EMPLOYMENT TRIBUNALS

Claimant: Mrs C Donovan

Respondent: Tesco Stores Ltd

Heard at: Bristol (by video) **On:** 3, 4 & 5 March 2021

Before: Employment Judge Maxwell

Appearances
For the Claimant: In person
For the Respondent: Ms Kight, Counsel

RESERVED JUDGMENT

1. The Claimant's claim of a failure to make reasonable adjustments on 23 May 2019 is well-founded and succeeds.

2. The Claimant's other claims for reasonable adjustments, discrimination arising and unfair dismissal are not well-founded and are dismissed

REASONS

Preliminary

Video Hearing

1. The hearing was conducted by the parties attending by video, in public and in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties agreed, a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 and because it was in accordance with the overriding objective to do so.

Claims

2. The Claimant presented a claim form on 1 March 2020. Her claims and the issue to be determined were clarified at a case management hearing before EJ Livesey on 28 October 2020. The claims are:

2.1. unfair dismissal

2.2. discrimination arising from disability:

2.2.1. the unfavourable treatment being:

2.2.1.1. refusing to allow her time away from her till on 23 May 2019 when she was expecting to have to answer a call from her GP between 9.00 am and 1.00 pm;

2.2.1.2. dismissing her;

2.3. failure to make reasonable adjustments:

2.3.1. the provision, criterion or practice ("PCP") is:

2.3.1.1. the requirement for staff in the Claimant's role to undertake till work.

2.3.2. the steps contended for are:

2.3.2.1. being required to work in the warehouse;

2.3.2.2. being required to stack shelves.

2.4. breach of contract:

2.4.1. the contractual obligation is:

2.4.1.1. to repay the fuel expenses associated with the Claimant's work on the 'Healthy Eating' campaign.

Evidence

3. The Tribunal was provided with:

3.1. an agreed bundle of documents, running to numbered page 302;

3.2. a separate mitigation bundle.

4. Witness statements were provided and oral evidence received from:

4.1. Caroline Donovan, the Claimant;

4.2. Martyn Donovan, the Claimant's Husband;

4.3. Nichola Abbot, the Respondent's People Partner;

4.4. Darren Ellis, the Respondent's Store Manager at Fratton.

Adjustments

5. The Claimant participated at a venue where she could be supported. The Tribunal explained that there would be mid-session breaks and an hour for lunch, although it would be possible to have breaks at other times if this were necessary because her symptoms were exacerbated and she should say if this was the case. The Tribunal proceedings were adjourned for short periods when the Claimant became distressed as a result of revisiting the events surrounding her complaints.

Scope of Hearing

6. As the time allocated proved insufficient to address all the issues and remedy if necessary, the Tribunal indicated that a determination would first be made with respect to liability and issues of principle in relation to remedy, such as reductions for **Polkey** and Contributory fault. In the event the Claimant's claims succeeded, in whole or part, the calculation of her award and the question of mitigation of loss would be addressed at a separate remedy hearing.

Closing Submissions

7. In the course of making her closing submissions and whilst working through her notes, the Claimant offered considerable further detail about factual matters. I explained that this was her opportunity to comment on the evidence that had already been given, rather than to introduce new evidence. I said I would, however, listen to her submissions going beyond that because I was anxious not to disrupt her flow and make this part of the hearing more difficult for her, but when making findings of fact about what happened, I could only take into account what she had said during the course of her evidence.

Disability

8. By a letter of 29 May 2020, the Claimant's GP wrote that she had "an extremely stressful time over the past couple of years" and had experienced "recurrent episodes of collapse or semi-collapse, initially sometimes associated with loss of consciousness […] likely to be related to stress and anxiety". Contemporaneous documents record her suffering with anxiety and depression.

9. The Respondent conceded the Claimant was a disabled person by reason of the mental impairment of depression and / or anxiety, from April / May 2018. During the hearing Mr Kight confirmed the Respondent also admitted knowledge of such disability from that point. Knowledge of substantial disadvantage was, however, denied. The case has proceeded on this basis.

Facts

10. The Claimant was employed by the Respondent from 13 October 2008 until her dismissed with effect from 12 November 2019. She had occupied a number of roles and until the events within this claim, enjoyed her job considerably.

Expenses

11. In March 2017, the Claimant volunteered to participate in the "Farm to Fork Trail Guide", which was a programme concerned with encouraging healthy eating. An

email of 6 March 2017 invited her to a training session on 13 March 2017 and stated "all of your travelling expenses will be covered". The Claimant construed this email and / or what was said to her about the scheme as involving a promise that any travelling expenses associated with the programme would be covered. On 29 January 2018, the Claimant completed an expenses claim form, including mileage expenses, for periods from 2 August 2016 to 14 March 2017. The claims did not include any sum sought for 13 March 2017 (i.e. the training day). The Respondent did not agree that any sum was due in this regard and the monies claimed for these other occasions were not paid.

2017

12. In 2017, the Claimant was accused of shoplifting and suspended. Although the Claimant says she was "reinstated" it is not clear that her employment actually terminated on this occasion. Neither party put forward detailed evidence in connection with this event, as it was relied upon as background only.

13. The Claimant, who had a prior history of suffering with her mental health, was badly affected by this turn of events.

14. Following a period of sickness absence, the Claimant returned to work. She continued to feel uncomfortable, however, on the basis she was returning under a cloud and would "be perceived" by colleagues as she had "been portrayed". The Claimant sought a transfer away from the customer service desk and it was agreed she could move instead to "meet and greet".

15. Later in the year, the Claimant applied successfully for the position of wages clerk, which she took up in December 2017.

2018

16. The Claimant's time in the wages clerk position appears to have been uneventful for much of the year, albeit she was frequently called down to work on the shop floor.

17. The Claimant continued to suffer with her mental health. A consultant's letter of 4 September 2018 opined that her "collapses" may be caused by the stress she was suffering and that epilepsy was unlikely.

18. In September 2018, the Claimant was investigated for a data protection breach. Following a disciplinary hearing on 28 September 2018 and by an undated letter (presumably, sent shortly thereafter) she was dismissed for gross misconduct.

19. The Claimant appealed against her dismissal and attended an appeal hearing on 2 November 2018. She was reinstated. The grounds on which her appeal was allowed were "the penalty was too harsh" and "not all information was taken into account at the disciplinary meeting". The outcome also included the Claimant being transferred to another department to avoid the risk of further breach. Whilst there was a little more evidence before the Tribunal in connection with the 2018 disciplinary than for that the previous year, there was still not much detail.

20. The paucity of evidence does not allow for findings to be made about precisely what happened. I would, however, observe that for the Claimant to have been accused of

gross misconduct on two occasions, within the space of a year, putting her job at risk, and on the second occasion dismissed only then to be reinstated on appeal, is a truly remarkable sequence and suggestive of something having gone very wrong.

21. The Claimant believed she was being targeted, identifying the same manager as having been behind the disciplinary allegations on both occasions. Unsurprisingly, these events further impacted upon her mental health. The Claimant began a period of sickness absence on 11 November 2018.

2019

22. An occupational health report of 18 January 2019 noted the Claimant had returned to work on 16 January 2019, working nights on 40% of her hours with the goal of "a full return to work as a General Assistant on Day Shift". The OH adviser recommended a phased return over 8 weeks. Whilst the Claimant later suggested this report made a recommendation that she should not work on checkouts, the document is silent on this.

23. As part of the Claimant's return, there was an absence review meeting on 11 February 2019. Asked about the area she would like to work, the Claimant said "due to confidence checkouts wouldn't be good". The manager conducting the meeting is noted as saying "checkouts don't go near. Even [a] multi skill replen job will be around customers. Happy for that [?]" The Claimant replied "as long as I am trusted yes". In March 2019 the Claimant resumed full hours, working the day shift and her duties including shelf stacking.

Checkouts

24. On 18 April 2019, Sam Saunderson, Lead Manager, advised the Claimant she would start working on checkouts from 23 April 2018, under a new line manager, Zak Sharrock. The Claimant told Ms Saunderson about a telephone appointment with her GP due to take place on 24 April 2019 between 9am and 1pm. The 'Let's Talk' note made of this conversation included that the Claimant should discuss any such appointments with her managers and "may need to work on shop floor until telephone call has happened". The Claimant signed a change of job details form recording that she would move from "frozen" to "checkouts". Notwithstanding she had agreed with this requirement, the Claimant was unhappy about the change to her role.

25. The manager who made the decision to move the Claimant onto checkouts did not give evidence, although the reason for this change is likely to have reflected the need for staff on that function.

26. At the Fratton Way store, very little replenishment (shelf stacking) occurred during the day, this was instead almost exclusively carried out at night. In April 2019, there would have been one or perhaps two employees during the day who would have undertaken replenishment as part of their duties. The focus of the Respondent's daytime activity was on serving customers, which created the need for work to be done in checkouts.

27. On 29 April 2019, the Claimant attended her GP who provided a fit note, which stated that she may be fit for work with amended duties and altered hours. This explained

that working on the tills was very stressful, could be a trigger for escalating her anxiety symptoms and invited the Respondent to consider amended duties to minimise her time in this setting. The Claimant's evidence was that she gave this fit note to Amy Deane, Team Leader and that shortly thereafter, Ms Deane communicated a response from Mr Sharrock that none of the suggested amendments could be put in place.

28. Ms Kight for the Respondent challenged the Claimant on her evidence, suggesting that she did not submit the fit note at all, fearing that if she did the Respondent would not allow her to remain in work and she needed to continue with this for financial reasons. Ms Kight also said that if this fit note had been submitted the Respondent would have acted upon it and now have a copy, which it does not.

29. I am not satisfied the Respondent's processes are so flawless that a Med3 could never be received and yet not stored or acted upon appropriately. Even in the best run organisations, paperwork sometimes goes astray. I note also that a subsequent disciplinary hearing conducted by Mr Sharrock included the following:

> **ZS Caroline, would you say you are fit to attend work and carry out duties.**
>
> **CD My doctor has said he wants to sign me off.**
>
> **ZS That's not the question, are you feeling fit to be here?**
>
> **CD Yes I think I am.**

The exchange set out immediately above does at least leave open the possibility that Mr Sharrock would not treat the GP's opinion as the final word on whether and in what circumstances the Claimant might be fit to return to work. The Respondent did not call either Ms Deane or Mr Sharrock to give evidence. On balance, I accept the Claimant's account, which was clear and unambiguous in this respect. Furthermore, there would seem to be little point her having gone to her GP to obtain a fit note supporting her opposition to working on checkouts, save unless she was intending to use that in the hope of persuading her employer to act.

30. Although unhappy with being kept on checkouts, the Claimant continued to attend for work.

31. On 8 May 2019, the Claimant was issued with a "Let's Talk" note, advising her of a complaint received. The customer had complained that the Claimant was using her telephone and did not feel acknowledged. The Claimant was advised:

> **phones must be kept away, especially when on a till. Unless exceptional circumstances where it's been agreed it can be on.**

Disciplinary - Double Scanning

32. On 20 May 2019, the Claimant was required to attend an investigation meeting in connection with an allegation of double scanning whilst on checkout. Such conduct can cause a loss to the Respondent, as when customers complain they are compensated in an amount twice the value of the double-scanned goods. During this meeting the Claimant said she had not wanted to work on tills and was told in response that the Respondent could only put colleagues in roles which needed fulfilling.

33. A disciplinary hearing took place on 22 May 2019, with Mr Sharrock as decision-maker. The discussion referred to above, about whether the Claimant was fit to attend work, occurred on this occasion. Asked how anxiety and depression caused her to double scan, the Claimant said she got upset with herself and denied any loss of concentration. Mr Sharrock suggested to the Claimant she was "so focused on giving excellent customer service that [she] accidentally double scan[ned]". Mr Sharrock issued a first written warning to last for 13 weeks. The Claimant appealed against this warning.

23 May 2019

34. On 23 May 2019, the Claimant was due to receive a call from her GP, at some point between 9am and 1pm. She had asked Mr Sharrock and her team leader to be allowed to work away from the checkout until after the call was received. Permission to work away from the till was refused and she was instead told to summon a replacement, by pressing the buzzer when her call came through.

35. On the day, when the Claimant's phone rang, she was in the middle of a customer transaction. She pressed the buzzer for help but was unable to answer her phone before it diverted to voicemail. Missing this call (which concerned a medical investigation) greatly exacerbated the Claimant's stress levels. When relieved on the checkout, the Claimant was told to take her call in the back office. Instead she went to her car for this. Because of her evident distress, the Claimant's GP asked her to come into the surgery (which was next door to her place of work) immediately. When the Claimant told her Team Leader about taking the call in the carpark, she was reprimanded for leaving the store. Immediately thereafter, the Claimant attended her GP and was signed off work.

36. In cross-examination it was variously suggested the Claimant should have answered her phone as soon as it rang, ceased serving the customer telling them that someone would be along to shortly putting their items through the till, then once relieved taken her call in the back office, alternatively that she ought to have made an appointment for a time of day when she was not at work. These propositions lack realism. The Claimant had very recently been issued with an informal warning or advice about not using her phone at the till because of the poor impression this created on customers. The risk of a customer being annoyed by a cashier who ignores them and instead carries on a private conversation is obvious. Obtaining a GP or other medical appointment is often difficult and frequently these will be offered at times which are not convenient. In the circumstances, the solution suggested by Ms Saunderson with respect to the 24 April 2019 appointment (i.e. temporarily working on the shop floor) would seem to have much to commend it.

37. Ms Kight suggested the Claimant had only sought permission in connection with the 23 May 2019 appointment on the day in question, and this made it difficult to accommodate. The Claimant said she reminded her managers the day before but had told them of the appointment previously. The Respondent did not call as witnesses the relevant managers to speak to the last minute nature of this request. I accept the Claimant's evidence on this point. She would have no reason to leave it late to raise her GP appointment and it would be inconsistent with her approach in April, when she spoke with Ms Saunderson in advance of the day. Furthermore, the Claimant telling her managers of this would give her another argument in favour of being moved away from the till and to undertake shelf stacking, even if only on one day, which is something she wanted. As such, she had an incentive to speak up sooner rather than later.

38. The burden on the Respondent caused by requiring someone to cover the Claimant's till for a few hours, whilst she undertook shop floor duties, would seem to be very modest. As the Claimant pointed out, the Respondent's standard practice at busy times is for those on the shop floor, even managers, to be called to staff additional tills, leaving their existing duties until after the surge has passed. Ms Abbot said there would be little difficulty accommodating this measure, providing the request was not left until the day.

39. The potential burden on the Claimant by not taking this modest step should have been apparent. She had a substantial history of poor mental health and absence from work. She had finished a phased return to work only recently, in March 2019. She was unhappy working on the tills and found this stressful. Whilst it might be possible for her to answer her phone straight away whilst on the till, without offending a customer, there was an obvious risk of this going awry and her missing the call. It ought to have been obvious that missing a doctors appointment risked exacerbating her anxiety.

40. The Claimant was signed off work by her GP and did not return.

Disciplinary - Scanning Own Shopping

41. Subsequent to being signed off work, the Claimant was informed she would be subject to a further disciplinary investigation, in this case an allegation that, in breach of the Respondent's rules, she had scanned her own shopping through the till.

42. An investigation meeting was carried out with the Claimant on 5 June 2019 by Mr Sharrock. He was dissatisfied with the answers given to questions and the notes include:

> **"Looking at everything that has been said at the meeting today. You lied at the beginning of the meeting (breakdown trust) previous final written warning in Oct 2017 for breakdown of trust, using another colleagues password / login"**

A letter of 7 June 2019 required the Claimant to attend a disciplinary hearing to answer allegations of gross misconduct in this regard.

Grievance

43. On 24 June 2019, the Claimant raised a grievance against Mr Sharrock. She complained about being called a liar, contacted unnecessarily whilst off sick, and said that she had tried to discuss what she needed to manage at work "but he was dismissive and said he was too busy to bother with forms" and he had a lack of understanding about mental health issues for employees.

Wellness Meeting

44. A wellness meeting took place on 26 June 2019. Whilst Mr Sharrock would ordinarily have conducted this, given the Claimant's grievance, Ms Abbott, the Respondent's People Partner took over. The Claimant began by explaining the stress caused to her by the events of 23 May 2019. She denied that her elevated stress levels were because of the pending disciplinary. The Claimant said it had been recommended that she not work on checkouts. Whilst Ms Abbott was willing to make temporary changes to the Claimants' work in order to facilitate a return to work, she could not "make [a] job up for people". She asked "is there anything we can do to get you back to work". The Claimant's reply is noted as "clear outstanding disciplinary, get a result from that, attend scans and appointments". No immediate return to work was anticipated and the Claimant was awaiting further medical appointments.

45. Mr Ellis explained the Respondent's position on the reason why a permanent change to the Claimant's role could not be made, in the following way:

    45.1. the need during the day was for staff on the checkouts to serve customers;

    45.2. there was very little need for replenishment (shelf stacking) during the day, such activity being undertaken primarily at night;

    45.3. the store had fixed staffing resources and removing the Claimant from checkout would create additional pressure in that area;

    45.4. the duties the Claimant sought were not compatible with the hours she wished to work, 8am to 2.30pm.

Grievance Meeting

46. A grievance meeting took place on 11 July 2019, conducted by Natasha Crockford, Lead DotCom Manager. The Claimant began by reciting the history generally. Her trade union representative said she came under the Equality Act and reasonable adjustments should have been made for her. The Claimant said she had been happy on grocery where she could "hide" but was moved to tills which was "embarrassing". This appears to be a reference to the Claimant feeling that she was coming back under a cloud as a result of the allegations which had been made against her previously. Asked how this was relevant to the grievance against Mr Sharrock, the Claimant moved on to him having called her a liar during the investigation meeting. She also objected to WhatsApp messages he sent during her absence, which she characterised as harassment. Ms Crockford emphasised the importance of getting the Claimant back to work at her current store, or at another location. Whilst the Claimant said her outstanding disciplinary would bar a store transfer, Ms Crockford

appears not to have believed this was insurmountable. The Claimant then said it would be "hard to find" (i.e. a vacancy suitable for her).

47. Ms Crockford's decision on the grievance was to propose a facilitated meeting (i.e. mediation) with Mr Sharrock and that the double-scanning disciplinary matter would be reinvestigated by a different manager. The Claimant appeared reasonably happy with these proposals and there was a discussion about her returning after the expiry of her current fit note in 3 weeks' time. The Claimant did, however, also say she was frightened to go back.

48. Although there was no written grievance decision letter, which there should have been, it is apparent from discussions in later meetings that the Claimant understood what the outcome was.

First Absence Meeting

49. Unfortunately, the Claimant did not return at the end of 3 weeks.

50. The first absence review meeting took place with Ms Abbott on 21 August 2019. The Claimant was accompanied to this and subsequent meetings by her trade union representative, Mr Webb. The Claimant explained that she was frustrated by having lost access to talking therapies provided by the NHS. Asked what was stopping her from returning to work, she said she could not walk into the store, there was a lack of trust and she feared that more would come up. Asked why she thought more would come up, the Claimant said that she needed counselling to help her come back without thinking someone was trying to trip her up. The Claimant had looked for alternative jobs in the Tesco Express store but there were none at 30 hours. Mr Webb suggested that if the Claimant had worrying moments when back at work, she could have time to speak with him. The Claimant said she could not go back into the store even to shop herself as the place had made her feel negative and worthless. Asked what the Respondent could do to stop her from feeling like that, the Claimant said there was nothing. The Claimant spoke of the financial pressures on her to return to work. Asked by Ms Abbott what she could do to help a return to work and resolve this, the Claimant said "if I knew the answer I would have told you ages ago". Ms Abbot said the whilst the Claimant's job was on checkouts, she could return for up to 6 weeks in another department.

OH Report

51. An occupational health report of 23 August 2019 included:

    51.1. the Claimant was absent with anxiety and depression;

    51.2. working full day shifts on the checkouts and disciplinary proceedings had increased the Claimant's symptoms, resulting in sickness absence;

    51.3. the Claimant felt "unwanted", "targeted" by her manager and "does not feel able to return to the store";

    51.4. the Claimant was best suited to a role away from checkouts if operationally viable;

    51.5. there was "no return to work date in the foreseeable future";

51.6. "medical intervention alone [was] unlikely to resolve the underlying cause of her workplace concern and facilitate a return to work".

Second Absence Meeting

52. A second absence review meeting took place on 5 September 2019, with Ms Abbott. The Claimant again spoke of difficulties with the availability of counselling. Asked about returning, the Claimant said she had to wait for the counselling before she would know. The Claimant was told of the Respondent's Employee Assistance Programme ("EAP"). Asked what was preventing her from returning, the Claimant referred to "stupid things" and said a colleague in his parked car had not acknowledged her saying hello. The Claimant said that if she returned there would be no "banter" with colleagues. The Claimant also understood the outstanding disciplinary would still have to be addressed. Ms Abbot proposed as return to work plan of up to 8 weeks in another department, after which the Claimant would return to checkouts as "I can't make a job up or put you where a job doesn't exist". The Claimant seemed positive, responding "as long as people listen to you and it happens", although she said she needed to have her counselling first, which was also necessary before she could attend a facilitated meeting with Mr Sharrock. Ms Abbott explained there would be another absence review meeting in four weeks time and after that a meeting with the store manager which could potentially result in dismissal. Ms Abbott also suggested that meeting in the store might help. The Claimant said she would see how she felt after counselling.

Third Absence Meeting

53. The Claimant attended a third absence review meeting with Ms Abbott on 8 October 2019. She had prepared a witness statement. In addition to reciting the background briefly, the Claimant stated that although she had now received some counselling, she had been told she was more suited to long-term counselling and there was a long waiting list for this. During the meeting the Claimant explained that contacting EAP was on her "list". She also referred to the investigation into her losing consciousness. The Claimant said her work related stress was because she didn't feel she belonged in Tesco Fratton. Asked what the Respondent could do to help her back to work, the Claimant said she didn't know. Ms Abbott offered a support plan for 6 to 8 weeks, during which time it was intended to rebuild the relationship with Mr Sharrock. The Claimant said she did not know what the hospital appointment would reveal. Ms Abbott said she would be there to support the Claimant's return to work with Darren (the store manager). The Claimant said there was no trust. Her trade union representative said Ms Abbott's plan would be set in stone and not be negotiable with any manager. The Claimant said "yes but why hasn't this happened before" and "its difficult to return and see people".

Final Absence Meeting

54. A letter sent by email on 8 November 2011, invited the Claimant to a final absence review meeting. This explained that a possible outcome was dismissal on the ground that she was incapable of a return to work in the foreseeable future.

55. The final meeting took place on 12 November 2019. Darren Ellis, the Store Manager, was decision-maker. The Claimant was again accompanied by Mr Webb. Mr Ellis had reviewed the notes of the previous meetings and began by asking whether

anything had changed. The Claimant said not, save she had now received dates for three hospital appointments, which had been long awaited. Mr Ellis referred to the recent occupational health report and asked the Claimant why she felt targeted. The Claimant became upset and offered to write down a name (this was the manager who she believed was behind the 2017 and 2018 disciplinaries). She explained that she had been portrayed as bad, which affected her health and financial position. Asked how she would feel about going back to work at Fratton, the Claimant said she couldn't do it. The focus of her concern on this occasion was not Mr Sharrock but rather the previous manager.

56. In the course of discussing the obstacles to a return, the Claimant's trade union representative, Mr Webb is noted as saying:

> **I'm going to try one more time - I will give you any job role of your choice - I will give you any days of the week – choice of shifts - if u put 3 hr shift and you can only do 1 hr Tesco will support but you will only get paid for what you do. I have put in my shifts so if you want to work same shifts as me as for support that's fine to support you back to work.**

The store manager, Mr Ellis followed this up with:

> **Darren is right - we need to support you back if we can't do that we have failed.**

57. There was then an adjournment for the Claimant to discuss matters with Mr Webb. The meeting resumed and the next session included the following exchanges:

> **DE I am here to get you back to work**
>
> **CD In my head its about trying to get rid of me. I just feel I've let people down. I don't know what to do.**
>
> **DE We are at final formal hearing and we just want you to come back.**
>
> **CD I'm so far out of Tesco's now, I don't think I can.**

58. Subsequent to a further adjournment to discuss matters with Mr Webb again, the Claimant said:

> **Sorry I'm being such a let down my emotions are everywhere, I don't know what to do - I don't want to push myself out of my comfort zone for it all to go wrong again.**

59. After a final adjournment, Mr Ellis returned to announce he had decided to dismiss. the Claimant. The dismissal letter sent thereafter provided:

> **At the meeting you informed me that you have been signed off by your doctor until the 4th December 2019 and stated again, that you did not know when you would be fit to return to work**
>
> **Our most recent occupational health report dated 23/08/2019 outlined that there was no foreseeable return to work date and you stated nothing had changed since.**

> **We have previously discussed any adjustments or a transfer or alternative role that might enable you to return to work**
>
> **in any capacity within the near future. We discussed these again at this meeting and confirmed that we have exhausted all options to enable you to return to work in any capacity.**
>
> **Following our three formal meetings, the analysis of your Occupational Health report(s) and the discussion we had at the meeting on 12/11/2019, I have come to a very difficult decision to dismiss you on the grounds of your incapability to return to work in the foreseeable future due to ill-health.**

60. The Claimant was advised of her right to appeal but did not exercise this.

Law

Discrimination Arising

61. Insofar as material, section 15 of the **Equality Act 2010** ("EqA") 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.**

62. Paragraph 5.6 of the **Equality and Human Rights Commission: Equality Act 2010 Code of Practice on Employment** (the EHRC Code) provides:

> **Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.**

63. Justification involves two stages: firstly, the identification of a legitimate aim and then secondly, a consideration of whether proportionate means were adopted in its pursuit.

64. Proportionality requires, a balance between the discriminatory effect of the treatment on the claimant on the one hand, as against the reasonable needs of the business on the other. Relevant to striking that balance will be a consideration of::

64.1. the nature and extent of the discriminatory impact upon the claimant;

64.2. the more serious the impact, the more cogent must be the justification;

64.3. whether the employer's aim could have been achieved less discriminatory means.

Reasonable Adjustments

65. EqA sections 20 and 21 provide, so far as material:

> **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.**
>
> **[…]**
>
> **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.**

66. Pursuant to EqA schedule 8, paragraph 20(1)(b), a person is not subject to the duty to make reasonable adjustments if they neither knew nor could have been reasonably expected to have know of the claimant's disability and that they were likely to be placed at a disadvantage by the relevant provision, criterion or practice ("PCP"):

> **20 Lack of knowledge of disability, etc.**
>
> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **[…]**
>
> **(b) [in any case referred to in Part 2 of this Schedule]1 , that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

67. **Environment Agency v Rowan [2008] IRLR 20 EAT** confirmed that an Employment Tribunal cannot say what adjustments were necessary to prevent a PCP placing the disabled person at a substantial disadvantage until it has first identified:

> **(a) the provision, criterion or practice applied by or on behalf of an employer, or;**

> **(b) the physical feature of premises occupied by the employer;**
>
> **(c) the identity of non-disabled comparators (where appropriate); and**
>
> **(d) the nature and extent of the substantial disadvantage suffered by the claimant.**

68. The Equality and Human Rights Commission ("EHRC") EqA Code of Practice identifies factors which may be relevant to the reasonableness of a proposed step:

> **6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> **• whether taking any particular steps would be effective in preventing the substantial disadvantage;**
>
> **• the practicability of the step;**
>
> **• the financial and other costs of making the adjustment and the extent of any disruption caused;**
>
> **• the extent of the employer's financial or other resources;**
>
> **• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
>
> **• the type and size of the employer.**

69. Pursuant to the decision in **Secretary of State for Work and Pensions v Wilson [2009] UKEAT/0289/09** the Employment Tribunal must have regard to:

69.1. the extent to which it would be practicable for the employer to take the steps proposed;

69.2. the feasibility of the steps proposed.

70. When considering the reasonableness of an adjustment the practical effect, objectively assessed is key; see **Royal Bank of Scotland v Ashton [2011] ICR 632 EAT**, per Langstaff J:

> **24 Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons.**

71. A claimant does not, however, need to go so far as to show a 'good' or 'real' prospect, it is sufficient if there is 'a' prospect the disadvantage will be removed or reduced; See **Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10/JOJ**, per Keith J:

> **[17] In fact, there was no need for the tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the tribunal to find that there would have been just a prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in Cumbria Probation Board v Collingwood (UKEAT/0079/08/JOJ) at 50. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in Romec Ltd v Rudham (UKEAT/0069/07/DA) at 39. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. When those propositions were put to Mr Boyd, he did not disagree with them.**

Limitation

72. The question of what amounts to a "continuing act" was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

> **52. 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 Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.**

73. The Court of Appeal revisited the concept of a "continuing act" in **Aziz v FDA [2010] EWCA Civ 304**. Having cited **Hendricks** Jackson LJ observed:

> **33. In considering whether separate incidents form part of "an act extending over a period" within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see British Medical Association v Chaudhary, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208.**

74. The discretion of the Employment Tribunal to hear OOT claims on the basis they were presented within a further period the Tribunal thinks just and equitable was addressed by the Court of Appeal in **Robertson v Bexley Community Centre [2003] IRLR 343**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.**

75. Factors relevant to the exercise of this discretion may include those identified in **British Coal Corporation v Keeble [1997] IRLR 336**:

> **8. […] The EAT remitted the case for rehearing, directing that the issue of whether it was just and equitable to extend time should be decided on the basis of the circumstances of each individual case after hearing evidence. The EAT also advised that the industrial tribunal should adopt as a checklist the factors mentioned in s.33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –**
>
> **(a) the length of and reasons for the delay;**
>
> **(b) the extent to which the cogency of the evidence is likely to be affected by the delay;**
>
> **(c) the extent to which the party sued had cooperated with any requests for information;**
>
> **(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;**
>
> **(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.**

<u>Unfair Dismissal</u>

76. Pursuant to section 98(1)(a) of the **Employment Rights Act 1996** ("ERA"), it is for the respondent to show that the claimant was dismissed for a potentially fair reason, falling within section 98(1)(b). Capability, or the lack thereof, is a potentially fair reason for dismissal.

77. If the reason for dismissal falls within section 98(1)(b), then neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

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

78. Where an employee's incapability arises from or is connected with ill-ill-health, a reasonable employer will make appropriate enquires in this regard before moving to dismissal. Relevant factors bearing upon fairness in such a case are likely to include:

78.1. whether the employer has consulted with the employee about their ill health, the effect this has on their ability to do their job, how this might change in the future and any alternative role the individual might undertake instead, see **East Lindsey District Council v Daubney [1977] IRLR 181 EAT**;

78.2. where necessary to clarify the nature of the employee's ill health, their prognosis and / or their suitability for alternative employment, the employer will

consider obtaining medical evidence, see (a first instance decision) **Crampton v Dacorum Motors [1975] IRLR 168 IT**;

78.3. the effect the employee's absence has on other employees in the business, the needs and resources of the employer.

79. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal; see **Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.

80. Where an appeal against dismissal is heard, a determination of whether the claimant was unfairly dismissed will require a consideration of the whole process. The issue of fairness will not turn on whether the appeal hearing is termed a re-hearing or mere review, see **Taylor v OCS Group Limited [2006] IRLR 613 CA**.

Conclusion

Expenses

81. Whilst the email of 10 March 2017 might have supported a conclusion that the Claimant and Respondent had agreed she would be entitled to travelling expenses for attending the training course, it does not support the existence of a contractual term that she could recover all and any expenses incurred through her participation in the Farm to Fork Trail Guide programme more generally. Notably, the Claimant's expenses claim does not include the training day. In the absence of a relevant contractual term, her breach of contract claim must fail.

82. Although no longer necessary to determine this claim, I was not persuaded by the Respondent's argument that the Tribunal lacked jurisdiction on the basis the claim was not "outstanding on termination" because the Respondent had already dealt with it, in the sense of having considered her expenses claim and decided that nothing was due.

Reasonable Adjustments

83. The Respondent agrees that between 23 April and 23 May 2019 it applied to the Claimant, the PCP identified by EJ Livesey. Once she started her sick leave, however, it is said this PCP was no longer applied. I will address this initial period in the first instance.

84. I am satisfied the PCP did put the Claimant at a substantial disadvantage because it tended to exacerbate her symptoms of anxiety. The checkout role was often quite intensive, with little let-up. This position also put the Claimant in the midst of her colleagues and the public, which exposure was stressful for her. The Claimant's self confidence was much reduced and she was fearful of how others perceived her. A person without the Claimant's disability would not be disadvantaged in this way.

85. The Respondent knew or could reasonably be expected to have known of the disadvantage. Whilst it is correct to say the Claimant's difficulty working on checkout

was not mentioned in her January OH report, she herself brought it up with management during the February absence meeting. Whilst the Respondent might have been under the impression that after the phased return ended so did the Claimant's anxiety in this regard, any such impression could not, reasonably, have survived her presentation of the 29 April 2019 fit note, which made her disadvantage in this matter entirely clear.

86. The real issue in connection with reasonable adjustments is whether it was reasonable for the Respondent to have to take the step of removing or reducing the requirement on her to work on the checkouts, directing her to alternative work on replenishment or elsewhere.

87. The Respondent's managers said to her on several occasions that a job could not be "created" for her. The basis for this was said to be not only the absence of a vacancy for non-checkout work during the hours the Claimant wished to work, but also there being very little need for such work to be done during the day at all. Mr Ellis said in his evidence to the Tribunal that there might be a small amount of replenishment of fresh food and there would have been one, or perhaps two members of staff (and therefore, roles in the structure which included this) during the day at the Claimant's level, who were not on the checkouts, albeit their hours did not match those she wished for.

88. The Fratton Way store (and presumably other premises operated by the Respondent) have a 'heatmap' indicating where work is required to be done and are allocated a finite amount of resource for staff to provide this. Asked about the difficulty of creating a role for the Claimant, Mr Ellis said that resources would need to be taken away from another area, which would create pressure at that point.

89. Whilst the Claimant said she should have been allowed to continue with the role she had in March 2019, the Respondent's stance was that this was part of phased return to work and did not reflect its need for staff during the hours she wished to work. Although not put by the Respondent in these precise terms, the position appears to be that it would support a less productive role in order to see an employee return to work but would not do so indefinitely.

90. I cannot say that it would be a reasonable step for the Respondent to have to create and then employ the Claimant in a permanent role it did not need. Accordingly, the Claimant's claim with respect to an ongoing failure to make reasonable adjustments, by not permanently giving her a role with no or less work on checkouts does not succeed.

91. A different analysis may, however, be called for as far as the Claimant's request to be permitted not to work on the checkout on 23 May 2019 is concerned. On this occasion there was reason to suppose that her already heightened anxiety would be further exacerbated. The burden on the Respondent from having the Claimant in a less productive role for a few hours and / or calling upon someone else (one of those who did undertake replenishment during the day, another member of staff by way of additional hours, or even a manager) to cover her till for a short time, would have been modest. Ms Abbott accepted this would not have been difficult to accommodate, as long as the request was not made on the day, and I have found it was not. On this basis, I am satisfied that allowing the Claimant to come off the checkout on 23 May 2019 until she had heard from her GP was a step that it was

reasonable for the Respondent to have to take. Such a step would have been very likely to avoid the disadvantage to the Claimant on that occasion. The Respondent failed to take this step.

92. As to the period after 23 May 2019, Ms Kight's primary answer was that the PCP no longer applied. During the course of closing submissions, the Tribunal posited a reformulated PCP, such as might apply more easily during the Claimant's sickness absence and capture the ongoing disadvantage she faced by the prospect, in the event of a return to work, of having to go back onto checkouts following a short phased return. Given, however, my conclusion that the Respondent was not obliged to take the step of creating a daytime role it did not need, the PCP issue is academic, as her claim in that regard could not succeed.

Discrimination Arising

93. The Respondent's refusal to allow the Claimant to be away from the till on 23 May 2019 was unfavourable treatment. This was a disadvantage and exacerbated her anxiety, as set out above. The something arising in connection with 23 May 2019 is said to be the Claimant's need to take a call from her GP. Ms Kight argued that the claim in this regard must fail as the unfavourable treatment was not because of the something, i.e. the something did not cause the treatment. Plainly, she is right in this. The reason for the refusal was because the Respondent's managers needed her to work on the tills.

94. It is conceded by the Respondent that dismissal was unfavourable treatment and this was because of something arising in consequence of disability, namely the Claimant's lengthy sickness absence. The Respondent does, however, seek to justify taking this step.

95. The Respondent's aim is said to be "the need for proper management of employee attendance and monitoring and ensuring staffing levels to deliver a high level of customer service". I am satisfied this was a legitimate aim, it is part of running an efficient customer-facing business. The question then is one of proportionality.

96. The nature and extent of the discriminatory impact upon the claimant was considerable. She had been with the Respondent for many years. Before the events described above, she had found the different roles associated with her employment to be enjoyable and fulfilling. It is also clear that her family relied upon the income received from this job. She had hoped to continue with Tesco into her 70s. The loss of this employment has been a great blow, coming as it did when the Claimant was already very unwell.

97. Could the Respondent's aim be achieved by less discriminatory means? By the time of her dismissal, the Claimant had been on sick leave for almost 6 months. She makes no complaint about the Respondent failing to follow its own procedure, although she says this failed to take into account her disability. There were 4 meetings with the Claimant to review her absence before dismissal. On each occasion there was a detailed discussion, in which the Respondent sought to understand the obstacles to a return and made proposals to support her in coming back, with adjusted duties for up to 8 weeks. The Claimant's trade union representative engaged with her managers positively, in order to explore what might be done. Whilst, in light of the way the Claimant's claims were put, there was much

focus during this hearing on the requirement made of the Claimant to work on checkouts after a phased period, this did not emerge as the principal obstacle to her return. The main barrier was her mental health. The Claimant's confidence and sense of self had been greatly diminished as a result of the events described above. She was very worried about how she was perceived by her colleagues. She believed that she was being targeted and in the event of a return to work, someone would be looking to trip her up. The Claimant had sought and received support, both from her GP and in terms of counselling. It became apparent, however, that she needed more intensive and sustained psychological support. Whilst the Claimant was able to respond positively on occasion to the suggestions made, this was always then subject to the resolution of her mental health problems, which did not appear to be imminent. The occupational health advice was consistent with what the Claimant herself said. There was no foreseeable return to work date. During this hearing, it did at first appear as though the Claimant disputed there was a lack of a return to work date. It became apparent, however, that her concern was this in some way implied she did not want to get better or was not trying, which was certainly not the case. The Claimant has throughout been heartfelt and genuine in her representations.

98. The Respondent's aim could not be met by indefinitely postponing a decision on whether to continue to support the Claimant's absence. Whilst the Claimant is a disabled person, this does not mean she cannot be dismissed for absence which is related to this. The question is whether dismissal was proportionate.

99. It is not suggested that there were any suitable vacant positions at other local stores, indeed the Claimant's comment during the absence meetings suggests she had been looking into this and nothing suitable was available.

100. Nor was there any other measure the Respondent could take to address and resolve the Claimant's health problems and feelings about the prospect of a return to work. This topic was discussed at length but did not produce a solution.

101. Very sadly, by the point of the final attendance review meeting, the position appeared irretrievable.

102. In the circumstances, I find that there was no less discriminatory measure that would have achieved the Respondent's legitimate aim.

Limitation

103. Accordingly, the only part of the Claimant's claim the Tribunal would be able to uphold if it had jurisdiction, is that relating to events on 23 May 2019. Section 123(1)(a) of the Equality Act 2010 allows for the presentation of a claim within 3 months of the discriminatory act, which period would have expired in this case on 22 August 2019. As the limitation period had already run out, ACAS conciliation did not extend time and the Claimant's claim was more than 6 months late.

104. In the absence of some later discrimination, there is nothing else to which the 23 May 2019 can be added to, for the purposes of a continuing act argument. The question then is whether it is just and equitable for the Tribunal to determine the claim, notwithstanding it was late.

105. There are two principal reason for the lateness of the Claimant's claim. Firstly, she did not wish to damage the relationship with her employer ("rock the boat" in her words) during her sickness absence as she was hoping to return to work. Secondly, she was ill throughout the period, in need of long-term counselling and other medical interventions, which she was waiting to receive from the NHS.

106. The delay in this case of more than 6 months is significant given the expectation of Parliament that claims should be presented within 3 months. That said, the ACAS conciliation scheme typically has the effect of extending that initial period to nearer 5 months and (whether on the basis of it being just and equitable or as part of what is relied upon as a continuing act) in practice Tribunals are often called upon to determine claims of far greater antiquity.

107. Any delay may have an effect on the cogency of evidence. It was not, however, the Respondent's case that relevant documents had been lost or witnesses no longer available. Ms Kight suggested the Claimant's account of 23 May was unreliable due to the passage of time. In the Tribunal's assessment, there was nothing to suggest the Claimant's evidence was any more or less reliable with respect to May 2019 than the later events she spoke to.

108. Ms Kight also relied upon the Claimant's access to trade union advice as a factor which tended against it being just and equitable to extend time. Whilst the Claimant was supported by her trade union during the internal proceedings, she has acted on her own in pursuing a Tribunal claim.

109. Taking into account all of the circumstances, I think the further period within which the claim was presented is such that it is just an equitable to allow the same. Given the context, namely a damaged working relationship operating as a barrier to the Claimant's return to work and good health, her wish not to further undermine the position is understandable. She was also, plainly, suffering with her mental health throughout the relevant period. Whilst Ms Kight pointed to the Claimant's attendance at absence review meetings as being inconsistent with her inability to present a claim, it is not necessary to establish a lack of reasonable practicability. The Claimant would be severely prejudiced by not being allowed to pursue this matter. The Respondent on the other hand was not prevented from contesting or defending this claim by its late presentation. The balance of prejudice supports the Claimant. I am satisfied that it is just and equitable to extend time for the claim with respect to 23 May 2019.

<u>Unfair Dismissal</u>

110. The Claimant was dismissed for 'incapability', which is a potentially fair reason. The Claimant was upset by this word but did not in substance dispute it. The Tribunal explained that capability is one of the potentially fair reasons for dismissal in the Employment Rights Act 1996, the Respondent's language was taken from that and it did not imply any criticism of, or lack of effort on her part.

111. The Respondent complied with its own sickness policy and I find, followed a fair procedure. The Respondent made extensive enquiries of the Claimant at the various meetings held with her and Mr Webb. Ms Abbott and at the final meeting Mr Ellis, sought to understand and explore the obstacles to a return. The Respondent obtained occupational health advice, which was consistent what the Claimant herself

was saying. Whilst the Respondent did not seek a fresh OH opinion subsequent to the report of 23 August 2019, there was nothing to suggest any change in the Claimant's health or the prognosis. She remained singed off by her GP, with work-related, stress throughout the period to dismissal (and beyond).

112. I am satisfied that it was reasonable for the Respondent to dismiss the Claimant for incapability at the point it did. The matters set out above in connection with proportionality are relevant here also. Despite the extensive discussion which had taken place around the Claimant's health and barriers to her coming back, the parties were no closer to a resolution. There was no foreseeable date for return, nor good reason to suppose that one might emerge were the decision further delayed. The Respondent could and did in the circumstances, reasonably conclude there was no prospect of the Claimant being well and able to return to work in the foreseeable future. It arrived at that conclusion having waited for a reasonable period and after appropriate enquiries.

Conclusion

113. The Claimant's claim with respect to the Respondent's failure to make reasonable adjustments on 23 May 2019 is well-founded and succeeds.

114. The Claimant's other claims are not well-founded and are not upheld.

Remedy

115. As discussed with the parties, I will rule upon issues of principle with respect to remedy at this stage, but not the calculation of any specific sum, which will be addressed at a remedy hearing in the absence of agreement between the parties.

116. Whilst the sickness absence from which the Claimant did not return began on 23 May 2019, I am satisfied that even if the Respondent had allowed her to work away from the checkout that morning until she received her GP's phone call, she would still have commenced sickness absence on that day of very shortly thereafter.

117. The Claimant's confidence in herself, trust in the Respondent, belief about how she was perceived and ability to work alongside colleagues without this causing much heightened anxiety, were already very greatly damaged by 23 May 2019. The disciplinary proceedings in 2017 and 2018 took a very considerable toll on the Claimant, and this was added to by various other misfortunes. In April 2019, she was required to undertake a role she did not wish, in circumstances where rather than being able to 'hide' away, she was in the midst of her colleagues and customers. Given her anxiety and depression, this was not a sustainable position. One new disciplinary matter had emerged by 23 May 2019 and another would do very shortly thereafter. Even if her GP's call had not been diverted to voicemail that morning, it is difficult to see how the Claimant could have continued in this workplace. The factors which prevented her return to work, were all present and would remain. On this basis, the Claimant is highly likely to have begun a period of sick leave at or about the point she did in any event and then subsequently been dismissed.

118. Accordingly, the Claimant's remedy will be an award for her injury to feelings. She will not be able to recover compensation for loss of earnings, as she would have lost this income anyway.

119. On this basis, given the only financial remedy the Claimant would be entitled to is an award for injury to feeling, the parties are invited to attempt to agree this sum and thereby avoid the need for attendance at a further hearing.

Provisional View

120. In accordance with the overriding objective and further to rule 3, which requires the Tribunal to encourage the resolution of disputes by agreement, I will set out below a provisional view with respect to the band within which the Claimant's injury to feeling award appears likely to fall. This is, however, subject to further evidence and submissions at a remedy hearing, in the event the parties are unable to agree on remedy.

121. The Tribunal's provisional view is that an award for injury to feeling in the lower band (**Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA**) is likely, which uprated for inflation now stands at £900 to £9,000. The reason the lower band seems appropriate is that the Claimant had already been greatly distressed by the matters set above, which occurred before 23 May 2019. This will also have been added to by events thereafter, including her dismissal.

122. The injury to feeling award would, therefore, be intended to compensate the Claimant for the additional distress caused by not allowing her to come off the till on 23 May 2019 in order to await and then take her GP's phone call, rather than the totality of her injured feelings, which had been caused or contributed to by earlier or later events.

123. As set out above, the view expressed with respect to the correct band for injury to feelings is a provisional one. This means that in the event the parties cannot agree a figure for compensation and a remedy hearing takes place, the Tribunal will hear further evidence and argument on the point. The Tribunal has not made a final decision and will keep an open mind.

Order

124. By 19 April 2021, the parties to write to the Tribunal and advise:

124.1. that agreement has been reached and a remedy hearing is no longer required;

124.2. or, that no agreement has been reached and the remedy hearing should proceed.

125. In the absence of agreement, a remedy hearing will take place on **1 June 2021**. Given the narrow point for determination, the time allocation will be reduced to **3 hours**.

Employment Judge Maxwell
Date: 10 March 2021

Judgment & Reasons sent to the parties: 11 March 2021

FOR THE TRIBUNAL OFFICE