of 11 April 2017, especially the second paragraph at page 264.
121. We found that the Claimant was dismissed partly because of the length of her absence from work, as Ms Panter stated in paragraph 35 of her witness statement. The long-term absence related to her ill-health. This absence coupled with the lack of any possible return to work date was the primary reason for her dismissal, which is apparent from both the dismissal letter and Ms. Panter's evidence. In addition, taken with the above, the Claimant's non-engagement with the welfare meeting process was a factor in the decision to dismiss.

Communication of the decision to dismiss

122. On 22 April 2017, the dismissal letter (dated 11 April 2017) was delivered to the Claimant's home address, and signed for by her husband, Misbah Mallick. It was not sent or copied to Kashif Mallick at that time.
123. The Claimant's evidence, which was not challenged, was that she did not learn of her dismissal until she received the letter dated 26 May 2017 at page 270 with her P60. This letter referred to the termination of her employment.
124. The Claimant did not see a copy of the dismissal letter until around 8 June 2017, when Kashif Mallick was sent a copy by email by Ms Panter, evidenced at page 273.
125. The Tribunal found that the email from Mr Mallick of 7 June 2017 (at page 272) implicitly includes a request to appeal by the Claimant. It is for this reason that Ms. Panter replies by stating, by the email on 8 June 2017, that the Claimant is out of time for making an appeal.

126. As a matter of fact, the Tribunal found that Ms. Panter's analysis that the Claimant was out of time to appeal was not correct. We heard and saw no evidence of any contractual term that service of the termination of employment at the home address amounted to service on the intended recipient.
127. Therefore, the Respondent did fail to afford the Claimant the opportunity to appeal. This did not arise from the sickness absence, or anything else arising in consequence of the Claimant's disability, but from the employer's belief that the Claimant had received the dismissal letter on 22 April 2017.
128. The Tribunal found that it was inevitable that, had an appeal taken place, the outcome would have been the same: the decision to dismiss would have remained in place. This was for the following reasons:
 - 128.1. Mr Mallick was fixated on the issue of the CCTV footage, and had not focussed on the Claimant's further treatment nor what (if any) further medical evidence could be produced on her behalf.
 - 128.2. Mr Mallick was advising the Claimant not to engage in the long-term sickness procedure. The Tribunal decided that the Claimant would continue to rely on his advice.
 - 128.3. Mr Mallick's stance was implacably opposed to that of Respondent and its purpose in holding the meetings, evidenced by the following:
 - 128.3.1. The emails from him at pages 254 – 259;
 - 128.3.2. Ms Panter was doing her best to get the Claimant to attend on 7.4.17, but she did not attend;
 - 128.3.3. At page 256, he had stated the Claimant would not attend until she was sent the CCTV;
 - 128.3.4. Mr Mallick's final comment on 4 April ("*See you in Court*") suggested that he did not consider an appeal had any substantive value. That this was his position is confirmed by his email, before he receives the dismissal letter, at page 272: this shows that he sees the appeal only as a paper exercise, one of form not substance.
129. We found that the Respondent did not communicate with the Claimant by email, but by post or by text, evidenced by the correspondence referred to above. The Respondent did contact Mr Mallick by email in response to his emails, but given the tone and nature of his emails on 31 March 2017 and thereafter, it is understandable why Ms. Panter would decide that there was no point communicating with him instead of the Claimant. Mr Mallick had, after all, finished off a sequence of correspondence on 4 April 2017 with a response of "*see you in court*", which was an unreasonable response.

130. We did not find that the mode of communication used by the Respondent amounted to unfavourable treatment of the Claimant.

Knowledge of disability

131. On receipt of the SSP form at page 143, the Respondent, including Mr. Finnegan, knew or could reasonably be expected to know that the Claimant had a right shoulder impairment likely to cause more than minor or trivial effect on her daily activities. This states “Frozen shoulder”, to which has been added in pen, “Torn ligament. Right shoulder”.
132. This information before the Respondent must be taken with the information received by Mr Finnegan at the welfare meeting on 20 May 2016. This included the information provided at page 173:

“SM – Very painful, ligament torn, right shoulder. Doctors done MRI scan, first they said it was frozen shoulder originally but now they say I got torn ligaments when I first spoke to the doctor they gave me an injection, also gave me strong painkillers still hurting. I asked for a scan”

133. In addition, the Claimant stated that she had been referred to a specialist. When asked what her doctor thinks about her situation, she responded:
“Not sure, sometimes they say 6 months...”
134. After the 20 May 2016 welfare meeting, Mr Finnegan and Respondent knew both the shoulder impairment and its adverse effect were likely to last at least twelve months. This was both on the balance probabilities and in the sense that they “could well” last twelve months.
135. When deciding to dismiss the Claimant, in April 2017, Ms. Panter had an even greater degree of the requisite knowledge, because by this stage the Claimant had been absent sick for more than 12 months.

The Law

136. To save repetition, save where stated, all section references below refer to the Equality Act 2010.

Definition of Disability

137. Section 6(1) provides that a person has a disability if:
- (1) the person has a physical or mental impairment;
 - (2) the impairment adversely affects the person’s ability to carry out normal day to day activities;
 - (3) the adverse effect is substantial; and
 - (4) the adverse effect is long-term.

138. In reaching its decision on the issue of whether a person is disabled under the DDA 1995, the Court must take into account the *Guidance on Matters to be taken into account in determining questions relating to the definition of disability* (2006).
139. The authorities show that a purposive interpretation must be given to the statutory test when deciding whether a person has a disability. But the burden of proof lies on the Claimant to show that she meets this definition: *Kapadia v LB Lambeth* [2000] IRLR 699.
140. We reminded ourselves that the Court must focus on the impairment on the ability of the person to do (or not do) acts: *Goodwin v The Patent Office* [1999] IRLR, para 34 – 36:
“In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves....”

Mental or Physical Impairment

141. This is largely a question of medical evidence. The medical report should deal with:
- (i) the doctor’s diagnosis of the impairment;
 - (ii) the doctor’s observations of the Claimant carrying out day-to-day activities and the ease with which he was able to perform those functions; and
 - (iii) any relevant opinion as to prognosis and the effect of medication.

See *Abadeh v BT plc* [2001] IRLR 23 EAT paragraph 9.

142. Whether a person is disabled within s.1 DDA is not a question of medical opinion, but a question for the Court: see *Abadeh*.

Substantial

143. Whether an impairment has a substantial adverse effect is a question of fact for the Court, not a doctor: see *Abadeh* at paragraph 9.
144. A substantial effect is one which is more than minor or trivial: see Guidance, Para B1 and s.212 EA 2010.
145. Crucially, the Act requires the Court to consider the “deduced effect” of the disability. Paragraph 5 of Schedule 1 EA 2010 provides that:
“(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.”

146. “Measures” includes medical treatment: paragraph 5(2) Schedule 1.

Long Term

147. Schedule 1 paragraph 2(1) of the EA 2010 provides a definition of “long term”:
*“The effect of an impairment is a long-term effect if:
(a) it has lasted at least 12 months;
(b) the period for which it lasts is likely to be at least 12 months; or
(c) it is likely to last for the rest of the life of the person affected.”*
148. The meaning of “likely” in Schedule 1 paragraph 2(1) should be interpreted as “could well happen”: see The Guidance C3.
149. The Guidance, C4, provides:
“In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).”

Adverse effect on the ability to perform normal day-to-day activities.

150. Normal day-to-day activities are “activities” which are no longer exhaustively defined by a list. This aspect of the statutory test is comprehensively addressed at Section D of the Guidance. Paragraphs D2 – D6 are useful guidance in most cases, including this one. The Appendix to the Guidance contains a helpful illustrative but non-exhaustive list of factors which it would be reasonable to regard as having a substantial adverse effect on normal day to day activities.

Disability Discrimination

151. In this case, three types of disability discrimination were alleged: unfavourable treatment arising from disability (section 15 EA); failure to make reasonable adjustments (section 20-21 EA); harassment (section 26 EA). The Tribunal directed itself to the relevant law as follows.

Duty to make reasonable adjustments

152. In practice, when hearing complaints of disability discrimination, an Employment Tribunal should first deal with the complaint alleging the failure to make reasonable adjustments: see *Archibald v Fife Council* [2004] IRLR 651 at paragraph 32.
153. As Baroness Hale explains in *First Group Plc v Paulley* [2017] UKSC 4 at paragraph 94, the object of the duty to make reasonable adjustments is to “level the playing field”. It is designed to produce equality of results rather than equality of treatment.
154. Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out the relevant statutory provisions at the outset:

“20 Duty to make adjustments

- (1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (4) *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.*

21 Failure to comply with duty

- (1) *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..”*

155. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission. Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

- 155.1. The phrase “provision, criterion or practice” (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements including one-off decisions and actions.
- 155.2. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by “reasonable steps”.
- 155.3. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and

whether the steps would be effective in preventing the substantive disadvantage.

156. In *Carrera v United First Partners Research* UKEAT 0266/15, the Employment Appeal Tribunal held that a PCP did not require an element of compulsion; an expectation or assumption placed upon an employee may suffice. This decision, and the law within it, was upheld on appeal: see [2018] EWCA Civ 323. In the EAT, HHJ Eady gave the following guidance at paragraph 31-37:
 - 156.1. The identification of the PCP was an important aspect of the Tribunal's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments.
 - 156.2. It is important to be clear as to how the PCP is to be described in any particular case.
 - 156.3. The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice".
 - 156.4. The Tribunal had taken an unduly narrow view of the Claimant's identification of the PCP, and that it should, instead, have adopted a real world view of what a requirement was in the context of the case.
157. The Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:
 - 157.1. the relevant provision, criterion or practice made by the employer; and/or
 - 157.2. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;
 - 157.3. the identity of non-disabled comparators (where appropriate); and
 - 157.4. the nature and extent of the substantial disadvantage suffered by the Claimant.
158. The above steps follow the guidance provided in *Environment Agency v Rowan* [2008] IRLR 20 at paragraph 27.
159. Substantial disadvantage is such disadvantage as is more than minor or trivial.
160. In *Archibald v Fife*, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).
161. In applying *Archibald v Fife*, in *Chief Constable of South Yorkshire v Jelic* [2010] IRLR 744, the EAT held that the test of reasonableness was an objective one, for Employment Tribunals to decide. The EAT also emphasized that each case turned on its own facts.

162. This Tribunal reminded itself that even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.
163. The Tribunal considered *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216. An employee's appeal against a decision that her employer had not failed to make reasonable adjustments for her disability was dismissed, because the proposed adjustments had not been reasonable in the circumstances. The case concerned a sickness absence policy, which was used against the employee. Although there are numerous important points made in the leading judgment of Elias LJ, the following is a fair summary of it for our purposes in this case:
- 163.1. The PCP was that the employee had to maintain a certain level of attendance at work, in order not to be subject to the risk of disciplinary sanctions.
- 163.2. The nature of the comparison exercise under section 20 required the tribunal to ask: does the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person? The fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the PCP bit harder on the disabled, or a category of them, than it did on the able-bodied. The ET and the EAT had erred in holding that the s.20 duty had not been engaged because the policy applied equally to everyone (see paragraphs 46-48, 58, 63 of judgment).
- 163.3. There was no reason artificially to narrow the concept of what constituted a "step" within the meaning of s.20(3): any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP was capable of amounting to a relevant step. The only question was whether it was reasonable for it to be taken. Although the proposed steps would have been, if taken, capable in principle of ameliorating the disadvantage resulting from the operation of the policy, the steps required to avoid or alleviate such disadvantages were not likely to be steps which a reasonable employer could be expected to take.
- 163.4. It may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.
164. The Tribunal also considered the following passage in *Griffiths* (at paragraph 80):
- "The section 20 duty is normally relevant when looking into the future; it is designed to help prevent treatment which might give rise to a section 15 claim from arising. But that is not the purpose of the section 20 complaint here. It is really a staging post in challenging in order to invalidate the written warning – treatment which has already arisen. In my view there is a certain artificiality in arguing the case in that way. I respectfully agree with some observations of HH Judge Richardson in General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 para. 34*

when he said that dismissal – and I would add any other disciplinary sanction – for poor attendance can be quite difficult to analyse in terms of the reasonable adjustments duty, and that:-

“Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15.”

Discrimination arising from disability

165. Section 15 EA provides:

“(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

166. In the case of section 15(1) discrimination, it is the treatment, rather than the PCP, which has to be justified.

167. The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability *“includes anything which is the result, effect or outcome of a disabled person's disability”*: see para 5.9.

Justification defence: Proportionality

168. Section 15(2)(b) requires the putative discriminator A to show that “the treatment” of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon “the treatment”; and the starting point therefore must be that the tribunal should apply s.15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim: *Buchanan v Commissioner of Police for the Metropolis* [2016] IRLR 918.

169. The correct test for assessing whether treatment is proportionate was explained (in the housing context) in *Akerman Livingstone v Aster Communities* [2015] 2 WLR 721.

1.1. is the objective sufficiently important to justify limiting a fundamental right?

1.2. is the measure rationally connected to the objective?

1.3. are the means chosen no more than is necessary to accomplish the objective?

- 1.4. Are the disadvantages caused disproportionate to the aims pursued? Put in context, does the treatment strike a fair balance between the employer's needs to accomplish its objective and the disadvantages thereby caused to the Claimant as a disabled person?
170. The judgment of the Court of Appeal in *Hardys & Hansons plc v Lax* [2005] IRLR 726, [2005] ICR 1565, concerned an appeal relating to a complaint of indirect discrimination on the grounds of sex. The Court held that it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The Court emphasised that there is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal.
171. *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, [2017] IRLR 547 involved the dismissal of a teacher due to her poor attendance record. The ET did not find the dismissal to be proportionate. In contrast to *Lax*, the Court of Appeal did not consider the test of asking whether the employer's response was 'reasonable' for the purposes of ERA 1996 s 98(4) when determining the unfair dismissal claim to be, in substance, markedly different from the test of considering whether the treatment was 'proportionate' and therefore justified when applying EqA 2010 s 15. Underhill LJ remarked (at [53]):
'The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.'

Requirement of knowledge

172. The requirement of actual or constructive knowledge in section 15(2) and section 20 EA (or, rather, in the equivalent DDA 1995 provisions) was addressed in *Gallop v Newport CC* [2013] EWCA Civ 1583. The Court held, per Rimer LJ:
"36 I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position."

173. The statutory language, however, makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something arising” leading to dismissal is a consequence of the disability: *Pnaiser v NHS England* [2016] IRLR 170, recently approved in *City of York Council v Grosset* [2018] EWCA Civ 1105.
174. It is also important to remember that an erroneous diagnosis is irrelevant, provided a type of impairment is identified. Subsequently applying the correct label to a condition was not diagnosing the impairment for the first time using the benefit of hindsight; it was giving the same impairment a different name. There may be sufficient factual material for the conclusion that an employer ought to have known that the employee was suffering from an impairment that amounted to a disability: see *Jennings v Barts and the London NHS Trust* [2013] EqLR 326 (paras 88-89, in a case involving a mental impairment).

Harassment

175. Section 26 provides, where relevant:

“(1) *A person (A) harasses another (B) if –*

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

....

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

- (a) *the perception of B;*
- (b) *the other circumstances of the case;*
- (c) *whether it is reasonable for the conduct to have that effect.”*

176. Paragraph 7.9 of the EHRC Code of Practice states that “related to” in section 26(1)(a) should be given “*a broad meaning in that the conduct does not have to be because of the protected characteristic*”.
177. In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, we considered *Dhaliwal v Richmond Pharmacology* [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26.

178. The Tribunal considered Paragraphs 13-15 and 22 of *Dhaliwal v Richmond Pharmacology* [2009] IRLR 336, and Paragraph 13 of *Grant v HM Land Registry* [2011] IRLR 751.
179. We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

Burden of proof in discrimination cases

180. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.
181. In respect of the application of these provisions in complaints of breach of the duty to make reasonable adjustments, in *Project Management Institute v Latif* [2007] IRLR 579 (Elias P, as he then was, presiding) the EAT held at paras 44, 53-54 that:-
- 181.1. The burden of proof remains on the Claimant to prove the threshold conditions (i.e. those matters identified in *Rowan*) without which the duty to adjust is not engaged. These are matters of fact in which the employer is unlikely to have knowledge or information not available to the Claimant.
- 181.2. Where the threshold conditions have been established, the burden only passes to the respondent if a potentially reasonable adjustment has been identified.
- 181.3. This does not require the Claimant to set out the detail of the adjustment for the burden to shift, provided the respondent can understand the broad nature of the adjustment proposed and has sufficient detail to deal with the question of reasonableness.
- 181.4. If no potentially reasonable adjustment has been identified, the burden does not shift to the respondent.
182. In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.
183. In the event, although the Tribunal considered section 136, it did not find it necessary to apply it in this case, where positive findings of fact have been made which did not depend on whether the burden of proof had shifted or whether the Respondent had then managed to discharge it.

Unfair dismissal

184. If a finding of unfair dismissal is made, where a Tribunal finds that the dismissal was caused or contributed to by any action of the complainant, it must reduce the compensatory award by such proportion as it considers just and equitable: see s.123(6) ERA 1996.
185. The proper approach to deductions in respect of contributory fault is set out in *Optikinetics v Whooley* [1999] ICR 984, 989. Before making any finding of contribution the employee must be found guilty of culpable or blameworthy conduct. The inquiry is directed solely to her conduct and not that of the employer or others.

Jurisdiction: Time Limits

186. Section 123 EA 2010 provides so far as relevant that:

"(1) ... proceedings on a complaint ... 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.

(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 a person does an act inconsistent with doing it, or
- (b) if a person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it."

187. A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

188. Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting

statement of the indicia of "an act extending over a period." Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: *Hendricks v Commissioner of Police for Metropolis* [2003] ICR 530 at paragraph 54.

189. One of the complaints in this case is of the failure to comply with the duty to make reasonable adjustments imposed by section 20 EA 2010. To determine when the failure is to be treated as occurring, section 123(4) EA 2010 must be applied. The proper application of these provisions has been recently considered in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 at paragraphs 11-15:
 - 189.1. Applying subsection 123(4)(b), the failure to comply with the duty is to be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustments.
 - 189.2. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.
 - 189.3. The period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.
190. The principles to be applied in the application of section 123 EA 2010 are as follows:
 - 190.1. The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Abertawe Bro Morgannwg University Local Health Board v Morgan*, paragraph 17.
 - 190.2. Unlike section 33 Limitation Act 1980, section 123(1) EA 2010 does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, paragraph 33.
 - 190.3. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the

tribunal must have regard. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

190.4. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

- (a) the length of, and reasons for, the delay and
- (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 19.

Extension of time: unfair dismissal complaint; s.111 ERA

191. When a notice of dismissal is communicated by post, and where there is no contractual provision governing when notice takes effect, the notice only starts to run when the letter by which it is communicated comes to the attention of the employee and he or she has either read it or had a reasonable opportunity to do so: see *Newcastle Upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22; [2018] 1 WLR 2073, at paragraph 39.

Submissions

192. Both parties provided written submissions, which they amplified with oral submissions. Although the parties referred to various authorities, no copies of any authority was provided and no reference was made to specific paragraphs. The Tribunal found this approach unhelpful.

193. The fact that each and every submission is not referred to in our conclusions below is not evidence that each submission was not taken into account. We took into account all submissions and all the authorities, even if we do not address all of them specifically below and even if no authorities were provided. For example, Mr. Mallick made oral submissions for about one hour, touching on points of marginal or no relevance.

Conclusions

194. Applying the law to our findings of fact set out above, we reached the following conclusions in respect of the issues identified in the attached List of Issues.

Issues 1-4: Jurisdiction; limitation issues in respect of the complaints under the Equality Act 2010

195. The Respondent conceded that the complaint relating to the Claimant's dismissal was brought in time. It follows from this that the complaint of failure to allow an appeal was also in time. These are the matters set out in issue 23.7.
196. The Respondent's submissions (eg. paragraph 5 of its Closing Submissions) took a broad brush approach, arguing that all other complaints pre-dated 8 May 2017 and, on their face, were out of time.
197. The Tribunal considered section 123 EA 2010. Mr. Hignett argued (in respect of all the complaints), that there was no good reason why the complaints could not have been brought in time; and, in any event, the Tribunal should not permit the extension required – which he described as long.

Acts alleged on 3 August 2015

198. The events on 3 August 2015 clearly amounted to acts occurring outside of the primary time limit. These were the acts set out in issues 16.1.1 to 16.1.4 and 16.1.6 and 23.1 to 23.3.
199. In respect of these acts, we concluded that there was a good reason why the complaints could not have been brought within the primary limitation period. The Claimant, like her managers and her GP, did not know the nature of her shoulder impairment in August 2015. The nurse at Accident and Emergency and her GP had advised her that it would get better, not progressively worse. She could not have known that it was likely to amount to a disability during the limitation period. The nature of the injury could not have been known to her at all until the MRI scan, reported to her at some point after 24 April 2016; and by the date of the welfare meeting in May 2016, she had only had a vague estimate for recovery.
200. Turning to the question of whether the complaints arising from 3 August 2015 were presented within such other period as the Tribunal considers just and equitable, the Tribunal concluded that they were. Our reasoning is as follows.
201. On the question of whether there was good reason for the delay throughout the period of the extension required, prior to the operation on 20 July 2016, from which the Claimant thought she would be recovered within two weeks (see page 179), there was no evidence that either the Claimant or the Respondent realised that she was likely to be a disabled person.
202. After the operation, there was some form of interventionist treatment which led to the shoulder becoming dislocated, leading to the emergency operation and the subsequent rehabilitation. The Claimant was in pain and discomfort over this period, and unlikely to be seeking advice and not in a position to identify that she had been a disabled person in August 2015.
203. We concluded that the Claimant was in position to know of her rights from the instruction of Mr Mallick, who is an accredited trade union representative. We find that this point is reached on about 30 September 2016, when he appears to have been first instructed. There is no good reason for the delay of about 8 months after this date.

204. We took into account, however, that there was no prejudice to the Respondent if time was extended. In particular, the Respondent was able to obtain statements from the main witnesses and to call them to give oral evidence. Moreover, documentation from 2015 was available (including the electronic record on Nexus). The fact that the CCTV was not available was not relevant to the issues.
205. More importantly, perhaps, having considered the factors in *Keeble*, the Tribunal could find nothing that indicated that the cogency of the evidence was affected by the delay in presenting the Claim.
206. From what we read and heard, the Claimant had put her trust in her brother-in-law to represent her from the end of September 2016. It was clear from his evidence and submissions that he had not appreciated the relevance of time limits until after the issue of the Claim. This much is evidenced by his note at C2; he equated the fact that the Claim was accepted to evidence that it was presented in time.
207. Taking into account our broad and unfettered discretion, and all the relevant factors, the Tribunal decided that the complaints alleged on 3 August 2015 were presented within such other period as was just and equitable in the circumstances of this case.

Grievance and appeal process; alleged refusal to allow the Claimant to view CCTV

208. The grievance process ended on 23 January 2017, with the provision of the appeal outcome. Applying section 123(4) EA 2010, the alleged omissions must have been decided upon on that date, or that was the last date of the period in which the Respondent might reasonably have been expected to allow the Claimant to view CCTV footage.
209. Therefore, the extension required in respect of the acts and omissions alleged at issues 16.1.4 to 16.1.5 and 23.4 to 23.6 was much shorter than the extension required in respect of the August 2015 matters.
210. For the reasons set out above at paragraphs 201-207, the Tribunal concluded that these complaints were presented within such other time as was just and equitable in the circumstances of this case. The Respondent did not argue that there was any prejudice to it in permitting these complaints to proceed; and, given the formal grievance procedure, the evidence and the reasoning was thoroughly recorded. There was no effect at all on the cogency of the evidence.

Issue 23.6: failure to inform the Claimant of her rights after suffering an injury at work or explaining relevant health and safety protocols

211. There was no specific failure of any sort identified in the evidence of the Claimant, nor any complaint of not providing information about her rights. There was no evidence of any request for such protocols.
212. We decided that the Tribunal had no jurisdiction to determine this complaint. Quite apart from having no reasonable prospect of success, the Claimant had not established that this complaint was either in time, or brought within such other period as was just and equitable.

Issue 23.8: R changing the method of communication with the Claimant from email to post

213. The Tribunal noted that this alleged change occurred at the point that the dismissal letter was posted on or about 20 April 2017: see the further particulars provided at number 9 (page 48) and the recorded delivery slip showing delivery on 22 April 2017. This alleged act is therefore in time.

Complaints of breach of the duty to make reasonable adjustments

214. In respect of issue 31.1, applying *Morgan* and putting the Claimant's case at its highest (that the adjustment proposed was a reasonable adjustment), the adjustment identified was made by the letter from Ms. Panter of 31.3.17, p.254, which refers to the duty to make reasonable adjustments to facilitate a return to work.
215. Again, the Tribunal was satisfied that this complaint was presented within such other period as was just and equitable, for the same reasons given above in paragraphs 201-207. It was not suggested that there would be any prejudice to the Respondent to allow this complaint and all relevant factors were considered.
216. In respect of the adjustments alleged at issues 31.2 and 31.3, these complaints were brought in time, given that the failures are alleged to continue up to issue.
217. In respect of the adjustment at 31.4 (to allow the Claimant to be represented by Mr Mallick at the welfare meetings), this complaint is out of time, lasting, at the latest, until the invitation letter of 6 February 2017 (page 246) inviting Mr Mallick to attend the welfare meeting with Ms. Panter.
218. Again, the Tribunal was satisfied that this complaint was presented within such other period as was just and equitable, for the same reasons given above in paragraphs 201-207. It was not suggested that there would be any prejudice to the Respondent to allow this complaint nor that the cogency of any evidence would be affected. All relevant factors were considered.
219. In respect of the adjustments identified at issue 31.5, the last welfare meeting which the Claimant attended was 16 October 2016. The expiry of the period in which the employer might reasonably have been expected to make adjustments was the date of the next proposed welfare meeting, 13 February 2017, which the Claimant did not attend.
220. In respect of the adjustment set out in 31.6 (insofar as it was an adjustment at all), the employer might reasonably have been expected to make this adjustment at the date of the next proposed welfare meeting, 13 February 2017.
221. Again, in respect of both the adjustment complaints at 31.5 and 31.6, the Tribunal was satisfied that these complaints were presented within such other period as was just and equitable, for the same reasons given above in paragraphs 201-207. Although all relevant factors were taken into account, it was not suggested that

there would be any prejudice to the Respondent to allow these complaints nor that the cogency of any evidence would be affected.

222. In respect of the alleged failure to carry out a fair and impartial grievance (issue 31.7), the expiry of the relevant time was the date of the grievance appeal outcome, 23 January 2017.
223. Again, the Tribunal was satisfied that this complaint was presented within such other period as was just and equitable, for the same reasons given above in paragraphs 201-207. Although all relevant factors were taken into account, it was not suggested that there would be any prejudice to the Respondent to allow this complaint nor that the cogency of any evidence would be affected.

Issues 14-15: Disability

224. On the facts found at paragraphs 19-58 above, we concluded that the Claimant was a disabled person from 4 July 2015.
225. We are satisfied that the impairment had a substantial adverse effect on the Claimant's daily activities from 4 July 2015. In particular:
- 225.1. From the outset, the Claimant suffered pain in her shoulder. This was consistent and required regular pain relief, indicating that it must have affected her ability to carry out daily activities or else there would have been no need for the pain relief medication.
- 225.2. Without pain relief, the effect of the pain was that the Claimant was unable to sleep.
- 225.3. The pain would have prevented the Claimant travelling to work and carrying out work-related tasks, but for the pain relief.
226. We are satisfied that the substantial adverse effect of the impairment, the right shoulder condition, was long-term from 4 July 2015, applying Schedule 2 paragraph 2(1) EA 2010. This was because, as at that date, the effect could well have lasted at least 12 months, because of the nature of the damage to the shoulder evidenced in the medical evidence summarised above.
227. In any event, the Claimant's right shoulder condition was a progressive condition from 4 July 2015, evidenced by the facts found. It had some adverse effect on her day-to-day activities from that date onwards. The symptoms grew progressively worse over time. Applying Schedule 1 Paragraph 8, EA 2010, the Claimant was a disabled person from 4 July 2015.

Issues 28 – 32: Alleged breach of duty to make reasonable adjustments

228. Mr. Hignett submitted that this complaint was misconceived, because the Claimant was unable to work over the entire period. His argument was that this was not a case where any PCP put the Claimant at any disadvantage.

Issue 28: The PCPs

229. There was no PCP of a failure to inform the Claimant of her rights under the Long-term sickness policy. No evidence was advanced by the Claimant on this point.
230. Furthermore, this policy was available with the Attendance (or Absence) policy to all staff on the Respondent's intranet and those rights were summarised in the amended Handbook, received in October 2016.
231. For the same reasons, there was no failure to provide the Claimant with the policies regarding injury at work or health and safety, or dignity at work.
232. There was no accident report for the events on 4 July 2015. There was an incident report, which was not provided until during the preparation for this hearing. The failure to provide this during the Claimant's employment is not a PCP.
233. There was no self-contained written CCTV policy. In any event, the policy was not to withhold the CCTV footage (as issue 29 appears to allege); the CCTV footage in this case was unavailable due to error by Mr. Finnegan in not burning a second copy and by the CCTV system being updated.
234. Even after applying a liberal rather technical approach that should be adopted to the meaning of "provision, criterion or practice", this is not a PCP.
235. It was never alleged or argued before us that the PCP in this case was that the employee had to maintain a certain level of attendance at work, in order not to be subject to the risk of sanctions under the Respondent's Long-term Sickness Policy.

Issue 29: Substantial disadvantage in relation to a relevant matter in comparison with persons not disabled?

236. The matters stated in issue 29.1 were not supported by evidence.
237. The comparators would be non-disabled shop assistants.
238. There was no evidence from the Claimant that disabled persons could be at substantial disadvantage if the PCPs at 28.1 and 28.2 existed, in comparison with non-disabled shop assistants. It was not argued or explained how the effect of the PCPs might bite harder on disabled persons than on non-disabled staff.
239. As for the failure to provide the CCTV recording policy and the lack of a right to request a copy of the CCTV (if this was a further PCP alleged) in order to pursue a damages claim, these alleged PCPs would be likely to affect disabled and non-disabled staff equally.

Issues 30 - 31

240. Given the above findings, issues 30 and 31 do not require determination.
241. For completeness, we considered the proposed adjustments in any event.

242. The Respondent informed the Claimant that, at the proposed welfare meetings with Ms. Panter, the issue of reasonable adjustments would be addressed. This was sufficient to prevent any possible breach of the duty by failing to make the adjustment in issue 31.1.
243. As for 31.3, if there was a PCP of failing to physically give employees copies of the policies identified, the Respondent had taken such steps as were reasonable to avoid any disadvantage to disabled persons by putting them on the intranet.
244. The adjustments at issues 31.1 to 31.2 and 31.4 to 31.7 are not reasonable adjustments relevant to the PCPs identified at issues 28.
245. Had the Claimant argued that the PCP was that the employee had to maintain a certain level of attendance at work, Mr. Hignett rightly identified that there was no step that could be taken by the employer in this case to avoid the disadvantage suffered by this Claimant, because she was unable to work at all due to her shoulder condition until late 2017. Accordingly, the potential steps of offering light duties or a phased return to work were not required and were not reasonable in the circumstances.
246. Insofar as it is relevant, it was not put to Mr. Sheldrake or Mr. Fensome that the grievance was not impartial or fair.

Issues 16-20: Harassment related to disability

247. Insofar as Mr. Finnegan engaged in unwanted conduct on 3 August 2015, as set out in our findings of fact at paragraphs 59-62 above, none of his actions were related to the Claimant's disability. Although they were unsympathetic, and perceived by the Claimant as hostile and intimidating, they had nothing to do with her disability. His actions were related to her performance.
248. Further, we concluded that in the circumstances the conduct of Mr. Finnegan did not have the purpose or effect of creating an intimidating or hostile environment for the Claimant. We considered the factors at section 26(4) EA 2010. Despite the perception of the Claimant, in effect, Mr. Finnegan was saying to the Claimant that she was being let off for a breach procedure; but she had been through a traumatic incident and was extremely sensitive to this criticism. There were different viewpoints: she believed that she did ring the bell at her till and had done nothing wrong. The absence of a proper Return to Work meeting meant that these could not be ventilated. Considering all the circumstances, we did not consider that it was reasonable for his conduct to have the proscribed effect.
249. The complaint of harassment therefore fails.
250. We add that a proper Return to Work meeting could probably have avoided much of the subsequent upset following the 3 August 2015 meeting.

Issues 21-27: Discrimination arising from disability

251. The absence from work identified at issue 22 arose in consequence of the Claimant's disability.

Issues 23-24

252. In response to the allegations of unfavourable treatment, we have found as a fact that the treatment alleged at issue 23.1, 23.2, 23.3, 23.5, and 23.8 did not occur.
253. In respect of 23.8, even if the mode of communication did alter, this was not unfavourable treatment in the circumstances; it is entirely reasonable, and not unfavourable, for an important letter, like a dismissal letter, to be sent by post.
254. In response the allegations concerning the CCTV footage, we have found that the Respondent did not refuse to allow the Claimant to view it; during the grievance process, it was explained why the managers were unable to provide her with a copy or a chance to view it. This was not unfavourable treatment; it was the result of a management error and some misfortune.
255. As for issue 23.6, the alleged failure to inform the Claimant of her rights after suffering an injury at work, there was no legal duty on the Respondent to do this, nor any evidence of a contractual duty requiring this to be done. Moreover, the Respondent did provide some advice, as we have found, directing the Claimant to the Criminal Injuries Compensation Authority (which seemed to this Tribunal to be a sensible suggestion). In short, we found that the Claimant was not subject to any unfavourable treatment in this regard.
256. In respect of issue 23.7, dismissal is clearly unfavourable treatment. The failure to consider an appeal against dismissal is also unfavourable treatment.
257. The Claimant was dismissed because of "something arising in consequence" of her disability.
258. The failure to consider the appeal was not something arising from the Claimant's disability. This arose because Ms. Panter, in error, believed that the time for appealing had expired when Mr. Mallick requested an appeal.

Issue 25: Proportionality

259. The Tribunal concluded that the decision to dismiss was a proportionate response on the facts of this case.
260. The Respondent's legitimate aims were:
- 260.1. to ensure that the Claimant could fulfil her contract, by providing a level of acceptable attendance at work for its business;
 - 260.2. to apply its policies in respect of long-term sickness absence, specifically its Long-Term Sickness Procedure and the Absence Policy.

261. We concluded that, balancing all relevant factors, the measure adopted by the Respondent, dismissal, was no more than was necessary in this case to meet those objectives. We reached our conclusion for the following reasons:
- 261.1. Ms Panter genuinely tried to apply the Respondent's Long Term Sickness Procedure, which provides a framework when employee absent more than four continuous weeks.
 - 261.2. The Respondent's Long-Term Sickness Procedure, R2, does incorporate support for an employee's return to work, including by making reasonable adjustments and including support by a structured, phased return. But, in this case, the Claimant was not fit for any work at the time of dismissal. The recent report from the GP stated that he could not give a likely return to work date; and there was no medical evidence as to when she might feasibly return to work. The question of whether, or what, adjustments might be made had not arisen.
 - 261.3. The prognosis for the Claimant was uncertain because she still had a limited range of movement despite surgery. The limitations in movement and their adverse effect was recorded in the letter 23 November 2016, page 249, from her physiotherapist, which the Respondent had received.
 - 261.4. The Respondent's Procedure states that if the options of reasonable adjustments and other points referred to at Step Three are not applicable, the employer may need to consider terminating the employment on grounds of ill-health. The steps set out in Step Three were not applicable in this case, particularly given the Claimant's non-engagement in the proposed meetings after October 2016. Given the medical evidence, for example, adjourning the meeting would have been unlikely to serve any purpose.
 - 261.5. The Claimant had not engaged in the proposed welfare meetings. Moreover, the Claimant had not engaged in the meeting arranged for 7 April 2017, despite being warned by the invitation letters (page 253-255) that if no reasonable adjustments or alternative roles could be identified, the outcome of the meeting may be dismissal. Despite the fact that Mr Mallick was likely to be responsible for this, this lack of engagement was a factor weighing against the Claimant on this issue. This was in part because we concluded that it was likely that the Claimant would have been advised not to participate had the meeting been adjourned to another date.
 - 261.6. The letter at pages 254 sets out the purpose of the meeting on 7 April 2017 in detail. It explained that the grievance was concluded.
 - 261.7. Although we found that there was mislabelling of the meeting of 7 April 2017 in the invitation letters, by referring to it as a welfare meeting when this was in reality an Absence Management meeting (as set out in Absence Policy at R2), at which an employee may be dismissed on

capability grounds, the Respondent did follow the letter of the Absence Policy, and that the mislabelling carried little weight in these circumstances.

Issue 26: Knowledge of disability

262. After the 20 May 2016 welfare meeting, the Respondent knew both the shoulder impairment and its substantial adverse effect was likely to last at least 12 months, both on the balance probabilities and in the sense of knowing that it “could well” last 12 months. It is irrelevant that it may not have had any formal, accurate, diagnosis at that point of time.
263. In any event, Ms. Panter had actual or, at least, constructive knowledge of each of the constituent parts of the definition of disability when reaching her decision to dismiss.

Unfair Dismissal: issues 5 to 13

264. It was conceded that the complaint of unfair dismissal was presented in time.
265. The reason or principal reason for the dismissal was a reason relating to the capability of the Claimant, a potentially fair reason within section 98(2) Employment Rights Act 1996. As we have explained, the principal reason was the combination of her long-term ill-health absence and the absence of any evidence as to when she might return to work.
266. Capability is a potentially fair reason for dismissal.

Fairness

267. The Tribunal considered that there was procedural unfairness in the decision to dismiss, taking into account the size and resources of this employer.
268. It was unfair, and in breach of the Respondent’s own Procedure, to label the meeting of 7 April 2017 as a welfare meeting, when it was a formal meeting at which dismissal could be considered. In itself, however, this failing may have carried little weight, particularly because in other such cases, any prejudice alleged to be caused by this could have been addressed on appeal. In this case, however, where the Claimant had limited English skills, we found that she did not understand the term “dismissal”, she had relied on Mr Mallick for advice (which was that she should not to attend the meeting on 7 April 2017) and there was no appeal provided.
269. The Tribunal considered that the failure to allow the Claimant to appeal was a far more serious failing by the Respondent, which rendered the dismissal unfair. Our reasoning is as follows:
- 269.1. The Respondent’s Absence Policy provides for a right to appeal “*the outcome of the meeting within five working days of receipt*” of the

dismissal letter. The dismissal letter was not received by the Claimant until about 8 June 2017, after Mr Mallick received.

- 269.2. Ms. Panter's responses on 8 June 2017 (pages 271-272) did not investigate whether the dismissal letter had been received by the Claimant before then, whether at the time that it had been signed for by her husband or at any other time.
 - 269.3. The Respondent is a large organisation with considerable financial and management resources. It would have been relatively simple to make the necessary inquiry and to arrange an appeal.
 - 269.4. In these particular circumstances, and recognising that the procedure adopted need only be within the band of reasonable responses open to this employer, the failure to hold an appeal takes the dismissal outside the band of reasonableness.
270. We considered and accepted Mr. Mallick's submission that, where an employer was culpable in causing the incapacity in question, this could be a relevant factor, as a matter of common sense and fairness, as to the reasonableness of dismissal: see, for example, *RBS v McAdie* [2008] ICR 1087. On the evidence we heard and read, however, the incapacity of the Claimant was caused by the actions of the thief on 4 July 2015.

Issue 12: Polkey

271. The Tribunal concluded that the dismissal would have been upheld on appeal for all the reasons set out in our conclusions on the issue of proportionality. Mr Mallick was fixated on the lack of the CCTV footage
272. Mr Mallick was advising the Claimant not to engage with the sickness absence process of the Respondent. His implacable approach is evidenced by the emails from pages 254 – 259, especially:
- 272.1. His email at page 256, indicating that the Claimant will not attend until the CCTV footage is provided;
 - 272.2. His final response at page 257: "*See you in Court*"
273. Further, before he received the dismissal letter, on 8 June 2017, his email at page 272 suggests that the appeal is only a paper step, not a substantive one, prior to the issue of a Claim.
274. The Tribunal concluded that he would not have considered obtaining further medical evidence for the appeal; and, from the evidence of the Claimant, had he sought to get such evidence, he would not have been able to obtain any medical evidence that assisted her.

275. Applying the Respondent's Absence Policy at R2 (final bullet point), the appeal would have been heard and dismissed within about two weeks of 8 June 2017. We find that this was likely to have been on about 22 June 2017.

Issue 13: Contributory fault

276. We concluded that the Claimant had not acted in a blameworthy way. The Claimant relied on Mr Mallick as her advisor. He was a Divisional Secretary of a trade union, he has excellent English language skills (as we heard), and he was her brother-in-law. We consider that it was reasonable for her to rely on his advice at that time.
277. Mr Mallick's position was intractable about the CCTV issue and he did not focus on the issues raised by the sickness absence process that the Respondent was engaging in. There were irreconcilable differences about certain events.
278. Having considered all relevant matters, we concluded that there was no contributory fault by the Claimant.
279. In any event, on the Respondent's own case, the primary reason for dismissal was a reason relating to capability, as we explain above. In those circumstances, in any event, the Claimant's conduct did not cause her dismissal. It is likely that she would have been dismissed on 7 April 2017 had she attended that meeting or meetings leading up to that meeting.

Summary

280. The complaint of unfair dismissal is upheld. The complaints of disability discrimination are dismissed.
281. Although the listing team will fix a date for a remedy hearing with the parties, we invite the parties to reach agreement on the issue of remedy to save the costs and resources otherwise required for such a hearing.

Employment Judge Ross

6 July 2018

APPENDIX

**IN THE EAST LONDON EMPLOYMENT TRIBUNAL
B E T W E E N :**

CASE No: 3201128/2017

MRS S MALLICK

Claimant

-and-

ICELAND FOODS LIMITED

Respondent

**AGREED LIST LEGAL ISSUES
(revised final)**

TIME/LIMITATION ISSUES

Equality Act 2010 Complaints

1. Was each complaint presented to the Tribunal before the end of the period of three months beginning when the act complained of was done?
2. In so far as the Claimant is complaining that the Respondent omitted to act, when did the Respondent make the decision not to act?
3. Did the matters complained of amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim?
4. If not, is it just and equitable to extend time? If so, by how much?

Unfair dismissal complaint

5. Was the complaint of unfair dismissal presented outside the prescribed time limits?
6. If so, was it reasonably practicable for this complaint to be presented in time?
7. If so, has the Claimant presented it within a reasonable time after that period?

Unfair Dismissal

8. What was the reason for the Claimant's dismissal? The Respondent contends that the reason was capability.
9. Did the Respondent hold that belief in the Claimant's incapacity on reasonable grounds?
10. Was the decision to dismiss the Claimant a fair sanction that was it within the reasonable range of responses for a reasonable employer?
11. Did the Respondent follow a fair procedure in dismissing the Claimant?
12. If not, would the Claimant have been fairly dismissed in any event, and/or to what extent and when?
13. Did the Claimant contribute to her dismissal?

DISABILITY

14. Was the Claimant disabled for the purposes of Section 6 of the Equality Act 2010 between July 2015 and her dismissal in 2017? The Respondent has conceded that the Claimant was disabled from 3 February 2017.
15. Did the Respondent know, or ought to have known, of the Claimant's disability for that period? If so, from what date? The Respondent has conceded that it knew or ought to have known of the Claimant's disability from 3 February 2017.

HARRASSMENT RELATED TO DISABILITY

16. Did the Respondent engage in unwanted conduct related to the Claimant's disability as follows:
 - 16.1. On her return to work following four weeks absence after the incident which occurred on 4 July 2015, her Store Manager, Peter Finnegan:
 - 16.1.1. telling the Claimant she would have been instantly dismissed if the money had not been recovered;
 - 16.1.2. money would have been recovered from her wages;
 - 16.1.3. that it was her fault for trying to prevent the incident;

- 16.1.4. the Respondent later refusing to let her see CCTV footage and providing no evidence as to why the footage was unavailable;
 - 16.1.5. the Respondent persistently denying her request to view the CCTV footage without explanation throughout her grievance and appeal process; and
 - 16.1.6. the Respondent stating that the outcome would have been very different had the money not been recovered implying either that she had acted dishonestly or that she could have been sacked.
17. Was the conduct related to the Claimant's disability?
 18. If so, did it have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment?
 19. Was it reasonable for the conduct to have that effect?
 20. In considering whether the conduct had that effect, account should be taken of the Claimant's perception, the other circumstances of the case and whether it was reasonable in the circumstances.

DISCRIMINATION ARISING FROM DISABILITY

21. Did the Claimant's disability cause or have the consequence of, or result in, "something"?
22. The Claimant alleges that the "something" is as follows:
 - 21.1. her absence from work for four weeks after a criminal assault at work; and
 - 21.2. her long-term absence for the same reason following two surgeries on her shoulder as a result of an MRI scan, which established that the impairment sustained was a shoulder ligament tear.
23. Did the Respondent treat the Claimant unfavourably because of that "something"? The Claimant relies on the following unfavourable treatment:
 - 23.1 Mr Peter Finnegan, the Store Manager, telling the Claimant she would have been dismissed if the money had not been recovered resulting in the claimant fearing for her job;
 - 23.2 that the money would have been recovered from her wages;
 - 23.3 that it was her fault for trying to prevent the incident; the Respondent later refusing to allow the Claimant to see CCTV footage and providing no evidence as to why the footage was unavailable, preventing her from obtaining legal redress;
 - 23.4 the Respondent persisting in denying her request to view the CCTV footage without explanation throughout her grievance and appeal process;

- 23.5 refusing to confirm how much time off with pay she would receive or that she was entitled to compensation as a result of the incident which occurred in July 2015;
 - 23.6 failing to inform her of her rights after suffering an injury whilst at work or explaining the relevant health and safety at work protocols following an injury at work;
 - 23.7 dismissing her and failing to consider her appeal against dismissal; and
 - 23.8 the Respondent changing the method of communicating with the Claimant from Email to post.
24. Did the Respondent treat the Claimant as aforesaid because of something arising in consequence of the disability?
25. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent denies that the alleged treatment took place. However, in the alternative the Respondent relies on the following
- 25.1 The Respondent operates a number of policies and procedures, which were communicated to the Claimant dealing with such issues as sickness absence, attendance, cash administration and grievances. The Respondent's policies procedures encourage regular attendance at work and safe working practices.
 - 25.2 The Claimant was absent from work from 17 March 2016 and did not return to work. From October 2016 she failed to attend any welfare meetings with the Respondent and failed to provide any fit notes from her GP from 30 December 2016.
 - 25.3 The Respondent applied its attendance policy fairly to all employees and could not reasonably be expected to continue to employ the Claimant in the circumstances.
26. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?
27. Did the Claimant have a disability at the time those acts took place?

REASONABLE ADJUSTMENTS

28. Did the Respondent apply the following provision criteria and/or practise ("the PCP") generally, namely:
- 28.1. the failure to inform the Claimant of her rights under the sickness absence policy;
 - 28.2. the failure to inform and provide the Claimant with policies regarding injury at work and health and safety, dignity at work, CCTV recording policy, and a copy of the accident report.

29. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant claims the follow substantial disadvantage:
- 29.1. Those who are disabled would suffer more detrimental treatment if the relevant rules surrounding injury at work, health and safety, right to request a copy of the CCTV images to pursue a claim for damages either from the defendants insured or as part of a damage's claim in another arena are not complied with, or/and protocols and procedures in place are not adhered to.
30. Did the Respondent take such steps as were reasonable to avoid the disadvantage?
31. The Claimant identifies the appropriate adjustments as follows:
- 31.1. to inform the Claimant of her right to reasonable adjustments;
- 31.2. providing her with a copy of the CCTV footage so that she would pursue a claim for damages against the Respondent;
- 31.3. provide her with a copy of the Injury At Work policy, dignity at work policy, health and safety at work policy, or CCTV recording policy;
- 31.4. allow her to be represented at the welfare meeting by her brother-in-law, an accredited Trade Union representative;
- 31.5. take steps to prevent bullying of the Claimant at welfare meetings;
- 31.6. not to intimidate or bully the Claimant into returning to work;
- 31.7. carry out a fair and impartial grievance where the accusations were heard and investigated properly so that she would feel confident to return to work.
32. Did the Respondent know, or could the Respondent have reasonably been expected to know, that the Claimant had a disability or was likely to be placed at a disadvantage?

REMEDIES

33. If any of the claims are upheld:
- 33.1. what compensation is the Claimant entitled to in respect of:
- 33.1.1. financial loss;
- 33.1.2. injury to feelings;
- 33.1.3. whether it is appropriate to consider reinstatement or reengagement and/or any declaration or make any recommendations.