EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Brinzica	v	Primark Stores Ltd

Heard at: Reading Employment Tribunal **On**: 26 – 30 June 2023

Before: Employment Judge George
Members: Ms A Brown, Mr J Appleton

Appearances

For the Claimant: in person
For the Respondent: Mr B Randle, counsel

Interpreter in the Romanian language: Ms M Stan (days 1 & 2), Mr Marcusan (day 3); Ms V L Gutoiu (day 4 & 5).

RESERVED JUDGMENT

1. The claim of direct disability discrimination is not well founded and is dismissed.

2. By a majority (employee panel Non-Legal Member, Mr J Appleton dissenting), the claim of discrimination arising in consequence of disability is not well founded and is dismissed.

3. The claim of disability-related harassment is not well founded and is dismissed.

4. The claim of victimisation is not well founded and is dismissed.

5. The claim of less favourable treatment on grounds of part-time worker status is not well founded and is dismissed.

6. The claim of unauthorised deduction from wages was not presented within three months of the date of payment of the wages from which the last deduction was made and it was reasonably practicable for that claim to be presented in time.

7. The employment tribunal does not have jurisdiction to consider the unauthorised deduction from wages claim and it is dismissed.

8. The hearing listed for 17 November 2023 will not now take place.

REASONS

1. Following a period of conciliation between 3 November and 5 November 2021, the claimant presented a claim on 6 November 2021 by which she complained of race discrimination, disability discrimination (relying upon sciatica/back condition) and less favourable treatment on grounds of part-time worker status. The respondent defended the claim by a response entered on 9 December 2021. The claims arise out of the claimant's employment as a retail assistant by the respondent, a well-known fashion retailer, which started on 4 November 2018 and was continuing at the date of the hearing. The claimant is, as we understand it, presently on sick leave.

2. An order was sent by the tribunal on 9 February 2022 warning the claimant that it appeared to the Employment Judge that the race discrimination claim had no reasonable prospects of success because no matters had been included in the claim form to support that complaint (page 45). The claimant did not reply and on 22 April 2022 the tribunal confirmed that that complaint had been dismissed as a result (page 55).

3. The case was case managed at a hearing on 7 February 2023 (page 69) at which the claimant confirmed that she was not going to apply for a reconsideration of the judgement dismissing her race discrimination claim. She expressed regret about that in the written opening note circulated at the start of the hearing but did not pursue the matter before us.

4. Also at the hearing on 7 February 2023, Employment Judge Eeley made provision for the claimant's application to amend her claim to include, among other things, LOI 9.1.1 and 9.1.2 (the unauthorised deduction from wages claim) to be heard. The earliest reference to a desire to amend is in correspondence on 27 January 2023. It was determined at a preliminary hearing in private conducted on 6 March 2023 when it was granted in part for reasons set out in the order at page 79. Employment Judge Hawksworth also extended the original three day time allocation to 5 days and case managed the claim, including by setting out the issues to be determined at the final hearing in her case summary.

5. In this hearing, which took place on 26 to 30 June 2023, we had the benefit of a joint file of documents to which additional documents were added at the start of the hearing. Following those additions, the file ran to 1598 pages and pages in that file are referred to in these reasons as page 1 to 1598 as the case may be. The respondent had provided a non-agreed chronology, cast list and suggested reading list. The size of the documentary evidence relied on and number of witnesses meant that a

decision was taken to reserve our judgement although the five-day hearing was timetabled to leave enough time for deliberations and decision-making. The respondent's counsel provided written submissions and a bundle of relevant authorities (the submissions are referred to in these reasons as RSA) and the claimant made her closing remarks from a written speech which she provided to the tribunal. Additionally she had provided document to the tribunal headed "Dear judges" before the start of the hearing which was in the nature of written submissions on the issues and we took that into account as such.

6. We heard from two witnesses on behalf of the claimant: the claimant herself and her husband, Mr M Brinzica. The respondent relied on the evidence of seven witnesses: Mathew Sedgman (Store Manager, Reading); Emma Oliver-Turnham (People and Culture Manager, Reading); Matt Hooper (ER Adviser, Reading); Natalie Kemp (Department Manager, Reading); Paul Fiander-Turner (Store manager, Uxbridge); Elaina Lane (Assistant Manager, Reading); and Phil Rouse (Store Manager, Bracknell). All witnesses attended in person and adopted witness statements that had been exchanged in advance on which they were cross-examined.

7. The respondent had conceded that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 (hereafter referred to as the EQA) by reason of sciatica/back condition. As a result of this condition, the claimant needed to stand and move around from time to time to relieve pain and as a preventative measure. She explained that she was not feeling particularly well, and was taking throat lozenges and needed to drink more water than usual. She was reassured that she should stand or sit as she wished to do throughout the proceedings as she felt most comfortable and also that if she felt too unwell to understand the process she should inform the tribunal of that. We took regular breaks and proceeded in that way. That appeared to be sufficient to enable the claimant to participate effectively.

8. The claimant had also requested a tribunal appointed interpreter in the Romanian language. The interpreter was held up by unavoidable travel delays on Day 1 and we waited until they arrived. The claimant confirmed that she was confident in speaking English and also reads and writes good English. It emerged that the claimant had written her statement in English but that her husband had written his in Romanian and used an online third-party translation service to translate it. It was therefore agreed that his relatively short statement would be interpreted for him into Romanian by the interpreter before he confirmed its truth. Although the tribunal had no particular reason to doubt the accuracy of the online translation service, Mr Brinzica had not had the benefit of a certified translation and that seemed to be prudent. In fact he was able to confirm the truth of the statement after it had been translated without amendment.

9. The claimant gave evidence principally in English, giving evidence in Romanian through the interpreter where she felt the need; she explained

that she found the process tiring and turned to the interpreter more when tired. From time to time, the Employment Judge directed that particular questions and explanations should be translated to ensure the claimant understood them and to ensure that any answers given were clearly understood by the tribunal to be the words of the claimant and her husband. By this we were satisfied that we had reduced the risk of miscommunication due any language barrier to the lowest level possible. Similarly, when cross-examining, the claimant occasionally asked questions in Romanian and they were interpreted into English for the respondent's witnesses. The claimant speaks very good English and the tribunal was confident, for the most part, that she was herself able to identify those places where she needed assistance but always erred on the side of caution when using the interpreter's services given the formal setting and complexity of some of the legal issues. Word for word interpretation of the whole proceedings was not necessary to enable the parties to be on an equal footing and would have caused delay.

10. Before hearing evidence, the tribunal ruled on one preliminary matters. The claimant renewed her application for specific disclosure of documents in respect of two documents or categories of document.

    a. The first was that she wanted disclosure of CCTV footage of incidents in May or June 2021 and on 17 September 2022.

    b. The second is that she wants disclosure of documents that she has referred to as tills targets.

11. We refused her applications for both categories of documents and gave our reasons orally. Those reasons were as follows:

    a. <u>The CCTV footage of particular incident(s)</u>. The incident(s) in question were the incident(s) that are referred to in list of issues 3.1.1 (direct disability discrimination) and disability-related harassment (LOI 5.1.1). In addition, there is a harassment allegation in respect of the incident on 17 September 2022. The individuals against whom allegations are made and whose actions are said to have been harassment or direct discrimination were two supervisors. It did not appear that we would be hearing evidence directly from them because they are no longer in the respondent's employment, although they were interviewed within the grievance procedures. The respondent has consistently told the claimant that CCTV footage of these incidents was unavailable and points to their policy on retention. The claimant disputes that they are unavailable pointing to inconsistent explanations of the policy provided to her. She argues there should have been retention of the CCTV footage when she first asked for it. The claimant will be able to ask questions of the relevant respondent witnesses about when she first asked for the footage; how long had passed since the relevant incidents at that point; and what is the retention policy. If she can

establish that she first asked for the footage when it either was or ought reasonably to have been still in existence, then, potentially, the tribunal could draw adverse inferences from the respondent's failure to produce it either within the grievance proceedings or at this hearing. Potentially those inferences might include that such evidence from the supervisors that we have available is less reliable than that of the claimant. The present position appears to be that the footage is now no longer available and therefore any order would be futile which is a strong reason not to order it. The claimant has the right to ask questions about the reasons why it is not available and that means that it is not necessary for the footage to be shown in in any event,

b. The till targets. The respondent denies that there are such targets. Setting that to one side, we have to start by looking at which issues they are relevant to if they exist. When discussing the application we used the word "productivity" because the claimant says that these are documents that show how many scans she did during an hour on her shift. She alleges that her productivity is potentially relevant to the allegation that an occupational health referral made on 8 December 2021 (page 508) was an act of victimisation. It is alleged to include incorrect details, one of which is said to be an incorrect assertion that the claimant's performance had deteriorated or was below standard. Ms Oliver-Turnham gives evidence, that she is expected to adopt, in her paragraph 32 which is her explanation as to why she completed the OH referral form in the way that she did. The tribunal will have to assess whether or not to accept that explanation. Again, the claimant has the right to ask questions about what the form meant and to challenge the evidence about why it was completed in the way and to suggest that it was misleading. However, nowhere in Ms Oliver-Turnham's evidence does it suggest that the claimant's productivity was substandard and that is not part of the respondent's case; quite the contrary. That means that, even if we were satisfied that such documents exist (which at the time we decided the application was yet to be determined) they are not necessary to decide the issue. If we were to conclude that such documents exist then, potentially, the tribunal could draw inferences from a failure to disclose them. However the central fact finding exercise is going to involve the question of whether we accept Ms Oliver-Turnham's evidence as to what she meant by what she said and the question of whether or not the form was inaccurate or misleading. The claimant needs to satisfy us that what is in the form is inaccurate and the respondent accepts that she was productive so documents which demonstrate productivity are not necessary.

The Issues

12. The issues remained those set out in the order of Employment Judge Hawksworth sent to the parties on 20 March 2023. That order starts at page 91 with the issues for the tribunal to decide being at page 98 to 104. We have reference to but do not repeat those issues here so that this judgement should not be unnecessarily long but the claimant brings the following types of claim:

    a. Direct disability discrimination

    b. Discrimination arising from disability

    c. Disability related harassment

    d. Victimisation

    e. Less favourable treatment on grounds of part-time worker status contrary to the Part Time Workers Regulations 2000

    f. Unauthorised deduction from wages in respect of failure to pay sick pay in 2019 and failure to pay one week sick pay for the week commencing 17 September 2022.

13. The claimant argued that her claim for non-payment of sick pay set out in LOI 9.1.2 was not correctly reflected in the list of issues. She seemed to argue that it should be an allegation that she should have been paid for a working day on 17 September 2022. No challenge had been made to the wording of the list set out by Employment Judge Hawksworth despite the parties being told (para.13 page 93) that they had 14 days from the date the order was sent to them to do so and therefore no amendment to the issue was made.

Findings of Fact

14. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

15. According to the contract of employment dated 5 January 2019 (page 138), the claimant's continuous employment started on 4 November 2018. The claimant was at that time contracted to work part-time from 8:45 AM to 6:30 PM on Saturdays and from 10 AM to 5:30 PM on Sundays (page 138)

16. The claimant explains in paragraph 12 of her witness statement that she developed back pain which she attributes to having to lift boxes on her own as part of her shopfloor duties. She goes on to state that she informed her line managers that, in the future, she would not lift on her own and also had two months of sickness absence due to symptoms of back pain. She complains that for one month she did not receive pay during her sickness absence.

17. According to the respondent she received company sick pay in August and September 2019 as set out in the email at page 1533. A full list of payments made to the claimant is set out at pages 1185 to 1188. These appear to show that the claimant was sick on 17 and 18 August 2019, 24 and 25 August 2019, 31 August and 1 September 2019, 7 and 8 September 2019, 14 and 15 September 2019, 21 and 22 September 2019 and 28 and 29 September 2019. These dates would have been the only working days for the claimant during those weeks.

18. The respondent's records show that she was not paid on 17, 18 or 24 August 2019 and they are marked on the spreadsheet "waiting days-unpaid". The records, if accurate, show statutory and company sick pay paid on 25 and 31 August and 1 September 2019 and then statutory sick pay paid for the remainder of that absence. As the claimant only works two days a week. Three days sickness absence amounts to 1.5 week's work.

19. The respondent's sickness absence policy is at page 124. As is commonplace, it records that the employee who is sick for seven calendar days or less must complete a self-certification form.

20. Sick pay is dealt with in sections B) and C) on page 125. Provided the employee's earnings are above the lower earnings limit (or LEL) they are eligible for SSP for a maximum of 28 weeks for any period of sickness. If the employee does not qualify for SSP, the policy states they will receive a form to enable them to claim sickness benefit from the Department of Work and Pensions. "SSP is payable on the fourth consecutive day of the period of incapacity to work. The first three days are called waiting days and no payment is due."

21. Depending on an employee's length of service they may be eligible for company sick pay (CSP). The policy provides that there will be no pay for the first three days of any illness; sick pay only accrues from the fourth day of absence furthermore

> "each week the company will deduct the appropriate rate of SSP or other government benefit, <u>even though such benefit may not be payable</u>, either because you do not qualify or because your entitlement to it may already have been used up." (Underlining added for emphasis)

22. We accept the respondent's interpretation of this contract and handbook. If an employee qualifies, as the claimant did, for company sick pay due to their length of service and earns more than the lower earnings limit, a

figure set by the government, then we find that the entitlement to sick pay by reason of this handbook is as follows,

a. for the first three consecutive days of an employee's absence they are neither entitled to SSP nor to CSP because those are waiting days. This follows from the explanation about SSP (see paras 20 above) and CSP (see para 21 above). Because the claimant worked two days a week, three consecutive days would spread over two consecutive weekends.

b. From Day 4 of an absence, the employee would become entitled to SSP and CSP but the amount of SSP would be deducted from the CSP. This means that the value to the employee of CSP was their daily rate of pay less the amount of SSP to which they were entitled in pounds. Where an employee is entitled to SSP and CSP that does not mean that they are paid SSP in addition to the amount of the normal wages. This follows from the quoted passage in para 21 above.

c. The passage underlined in para.21 above means that if an employee qualifies for CSP but not, for some reason, SSP then the amount of CSP is exactly the same as if they did. This does not appear to be consistent with the position communicated by payroll (page 1395) who suggested that no sick pay at all would be payable if an employee was below the LEL whereas that passage suggests that custom and practice was that an employee earning below the LEL who qualified for CSP would receive the difference between the rate of SSP and their CSP entitlement, subject to there being another reason why they should not be paid, such as that it was the first three days of a period of sickness absence.

23. We accept Mr Hooper's evidence (MH para 5 to 10) about CSP. In particular, if an employee has between six months and three years of service they are entitled to 2 weeks' full pay and if they have between three and five years of service they are entitled to 4 weeks' full pay. At the time of the claimant's absence in 2019 she was entitled to 2 weeks' full pay which in her case was four days.

24. The claimant's case is that she was absent in July 2019 whereas the respondent states that she was only absent on the dates recorded above. Evidence relied on by the claimant to indicate that the respondent's records are incorrect is the email at page 175. In that, the claimant wrote to a manager to inform him that she had checked the rota but was certified unfit and unable to carry out the duty saying "I start on 13.07 and I will finish after three weeks". This email is dated 21 August 2019 but the claimant relies on it to show that her sickness absence and GP certificate had been dated from July. Ms Oliver-Turnham refuted that with reference to an email at page 172 that she had written on 15 August 2019 to confirm receipt of MED3 that Mr Brinzica had delivered.

25. It seems far more likely to us that the claimant made an error in the date she put in the email of 21 August 2019 and the certificate was actually dated 13 August (page 182). The claimant was unable to explain away the internal inconsistency of her email and worked very hard to attempt to do so rather than to accept that she had made an error. Her recollection of something that happened nearly 4 years ago appears to be something that she has convinced herself of by looking solely at the email at page 175 but it is inexplicably inconsistent with other documentary evidence.

26. In September 2019 the claimant had an MRI scan (page 230) as a result of which she was told that she had a degenerative disc bulge at L5/S1 compressing the left S1 nerve root series. She returned to work working only on the tills without any lifting.

27. She seems to have had the misfortune to experience further pain and aggravated symptoms following a spinal injection and was absent from work in January or February with a return to work meeting on 1 February 2020 (page 200). The note of this meeting appears to record that she thanked her manager for understanding and for the ability to sit down at the tills. It also appears that there were ongoing investigations by her medical advisers.

28. It seems to us that at this period, a relatively short space of time before the national coronavirus lockdown closed the store, the respondent appears to have been able to accommodate the claimant only to work on tills with the ability to sit down. It was common ground, certainly, by the return to work meeting of 1 February, that she had a chair behind the till.

29. As will be seen below, a more complex medical position emerged during the hearing of the grievance. Our view is that it wasn't until the respondent heard the grievance and heard more about new medical conditions together with some deterioration in attendance that it emerged that what the claimant could not do at work was a source of possible conflict. Those triggers were not present in 2019 and we do not think it right to draw adverse inferences about later action under the capability process because no such action was taken earlier.

30. The allegations of direct disability discrimination which are first in time stem from the alleged behaviour of the claimant's Sunday supervisor, Aisha, who is said to have screamed at the claimant to do her colleagues' duties between the closure of the store on Sunday and the end of her shift; in particular to carry out returns (see para 34 of the claimant's statement). When this allegation was explained to Judge Hawksworth, eight specific dates were included taken from a hand written letter provided to the tribunal after the hearing (see footnote 1 on page 100) – some of which are days on which she was absent due to ill health.

31. The claimant complained on 8 June 2021 (page 242) that she started to feel harassed by her colleagues and described how the previous Sunday "I start feeling very dizzy and I feel my heart exploding… On the floor it was

returns from LG [lower ground] departments". In essence she complained of being told to do further returns and also about comments from colleagues that she attributed to her sitting on a chair or about her back pain. She states that it is not the first time that it has happened and supplied a sick note. To judge by the date of that email, the event referred to must have happened on 6 June 2021.

32. Although the claimant apparently told Judge Hawksworth that this happened on a number of dates the only occasion for which there is any contemporaneous supporting evidence is 6 June 2021.

33. Our view of the claimant's reliability as a witness of fact in general is that her memory of events that took place some time ago has been affected by her reaction to subsequent events. In paras.119-121 below we refer to guidance in the case of Gestmin which was referred to by Mr Randle in para 27 of the RSA. It is not that we consider the claimant to be deliberately trying to mislead but her account of incidents such as the date of her absence in August 2019, when she insisted - contrary to the documentary evidence - that she had been absent in July, cause us to infer that the claimant sometimes adopts a fixed viewpoint and her memory adapts to accommodate that viewpoint. Further, her account of some events grows in the telling. The point made by Leggett J in Gestmin is that the memories are rewritten and external information, or a witness's own thoughts and beliefs can intrude into those memories making them less reliable. We accept the submission that there is evidence from which to infer that this is a reason to treat the claimant's recollections with caution when comparing it with the respondent's witnesses account and to look for contemporaneous evidence of her account when making our findings of fact.

34. Without supporting contemporaneous documents we do not accept that the claimant experienced conflict with her supervisor on as many occasions as set out in the list of issues. Following a formal grievance the Sunday supervisor was interviewed (page 435). It appears that the claimant's health condition had not been explained in detail to the supervisor and, although a mutually acceptable way forward had been reached in January 2020 when the claimant returned but was working only on the tills, arguably the situation was under managed at that time.

35. As to her account of 6 June 2021, in her complaint at page 242 she supplied her sicknote saying she had felt very bad on Sunday and had gone to Accident & Emergency. She appears to distinguish between her colleagues and her supervisor (see penultimate line on page 243) "who after 5 Sundays put in my hands returns and other colleagues stay in team and making chatting time". The only complaint about the supervisor in this email appears to be that on up to 5 Sundays she put returns in the claimant's hands when other colleagues stood around chatting.

36. Returns means returning unsold items to the appropriate department for restocking shelves. This can mean returning a small homeware item to a

shelf in that department which is relatively nearby the pay point where the claimant worked. However it can mean returning items to other departments on the lower ground floor or to racks by the lifts. It is the latter which we understand to mean the retail assistant is out on the shop floor so, as will be seen, there was the possibility to distinguish between "light returns" of small items to the nearby Homeware shelves and returns more generally. Other colleagues will then transport the racks by the lifts to departments on other floors.

37. The claimant initiated a grievance on 4 August 2021 (page 319 and C para:48). In that email her complaint is that the supervisor put her down to do more duties that she could do after working a hard day on the tills. She said she has informed every manager and supervisor about her health conditions which should be considered disabilities and that the supervisor put her to make returns for all departments on the lower ground floor when other colleagues were chatting. We deal with the handling of the grievance below but note that the complaints about the supervisor had twice been limited to a complaint about allocation of work.

38. It is in the grievance hearing conducted by Ms Lane on 9 August 2021 that the claimant alleges the supervisor was screaming at her to do the returns for the Department (page 328); that she shouted (last line on page 329). This is the point where the complaint goes from the claimant been asked to do more than she can and remain safe to that instruction being given in an unacceptable way.

39. We remind ourselves of evidence given by Ms Kemp about what she had previously told the supervisors about the claimant's condition. She passed on her understanding which was that the claimant could do some light work around the tills. We note also that there is an element of the grievance where the claimant compares her own hard work with others who she says sat around and didn't work as hard; she raises a grievance when the supervisor asked her to keep working in the last 30 minutes of her shift and do something other than tasks that she thought she ought to be limited to for the sake of her health. She states she was told "I needed to get off the chair and coming to do returns on the floor".

40. It seems to us that there was genuine uncertainty on the part of the managers and supervisors about what the claimant could do without further injuring herself after the store closed and no customers were coming through the tills; uncertainty about what the supervisor could reasonably ask her to do. The claimant's position was that she knows her own back and, in essence, that she should be trusted since from her perspective she worked hard.

41. If the medically supported position had been that the claimant was the best judge on any given day about whether she was or was not able to do a particular task then that needed to be documented and communicated. There was no such medical evidence. In her first complaint at page 231 the claimant said she had cleaned everything around the till when she finished her till point and "I was doing a few returns". This corroborates Ms

Kemp's then understanding that the claimant could do some light returns work. Another way of looking at it would be to say there was no reason why the managers and supervisors ought reasonably to have known the claimant could not do a few light returns as at 6 June 2021 when this incident happened.

42. We think it unlikely that the supervisor shouted because that was not a detail the claimant mentioned when she first complained. A complaint about being asked to do something which is medically inadvisable is quite different to a complaint about unreasonable or bullying conduct. She did not ask for a witness to be interviewed at that time and could have done. She did not ask for CCTV footage to be viewed until September 2021 (page 428) and then in October 2021 (page 1508).

43. When the supervisor was interviewed, she was not asked whether she had shouted. It did not come across clearly to Ms Lane that the supervisor's manner rather than the substance of what she said was part of the complaint. This interview did not take place until 17 September 2021. Aisha was then being asked about something which was said to have taken place on 6 June, three months previously. So the interview with the supervisor is not strong evidence about whether she shouted or not because that was something she simply wasn't asked. As we say, a possible reason for Ms Lane not asking that is that it hadn't been mentioned before the meeting with the claimant and wasn't in the letter (page 325) which, in effect, set out the terms of reference for the grievance. There were many other strands to the complaint and shouting, quite reasonably, was not something that Ms Lane focused upon.

44. The claimant needs to satisfy us that the supervisor screamed at her and, on balance, we reject that allegation. It is an embellishment. We do not consider the claimant to be reliable on this point. We think the supervisor probably did ask the claimant to do some work related activities other than work on the till. In her interview (page 437) the supervisor said that she knew about the health condition because the claimant had told her but that no one had explained what the claimant could or could not do. When you read through the minutes of that interview you get a sense of her frustration: in particular as the claimant was not occupied from the store's closure at 5.00 PM and the end of her shift at 5.30 PM. The supervisor said that since the claimant had mentioned her health conditions she had not asked her to do anything in that time "I'm not exactly clear on what she can and cannot do".

45. The allegation that the supervisor was screaming or shouting was investigated at the appeal stage by Mr Sedgeman, who spoke to 2 other colleagues who did not recall such behaviour (page 491 and 494).

46. The claimant's period of sickness absence is recorded on page 1187. It appears that she was absent on 12 and 13 June which are recorded in the spreadsheet as "not forming a period of incapacity for work (PIW) and AWE above LEL-unpaid". The dates 26 and 27 June and 3 July 2021 have

"new PIW-waiting days-unpaid" written against them and then 4, 10, 11, and 17 July 2021 have "SSP and CSP paid".

47. The claimant's very firm evidence was that she was told by her colleagues that, contrary to the express wording of the handbook, if she completed a self-certification form she would be paid from the first day of sickness absence. She must be mistaken about that. They are said to be comparators for her part-time workers less favourable treatment complaint – although she accepted that all bar one, Gina, worked part-time themselves. The only evidence before us that her comparators were paid for the first three days of sickness absence is the claimant's own assertion based upon an email she says she was sent. She has certainly not taken us to a clear statement (whether in an email or otherwise) by one of her comparators that completing the self-certification form entitled her to be paid from day one of her sickness absence.

48. It seems to us that the claimant is mistaken about the purpose of the self-certification form. It is a communication by the employee to the employer of the reason for the absence so that the absence can be authorised. That is separate from whether the authorised absence should be with or without pay: an employee will be entitled under the contract to be absent without that being misconduct in some circumstances and separately may be entitled to be absent with pay.

49. There is a manuscript note at page 279 which the claimant alleges to be a transcript of conversation with Ms Oliver-Turnham about this topic on 1 July 2021. Taking that at face value, it is clear that the claimant simply will not accept what she has been told by Ms Oliver-Turnham, namely, that if she earns below the lower earnings limit she does not qualify for SSP. That is exactly what the terms from the handbook referred to at para.20 above do mean.

50. She repeatedly insists there is nothing in the handbook to that effect. She also appears to refuse to accept what she is told about waiting days when this is a result of the statutory SSP scheme. Although the respondent does not necessarily accept the accuracy of this so-called transcript, it seems to us that, if this conversation took place as alleged, what Ms Oliver-Turnham is trying to explain to the claimant was accurate.

51. The claimant appears to believe that if you send the self-certification form to the employer you automatically get paid. Whatever she has been given to believe by colleagues, that is not what a self-certification form usually means. It is paperwork which an employer requires instead of a MED3 because a MED3 is not needed for the first seven calendar days of sickness absence. Although the self-certification form states that you will not be paid without a form that does not mean you will be paid for what are otherwise waiting days with it. Furthermore, the policy requires the self-certification form to be filled in if the employee is "sick for seven calendar days or less". An employee such as the claimant might be sick for seven *calendar* days but only absent for two *working* days. An employee who

works five days a week would be absent for those five days if they were sick for seven calendar days. The first three of the five days would be waiting days but they would need to complete a self-certification form to be paid for the final two days of their absence. It would only be if their sickness absence went into the second calendar week that they would need a medical certificate.

52. It seems to us that the claimant is probably drawing inferences from information provided to her by someone in a completely different situation to her own. Without knowing who that was and what their situation was in detail (in terms of average weekly earnings and days of work) it would be unsafe to rely upon the hearsay evidence relied on by the claimant. The claimant does appear genuinely to believe that the alleged comparators were paid but we are satisfied that that is because she has made a link between providing the reason for absence to satisfying the requirements for payment for that absence but the one does not follow from the other. It is the case that a different policy applies to colleagues whose contracts predate 2012 and, because of specific statutory provisions, in some cases of Covid related absence (see EL para 11). However those are specific cases that are not materially the same as the claimant's and also not relevant for her part-time workers claim.

53. Within the grievance the claimant was asserting that she had disabilities and, although she does not specifically refer to the EQA, the words "can be considered disabilities" (page 319) ought reasonably to be understood to be an assertion that she is protected as a disabled person. She complains of harassment by her colleagues "regarding my health condition". She asks all of the problems to be added to the grievance invite and it is this communication that is referred to in LOI 6.1.1. As we say, the grievance invite at page 325 sets the scope of the grievance.

54. The grievance was investigated by Ms Lane who conducted a telephone hearing with the claimant on 9 August 2021 (page 327). When asked what resolution she wants, the claimant suggests that the supervisor be spoken to by the manager about how serious her medical conditions are and what she is capable of.

55. Unsurprisingly, given the impact on her health the claimant described the event having and the allegation that she was harassed about her health condition, Ms Lane asked the claimant about that condition(s). We see from page 337 that Ms Lane explored this situation with the claimant going back to when she started to have problems with her back. She asked the claimant what happened when she explained to her manager that she had health conditions and was having to go to Accident & Emergency with pain after work. The claimant told Ms Lane that she had a doctor's note regarding an inability to go on the shop floor and that she would need to be on tills. It is at that point that Ms Lane asks her whether she has had a capability meeting (page 338).

56. Ms Lane explains her reasoning in her paragraph 10 as being that a capability meeting would have been helpful for the respondent to understand how they could support Mrs Brinzica and consider whether there were any reasonable adjustments that could have been made. The claimant's firm belief is that the capability meeting was made to finish the contract with her which we understood to mean that she thought the respondent wanted to use it as a way of ending her employment.

57. Ms Lane continued her investigation and interviewed a Saturday supervisor who has had a discussion with the claimant regarding sick pay (page 345) and Ms Oliver-Turnham (page 389). She also had further correspondence with the claimant including an email on 30 August 2021 where Mrs Brinzica informed Ms Lane (page 363) that she had been diagnosed by a doctor in Romania with the blood illness Tromobophilia for which she had been prescribed anticoagulants.

58. On 3 September 2021 Ms Lane responded to say she was progressing with the grievance but added

> "as you are due back to work this weekend, I would like to let you know that you will be receiving a letter inviting you to a capability meeting. I feel that this would be a good step forward to ensure that your medical conditions are documented and that we have a full understanding of what you are able to achieve. This will also ensure that the relevant people are aware which will help you in the work environment."

She invited the claimant to ask her any questions.

59. The following day the claimant was sent a letter (page 360) inviting her to a capability meeting with Natalie Kemp. It states that the purpose of the meeting is to discuss some or all of the following areas

a. whether there are any temporary adjustments the respondent could make to her job, duties, hours of work et cetera to support her return to work on a phased basis;

b. whether there are permanent adjustments the respondent could make to her job duties, hours of work to allow her to return to work;

c. whether a return to the current role is not possible due to her medical condition and if so if there are any redeployment options; and

d. whether there should be an occupational health referral.

60. The claimant had the right to be accompanied and the second page of the letter contains this warning,

> "I should make you aware that in cases of prolonged or persistent absence due to ill-health or injury, your capability to continue working may be

> considered and unless the Company are satisfied that you are in a position to resume regular and reliable employment in the near future, we may have to make a decision on your continued employment with Company."

61. When she received it, the claimant raised the reasonable question why she had not received an invitation to that kind of meeting before. She wanted to understand if it was standard procedure and how this proposal was a resolution for her grievance (page 362).

62. Ms Lane explains that they letter sent to Ms Brinzica is a standard form written by adapting a template. Page 1562 is a materially identical letter sent to another colleague at Reading on 17 August 2021. It is clear from page 369 that Ms Lane had been taking advice from Mr Hooper. He produces the template letter itself and explains that the paragraph quoted in paragraph 60 is always included because it is important that employees are aware of the potential escalation under the capability procedure.

63. The additional information provided by the claimant in her email of 30 August 2021 seems to us to raise new potential medical issues that had not existed at the time of the previous sickness absence. The immediate response by Ms Lane states that the respondent wants to understand the medical conditions and what the claimant is able to achieve. We consider that, arguably, the claimant's health was under-managed in 2019/20 although, if there was a simple request by a GP for the claimant to work on tills and that was easy to accommodate, then perhaps there was no need for a more detailed investigation.

64. There were a number of triggers in August/September 2021 that would have caused the reasonable manager in the position of Ms Lane to decide that more information was needed which were absent in February 2020. Not only was there this additional health condition but she had a supervisor who did not sound confident that she knew enough about the claimant's health condition and a situation of tension and possible conflict concerning what the claimant could do during the last 30 minutes of her shift. On the other hand the claimant's description of her state of health at the end of a working day appears rightly to have been a matter of concern.

65. We can understand why the claimant was unnerved by the inclusion of that paragraph. There is no mistaking it was a formal meeting but we accept that this respondent has more than one purpose of its capability process. In para.64 of its amended grounds of response the respondent relies on the following aims,

    a. ensuring the health and safety of its staff;
    b. operating reasonable and consistent capability procedure; and
    c. ensuring that all staff are aware of the potential ramifications and escalation under the capability procedure.

66. When an employee has a health condition that means they cannot carry out the full range of duties of their role there are competing interests: the

employee may wish to continue with their job because of the financial and emotional benefits their career brings; they will no doubt wish not to be required to carry out tasks that will aggravate the impact on them of their health condition; a good employer will want to support their employee but will also have to balance the needs of one employee against consistent support of many employees while running a business.

67. We accept that the invitation for a capability meeting at this stage was done by this respondent for aims which included finding out information about the claimant's needs and abilities. We accept it was a standard letter and it did not come out of the blue because Ms Lane explained to the claimant that it would come in her email and had discussed such a meeting in their telephone grievance hearing.

68. The capability policy itself is at page 144 and capability review meetings are covered at page 145. The matters listed on that page to be covered in a capability review meeting are consistent with those listed in the invitation letter and the section starts "managers should hold regular capability review meetings with you during your period of long term absence". We also note the reference in the right-hand column of that page to the possibility that once a fitness for work certificate has been issued by a GP manager may ask the employee to attend capability review meeting to discuss that and participate in an OH referral. This was consistent with oral evidence which was that it was not usual to make an OH referral without a capability meeting. Consideration to end the contract is covered on page 146 and, according to the policy, arises if the employee is unable to return to work to their normal role and cannot be permanently redeployed.

69. The words of the formal policy support the impression we have from the respondent managers that, at this employer, capability review meetings are probably held far more often than meetings with that title are held in some other organisations.

Majority and minority findings about the invitation to the capability hearing

70. The tribunal makes the following findings about what was in Ms Lane's mind when deciding to recommend a capability meeting; about the state of affairs known to her because it was she that raised the question of capability although Mr Hooper advised on it and the letter in fact went out in the name of Ms Kemp.

71. Mr Appleton, the employee panel non-legal member, is of the view that Ms Lane clearly wanted the claimant to be seen by occupational health and this respondent made those referrals following a capability meeting which in turn meant using the standard letter. His view is that the respondent needed to know what the claimant could or could not do in an authoritative way which is consistent with later questions about how many kilograms the claimant could lift. His view is that Ms Lane thought there needed to be

someone who could definitively say what they could ask the claimant to do.

72. While not disagreeing with Mr Appleton's view of the evidence as set out above, Ms Brown (the employer panel nonlegal member) and Employment Judge George additionally accept Ms Lane's evidence (para 17) that this respondent holds capability meeting to ensure that they can support employees in store. They accept that the capability meeting was used as a way of unlocking support for the employee, specifically for the claimant in the present case. There are cases where the evidence suggests that a capability process has been started because the employer havs in mind that the process may lead in due course to the end of employment. Ms Brown and Employment Judge George were satisfied that this was not such a case and were generally impressed with the supportive attitude of the respondent's managers. They are of the view that it is inadvisable and therefore not open to managers to alter or adapt the standard template letter set by HR because of possible future confusion. On balance, while possibly clumsily worded, it would be remiss of the respondent not to make any reference to possible future action.

73. Ms Brown and Judge George accept that including the paragraph fitted in with the three aims set out in paragraph 64 of the grounds of response although it certainly had unfortunate consequences. They note that the 3 September email warning the claimant in an informal way to expect a capability letter did state what the genuine purpose was in sending it. The claimant seems genuinely to believe that that paragraph is a threat. She has looked at it out of context when the context was a lot of other attempts to explain to her why they were acting as they did in her case. The recommendations from the grievance include at page 456 that a formal capability meeting be held for the reasons stated there. Her perception that the paragraph was intended as a threat have coloured her view about the respondent's actions. The majority view is that although the respondent could have removed that paragraph and only introduce it if a point in the formal process was reached when dismissal was a realistic prospect, many employers are criticised for not being transparent. The claimant has focused on that one letter to the exclusion of a lot of other evidence that the respondent was not in fact setting out to end her contract.

74. Mr Appleton is of the view that inclusion of the paragraph is inconsistent with the purpose of the process only being to support. The purpose in his view is also to start a formal process and the claimant has clearly seen that paragraph as a threat to her continued employment.

Further unanimous findings of fact

75. The Tribunal all find that none of Mr Hooper, Ms Lane or Ms Kemp had dismissal or the end of the claimant's employment in their minds at all when that letter was sent. It did not occur to them that inclusion of the standard paragraph might be contradictory to their purposes in calling the

capability meeting. Although, as will be seen, there is a reference on the occupational health form to performance deterioration, that was not to say that the claimant was doing anything other than working well at what she did. She was not carrying out the whole of her role but the respondent has not suggested that there was a problem with how she was carrying out those parts of the role that she was fit to do. The respondent had to solve the problem of what tasks the claimant could do in the last 30 minutes of the Sunday shift when the tills were closed.

76. The tribunal unanimously find that the claimant interpreted that paragraph as meaning that her contract may be finished in the near future that if she signed the notes from the capability meeting she would facilitate a step towards that end. Even taking the letter at face value there is wording which makes clear that such a decision is, even on the worst case, a long way down the line. Where it says “we may have to make a decision” that implies a decision taken very much sometime in the future dependent upon what happens in the meantime. Unfortunately the claimant concluded that this paragraph meant that the managers were managing her out of the business. This was not a reasonable conclusion to reach.

77. The answer to her question about why a process was not put in place two years previously is that they had put informal measures in place which were working satisfactorily for a while but then were no longer working. Ms Lane refers this in her grievance outcome at page 455 where she confirmed that she had added this question to the grievance. She states that the belief was the informal approach could resolve these issues and so there was no requirement for a further meeting. This passage at the bottom paragraph on page 455 explains why there was a change in position and we accept that explanation.

78. The need for a more in-depth investigation is underlined by the information provided by the claimant through the capability meeting which took place on 11 September 2021 and was conducted by Natalie Kemp. The notes of the meeting are at page 377. The outcome of the capability meeting (page 444) sets out the full information about the claimant’s health conditions as explained by the claimant at the start of the meeting (page 379). If one compares that with the description of back pain in the return to work meeting in February 2020 it is immediately apparent why more formal approach was needed.

79. Ms Kemp asked the claimant if she had any recommendations from her doctor and she said that she did but they were not in writing: they had been not to lift, not to bend and, if she stayed on the chair she needed to stand for five minutes. The claimant suggested she might need to split her break so that she could move her legs.

80. When asked how her health conditions affecting her work the claimant said that she was advised that she needed to stand every 10 customers. She said she had pain all the time on her back and could not move fast which meant, for example, she needed longer to go to the toilet. She said

she was not able to be on her legs and felt very dizzy if she had to do so. When asked what things they could offer to make a more comfortable at work she said “understand me (to know my condition) not give me more jobs on the floor that I can’t do”. She also suggested it would be better to have two half-hour break than one 1-hour break and perhaps an extra 15 minute break. She was asked what she did after the tills were closed on Sunday and said cleaning behind the till.

81. The outcome of the capability hearing included that the break time of 1-hour was split into two half-hour slots. Ms Kemp recorded that the claimant found clearing up duties on a Sunday caused her pain but that there were no sedentary duties available in-store at that time. A reduction in hours had been discussed and rejected by the claimant on financial grounds. No adjustments had been thought of by either side in the meeting to overcome the problem that the claimant was being paid for the last 30 minutes of her shift but unable to be allocated tasks to fill that time.

82. The claimant sent an email of complaint to customer service on 13 September 2021 (page 405) and the following day wrote to Mr Hooper seeking to add some matters to her grievance (page 409).

83. The grievance outcome is at page 454 and dated 1 October 2021. The claimant appealed and it is also at about this point that she started to ask for the CCTV footage.

84. By the time of the complaint on 4 August it was nearly 2 months after the incident. The claimant’s evidence is that she was told by Ms Lane that CCTV images were kept for four months (page 466).

85. The claimant said that she had been asking from the beginning that she wanted to explain her managers’ behaviour and, in effect, that Ms Lane or Mr Hooper should have known immediately to seek the CCTV footage. However, different kinds of evidence are relevant depending on the nature of the allegation. Until the point where there was an allegation of unreasonable conduct there was no reason to think that CCTV footage that has no audio would provide any evidence that would assist Ms Lane in coming to a conclusion about what happened. Even with an allegation of screaming there is a weak prospect that CCTV with no audio would provide reliable evidence.

86. Although Ms Lane appears to have told the claimant that CCTV footage was available for four months (page 466) this is inconsistent with the evidence of Mr Sedgman and we find that she was mistaken about that. The claimant did not request CCTV images until September (from Mr Hooper). By the time she mentioned it in October to Ms Lane, nearly four months had passed.

87. We are satisfied that as a matter of fact the system will record over itself once it reaches a maximum amount of data usually after 28 days although that depends upon how much data is recorded. Mr Sedgeman told the

claimant it would be available for 28 days but possibly up to 6 weeks. We are quite satisfied that the respondent has not been attempting to hide the CCTV footage or are unwilling to give the claimant the footage. The simple fact is the claimant did not ask for it until it was no longer available. At first her complaint about the supervisor was not of a nature that would cause anyone to think CCTV footage would shed light on her grievance. Indeed probably the CCTV footage was not available at the time of her first complaint.

88. The claimant's appeal against a grievance is dated 20 October 2021 (page 475). It is very clear from the wording of her complaint about the capability invite (see top page 477) that she was comparing her situation (receiving a capability meeting invite letter which referred to "finishing her contract") with that of colleagues with health conditions other than hers whom she alleges did not receive that wording. As a matter of fact, we have seen the same wording in a letter to a colleague. Nevertheless, it is clear that she is alleging direct disability discrimination by this appeal. She also repeats a complaint about non-payment of the sick pay she claims to be entitled to.

89. Mr Sedgeman, as store manager, was allocated the grievance appeal hearing and he conducted a hearing on 2 November 2021 (page 1503). They appear to have had a discussion about CCTV footage and Mr Sedgeman said that the footage would not go back far enough. He asked the claimant if there were any witnesses she wished him to speak to and she said the only one was the supervisor herself. However Mr Sedgeman also spoke to a senior department manager to whom the claimant said she had spoken following the alleged incident and she was not able to recall any altercations or that the claimant had spoken to her about one. He spoke to another department manager to similar effect (MS paragraph 14).

90. By this point the claimant was alleging that her supervisor had treated her less favourably on grounds of race. She explained to Mr Sedgeman that she had not signed the capability meeting notes because she had not received an explanation about how the capability process supported her. The grievance appeal outcome is dated 1 November 2021. An occupational health referral was made on 8 December 2021 because the claimant had apparently agreed to that in the appeal hearing.

91. The referral form was not sent in advance to the claimant. We see at page 508 that, among the reasons given for the referral, Ms Oliver-Turnham, the referring officer, has been ticked the box "Performance deterioration". Among other things the referral asks the following:

    a. what are the duties apart from till work the claimant is able to complete within her shift;

    b. what weights can she lift without causing herself harm;

c. are there adjustments that can be made to support the claimant with the need to drink a lot of water and consequently visit the toilet; and

d. is the claimant able to put away hangers and customer returns while carrying out her till work or to replenish the store after trading has finished on Sunday?

92. Ms Oliver-Turnham explains in her paragraph 31 and 32 why she ticked the boxes she did. The claimant is particular concerned (as she states in para.68 on page 33 of her statement) that no one had been questioning her performance. She also thought that details of an accident at work and details of any claim in relation to absence should have been completed because her position is that her back condition was caused by lifting boxes at work.

93. Ms Oliver-Turnham explains that she ticked "performance deterioration" and "capability to continuing role" because the full range of tasks for a retail assistant (as set out in EOT para.32) were not carried out by the claimant as the respondent had agreed to limit her work to till work only. This was true as a matter of fact. The respondent did not say and did not mean to say that she was performing the duties she undertook poorly; they did not question her productivity on the tills. She was not performing all of the duties of a retail assistant and to that extent it is not inaccurate to say there had been performance deterioration: from full duties of a retail assistant to limited duties of a retail assistant. This explanation was repeated in cross-examination and we accept it. Furthermore, as Mr Sedgeman says (MS para 26) it would also cover the fact that she did not have tasks to do in the last 30 minutes shift so her performance in that 30 minute period was adversely affected.

94. As to the claimant's complaints that the referral does not refer to ill health caused by work, there was no work related accident specifically; her view that her back injury was caused by repetitive actions of lifting boxes at work has not been investigated. Whether that is factually or medically true is not for us to decide but we would not expect the respondent's managers, in absence of a specific incident, necessarily to tick a box to accept responsibility.

95. On this point we consider the allegation against Mr Rouse in the second grievance that he stated that she had hurt herself (see the grievance notes page 752 @757). The English phrase used by Mr Rouse "you then hurt yourself by lifting heavy boxes by yourself" was probably understood by the claimant to mean Mr Rouse said she was responsible for her injury. However we think that he probably meant the phrase in a more neutral way for example saying "you were hurt" without attributing responsibility for how that happened.

96. We do not consider it to be inaccurate to say "health issues related to conduct/disciplinary issues/grievance" were a reason for referral since that

box was ticked. Knowledge of the health issues arose out of the grievance and were "related" to it in that way, so that was an accurate box to tick. We do not think it inaccurate to have ticked "continuing sickness absence" despite the claimant then being in attendance at work because she had intermittent sickness absence. We think the referral form should be looked at as a whole and the narrative was fair.

97. The claimant reads into this referral a challenge to her productivity on the tills. It was what she saw as a need to defend this that led to the application for specific disclosure. She said she had been told by Mr Sedgeman that there was a till target of 170 items per hour for every colleague her understanding was that good performance led to managers getting a bonus.

98. The claimant put to Ms Oliver-Turnham in cross examination that it was very clear that her tills targets were met and were producing financial bonuses as a result the managers every three months made someone a star of the quarter and they receive a reward. Ms Oliver-Turnham explained that the employee of the quarter scheme; as a store they receive £250 as an incentive which they can divide up as they wish. They have a voting system where you could vote on a colleague who thought done really well or been extremely helpful and those chose would receive a £25 store voucher. She stated, and we accept, that it was simply voted on and was not assessed on the basis of targets.

99. Mr Sedgeman has given evidence about that also, saying that no retail colleagues were paid bonuses. Furthermore, he stated and we accept that the target of 170 items per hour was a guide to enable managers to understand how many colleagues needed to be on tills at any one time. It was not to monitor employees. There was certainly no evidence of the throughput being relevant to the voting system and no bonus scheme was dependent on throughput on tills.

100. There was a specific complaint that the referral had been sent to the OH doctor before the claimant saw it and the first she knew about it having been made was when the doctor contacted her. Perhaps the procedure could have been better explained, but had the claimant attended the appointment she would have had an opportunity to correct any inaccuracies in the referral and make sure that her point of view was taken into consideration by the OH physician when making their report. She could have a copy of the referral on request. We do not think that this realistically disadvantaged the claimant in any way.

101. An OH physician's expertise is not just due to medical expertise; they know the respondent business especially when, like this OH provider, they are retained. They are able to put together the explanation by the individual employee of their abilities with knowledge of the specific job role when making recommendations. Knowledge of the job description enables them to give a more informed opinion about the interaction between the health condition and the workplace environment.

102. By the time of the grievance appeal outcome the claimant had presented a claim form. As we say, adjustments had been agreed in a capability outcome and, although an occupational health referral had been made following the grievance appeal outcome, the claimant did not consent to attend the appointment. It appears from the sickness records at page 991 and following that the claimant started a period of sickness absence on 2 October 2021 which continued essentially unbroken until at least May 2022. As we understand it 17 September 2022 was the day on which she returned to work after this sickness absence (C para.81).

103. The claimant complains about events on that day and about payment during her subsequent absence. These were among the matters that she was permitted to add to the claim by amendment. The claimant does refer to events in the intervening months in her witness statement, including to an unsuccessful application to change her working hours. These are by way of background to the return to work on 17 September 2022. This happened following a return to work meeting with Natalie Kemp.

104. On 17 September 2022 her supervisor was Shane and the claimant's allegation is that she attended for work and, in an aggressive manner, he directed her to perform duties "for which I signed that I will not do and cannot do because I have back pain" (see C paragraph 82.a). When she tried to explain that she could not do those tasks her account is that he got angry, that she started to have heart palpitations and went to report the matter to Mr Sedgman.

105. The store manager directed her to work on a different floor to avoid contact with Shane and she explained "I am not feeling well and I will call the ambulance as I have palpitations in my heart, head pain, needles in all my body, short breath, blurry vision, feel vomiting, added to my spine pain, numbness in my hands and I start to cry". She waited for the ambulance in the canteen and was apparently told by the paramedics to avoid stressful situations, to go home and rest and if the pain continued to go to Accident & Emergency. She did so the following day and describes there being further investigations such as CT scan and blood tests. She states that her head pain continues but that she is managing it with acupuncture.

106. Some of the symptoms and impact the claimant describes appear to be connected with conditions other than sciatica/back pain. For example, she informed the respondent about other conditions which were being investigated and the fit note following an assessment on 22 September 22 states that she is not fit for work because of anxiety disorder. The claimant has been absent on long-term sick leave since 17 September 2022.

107. Shane has not been called to give evidence but was interviewed as part of the claimant's subsequent grievance investigation and his account is at page 770. His version of events is that, on that Saturday, the claimant's shift had started at 8:45 AM although she used to start 9 AM due to health problems. She had arrived about 20 minutes early before 9 AM and he had asked her to do "the light stuff returns from the tills" those which were closed

tills and therefore easier for her. According to Shane, she initially agreed and then when he returned she told him he had given too much to do. He said his reply had been "that I only told her to do little stuff from behind the tills. I wasn't expecting her to finish all returns but only after to support with any light weighted returns".

108. In her email of complaint of 20 September 2022 (page 612) the claimant's account of what she had done focuses on Shane being "very rude" but also clear that she had carried some small, light items that morning. She refers to returning a pillow of about 500 g and picking up a candle of about the same weight with the intention to buy it later. We find that the pillow would have been returned to the homeware section which is yards from the tills. In our view, the essential difference between their respective accounts is that she accuses him of being rude and Shane's account is that she accused him of demanding too much of her.

109. We do not doubt that the claimant's back condition is very painful and means that she needs to take care not to aggravate her symptoms. However, she appears to think that the fact of her back condition means that the respondent is not entitled to make reasonable enquiries about her capabilities. We suspect that when people take a position which is contrary to her own, she interprets that as rude and are reminded of her accusation to Mr Randle that he was harassing her in cross-examination when objectively, in a gently spoken way, he persisted in seeking an answer to his questions. Since she had clearly been willing to return at least one item it was not unreasonable for Shane to think that she was able to do more returns of a similar nature.

110. Shane advised the claimant to speak to Mr Hooper and Ms Oliver-Turnham about returning to a 9 AM start. The claimant's position is that "after this it is very clear that the workplace cannot be safe for me".

111. Our view is that her anxiety about that and the obvious uncertainty on the part of the supervisors about what she can do without further injuring her back other than work on the tills, given that she does in fact lift some items, is exactly why she needs to be referred to occupational health so that an expert can assess the impact of a variety of health conditions on her ability to carry out her role and the risk, if any, that that workplace will exacerbate the impact of her health conditions. It seems to us that both the claimant and the respondent would benefit from medical evidence about what she can and can't be asked to do. It is not unreasonable, in the absence of medical advice, that the respondent should be feeling their way about what her duties can be if she is working at times when the store is closed.

112. When he received the complaint, Mr Sedgeman took the view that it was about him as well so he did not investigate personally. He did not look for any CCTV footage. However the claimant accepted she had not asked for any. The reason she now says it would have been useful is that she claims that Shane flung his arms.

113. We bear in mind our view of the claimant that she regards as confrontation some matters which objectively are simply things she disagrees with. For example, she seems to have taken exception to Shane suggesting that if there were no activities for her to carry out between 8:45 AM and 9 AM then perhaps she should revert to a 9 AM start and regarded that as confrontational and aggressive. She has not persuaded us that Shane did behave aggressively and on the balance of probabilities we think it is more likely that there was nothing exceptional in his tone or in his approach as supervisor.

114. The claimant was treated as absent through sickness on 17 September 2022 because she became unfit to work so soon into her shift (less than 15 minutes). Further issues about the payment of sick pay were raised. On page 636 there is an email to Ms Oliver-Turnham explaining that, at this period, if the employee's average weekly earnings were over £123 they would receive SSP from the fourth day. The email also refers to employees with continuous service from prior to April 2012 having different terms and the different position for those self-isolating due to Covid.

115. It appears from page 1185 to 1186 that this was treated as a new period of sickness absence and that at this time payroll considered the claimant's average weekly earnings to be below the lower earnings limit. This was the explanation provided claimant for not being paid sick pay by Mr Sedgman on 21 October 2022 (page 1395). We accept as a matter of fact (as did the claimant) that here earnings in the reference period were lower than the LEL. This was a new period of sickness absence.

116. The second grievance was investigated by Mr Rouse who interviewed the claimant on 5 November 2022 (page 752). The grievance outcome was provided on 14 November 2022 *(*page 849) and Mr Rouse did not uphold any aspect of it. The claimant appealed against the refusal of her grievance and the appeal hearing was held on 1 December 2022 by Mr Fiander-Turner. There are no allegations about the conduct of the grievance or grievance appeal or complaints about the outcomes within the scope of the present litigation.

117. In the grievance appeal meeting, it is apparent that Mr Fiander-Turner heard the claimant's complaints that she had not received sick pay despite, as she saw it, having completed the self-certification form that should entitle her to pay. She describes receiving a self-certification form from a Romanian colleague who said that if she completed that she would be paid. As we explain above we are satisfied that the sick pay policy was correctly applied in the claimant's case. It appears from page 890 that the Romanian colleague worked 20 hours. That is the distinction between her case and the claimant's not that the colleague worked weekdays and the claimant at weekends. It was not that the colleague was full time because she patently was not. It was that the claimant's average weekly earnings were not over the lower earnings limit. No doubt this financial difficulty was stressful for the claimant but in those circumstances she was not entitled to SSP. In any event, these were waiting days. She therefore was not entitled to CSP.

118. Mr Turner rejected the grievance appeal and the outcome letter is at page 900.

Law applicable to the issues in dispute

119. We have been reminded by Mr Randle in his closing submissions about the observations of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) where the learned judge had some valuable observations about testimony based upon memory (paras 15 – 21). He drew on psychological research to set out some principles which challenge presumptions about how reliable oral testimony is about an event. In particular, he referred to what he described as the

> "faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. … External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else .."

120. Leggatt J also pointed out that the process of civil litigation itself subjects memories to powerful biases because witnesses often have a stake in a particular version of events,

> "This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces."

121. Finally, he explains how the process of the process of preparing court documentation can establish in the mind of the witness matters recorded in the statements or documents and the "memory" is increasingly based upon later interpretations of the events rather than on the original experience.

Direct discrimination

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

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

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

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

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

127. That said, if the Tribunal considers that there is evidence that could realistically suggest that there was discrimination or victimisation it would risk failing to give the claimant the benefit of the burden of proof provision, which is designed to address the difficulties of proving discrimination, were that evidence merely to be added into the balance and weighed against other evidence in the case on the balance of probabilities. If the Tribunal does in that situation move to the second stage of the s.136 analysis, it should do so on the basis that it has presumed that the burden of disproving

discrimination has passed to the respondent. Where the respondent bears that burden it can only be discharged with cogent evidence.

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

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

Discrimination arising from disability

130. Section 15 EQA provides as follows:

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

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

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

> dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> *EHRC Employment Code paragraph 5.6.*

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

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

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

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

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

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

133. The other potential defence is lack of knowledge of disability. This requires the respondents first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA)

    Harassment

134. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(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.
> (2) …
> (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."

135. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT (a race related harassment claim) at paragraph 22, Underhill P (as he then was) said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

136. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

137. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the

> objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

138. In Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31, the EAT considered the meaning of "related to" within s.26 EQA and contrasted it to the test of "because of" within s.13 EQA,

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. … "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

139. It should be noted, however, that by reason of the definition of detriment within s.212 EQA, conduct cannot both be direct discrimination and harassment.

Victimisation

140. Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. A protected act is defined in s.27(2), subject to s.27(3),

> "(2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

141. There is no suggestion in the present case that the allegations were made in bad faith.

142. If we are satisfied that the claimant's first grievance was a protected act, the next question for us to decide is whether the acts complained of or any of them were done because the claimant did that protected act. That will require us to consider first, whether the claimant suffered a detriment or detriments as she alleges (which requires us both to consider whether the core facts alleged are made out and whether they amounted to a detriment in law) and secondly, what, subjectively, was the reason that the respondents acted as they did. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases.

Less favourable treatment on grounds of Part-time worker status

143. By reg.5 of the Part-time workers (Prevention of Less Favourable Treatment) Regulations 2000 (hereafter PTWR) a part-time worker has the right not to be treated less favourably by their employer than the employer treats a comparable full-time worker as regards the terms of his contract or by being subject to any other detriment by any act, or deliberate failure to act, of his employer. Not only must there be a comparable full-time worker, but they must be an actual, as opposed to hypothetical, full-time worker. In certain circumstances the worker who was a full-time worker but has changed to become a part-time worker may use themselves as a comparator but, unlike discrimination under the EQA, there must be an actual comparator. Another difference is that where it is found that there is less favourable treatment on grounds of part-time worker status, there is a defence of justification open to the respondent.

Unauthorised deduction from wages

144. The right not to suffer unauthorised deductions from wages is found in s.13 Employment Rights Act 1996 (hereafter the ERA) which provides that an employer shall not make a deduction from wages of a worker unless it is required or authorised to be made by statute or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

145. Section 13(3) defines a deduction as being where the total amount of wages paid on a particular occasion are less than the total amount of those which are properly payable. The amount of any deficiency is a deduction. We are therefore required to consider what wages would be payable from time to time under the contract of employment.

146. By reason of the Deduction from Wages (Limitation) Regulations 2014, the tribunal may not consider so much of the claim as relates to a deduction where the date of payment of wages was more than two years before presentation of the claim: s.23(4A) ERA. Although this was not raised in argument, this potentially affects the first part of the present claim which relates to an alleged deduction from wages payable in August 2019 when the claim was presented on 6 November 2021. For reasons which will become clear from our conclusions, this was a moot point and we do not consider it necessary to revert to the parties about it.

147. Furthermore, the tribunal shall not consider a complaint under s.23 ERA of a breach of s.13 unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Where a complaint is brought in respect of a series of deductions time starts to run from the last deduction or payment in the series: s.23(3) ERA. If a deduction has been repaid, that does not affect whether or when the deduction was made.

148. Whether there is a series of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. As Langstaff J said in Bear Scotland Ltd v Fulton [2015] ICR 221 EAT (paras 79 – 80) series involves,

> "two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual and a sufficient temporal, link"

149. Langstaff J went on to say that he considered that, in context of a three month limitation period, parliament did not intend that jurisdiction could be regained because a later non-payment occurring more than three months later than the first could be characterised as having such similar features that it formed part of the same series. A break of three months between deductions therefore would mean that deductions could not be regarded as a series within the meaning of s.23(3).

Conclusions on the Issues

150. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Knowledge of disability

151. We start our conclusions at LOI 2 and consider the impact of any applicable time limits on those conclusions as we go along, where appropriate.

152. The first issue is that of knowledge of disability. The act complained of date from 6 June 2021 to September 2021 and there is then an allegation of disability-related harassment in relation to 17 September 2022. The respondent did not concede that it knew or could reasonably have been expected to know that the claimant had the disability of sciatica/back condition at the relevant time. This requires us to consider whether they knew or ought to have known of the facts which amounted to the disability namely that there was a more than trivial adverse impact on the claimant's ability to carry out day-to-day activities and that that was long-term.

153. As at early June 2021, the respondent had known since 2019 and certainly since the return to work meeting in February 2020 that the claimant had back condition which placed limitation on her ability to bend and lift such that she was limited to till work and needed to sit down rather than stand for prolonged periods. These matters are the facts which amount to the disability and the respondent had had that knowledge for more than 12 months as at early June 2020 one so we find they had actual knowledge of disability.

Direct disability discrimination

154. The first direct disability discrimination allegation is LOI 3.1.1 which has only been clearly evidenced in relation to 6 June 2021. We have found that the supervisor, Aisha, did not scream at the claimant. The contrast the claimant relies on the causes her to bring this is a direct discrimination claim is that she not only is the person who has been working very hard but once the store doors are closed at 5 PM she, the person with a disability, is asked to do the work while her workmates stand around chatting.

155. We have taken into account that we have not heard directly from either Aisha or Shane, the two supervisors against whom allegations were made. In the case of Aisha, her interview notes do not provide any evidence about whether she shouted or not because she was not asked the question. However for reasons we explain in paras.33 and 44 above, we do not consider the claimant to be credible when she complained that Aisha screamed, principally because this was not part of her original complaint and because she does, in our view, tend to embellish the actions of others as the events replay in her memory over time. The allegation that she was asked to do other things while workmates stood around chatting is not made out on the facts. There was tension between her and her supervisor arising out of a lack of clarity about what the supervisor could ask her to do when there were no customers in the store.

156. Both the acts complained of in LOI 3.1.2 and 3.1.3 are admitted with qualification. The claimant was invited to a capability meeting by a letter which included a warning that in certain circumstances the respondent might have to consider making a decision about her continued employment.

This is not the same as telling the claimant that the respondent has a right to terminate her contract because of sickness absence. The letter was a template letter (see the template at page 1500) and we have seen an identically worded letter sent the previous month to a colleague who is not disabled with a back condition so it is not the case that others were not told they were at risk of termination. This was not therefore less favourable treatment.

157. Furthermore we are sure that in a materially identical situation, where the respondent had an employee with health conditions that were affecting their ability to carry out the full range of tasks normally done by someone in that role and the impact of that health condition was not fully understood, the respondent would have invited the employee to a capability review meeting by an identically worded letter. As we explain in paras:68 & 69 above, we accept that this respondent uses the mechanism of the capability review meeting to initiate all but the most informal arrangements for workplace adjustments particularly when there is any uncertainty. In particular this is the method by which a referral to occupational health is made.

158. The respondent has satisfied us that the reasons why the letter was sent and the meeting was convened was the lack of understanding on the part of the respondent of the details of the impact of the claimant's health conditions (including but not limited to the disabling condition) on her ability to carry out her role safely. This was not less favourable treatment on grounds of disability.

S.15 EQA discrimination arising in consequence of disability

159. The sending of the letter of 4 September 2021 with that paragraph included is also alleged to be unfavourable treatment for a reason arising from disability contrary to section 15 EQA. As we explain above the respondent did send this letter although others who received an invitation to the capability review meeting also received letters which told them that in cases of prolonged persistent absence the company may have to make a decision about their continued employment (see para.156 above).

160. Part of the reason why the respondent sent a capability letter was that the claimant's attendance had deteriorated. Ms Lane recommended sending the letter to initiate a capability review meeting, Mr Hooper concurred and the letter went out in Ms Kemp's name. They wanted to understand the relationship between the claimant's health conditions and her working environment so that they could consider what more could reasonably be done to support her in addition to being limited to till work while keeping her occupied during working hours. The claimant had had periodic sickness absence and referred in her grievance hearing to regularly attending Accident & Emergency due to pain after work. There must have been concern that future absences would occur. There was uncertainty on the part of the claimant's supervisors because there was a 30 minute period on Sundays between the closure of the store and the end of the claimant's shift where there was a question about what the claimant could be asked to do.

The consequent conflict between supervisor and claimant caused sickness absence.

161. We conclude that at least some of the sickness absence arose directly in connection with disability because it was caused by back pain or the claimant's other symptoms such as numbness associated with sciatica. It is possible that the specific sickness absence after the incident with Aisha on 6 June 2021 was not directly due to back pain but it was nevertheless indirectly due to back pain/sciatica because uncertainty about the reasonable adjustments necessary for that condition caused conflict which led to the absence. Either way disability related sickness absence was at least part of the reason why the capability letter was sent.

162. The burden therefore transfers to the respondent to show that sending the letter was a proportionate means of achieving the legitimate aims set out at para 97 above. We accept that the respondent had those aims as a matter of fact (para 98).

163. We therefore consider whether sending the letter which included that paragraph that the claimant has misinterpreted to mean her contract may be finished in the near future was apt to achieve those aims and reasonably necessary. The tribunal accepts that it is apt in the sense that it is capable of achieving those stated aims. The paragraph means that the respondent is transparent about all possible outcomes of the formal process and transparency itself as a legitimate aim.

164. In our view whether it was proportionate to send the letter has to be judged in the context of the email sent to the previous day to prepare the claimant to receive the formal letter details of which are it para.58 above. The immediate purpose of the respondent in starting this process was truly that explained by Ms Lane in that email. The context also includes that they are a large employer employing over 28,000 employees which has to have consistent processes that can be applied by managers across the country.

165. The minority member (Mr J Appleton, employee panel member) would hold that the respondent had failed to justify sending the standard letter in this situation when, on their own account, as he accepts, there was no thought of dismissal of the claimant. The formal process initiated by that letter did not achieve the desired outcome of an occupational health referral and it appears that no thought went into tailoring the invitation to the situation by removing the paragraph or giving more explanation about the stage the parties were presently at which was far more informal in reality.

166. The majority (Judge George and Ms A Brown, employer panel member) are satisfied that the respondent has shown the sending of the letter to be a proportionate means of achieving all of the aims set out in para 64 of the Amended Grounds of Response. In the context of the discussion in the grievance hearing and the explanation of the capability process by Ms Lane, together with the rapport there appeared to be between her and the claimant, it was reasonably necessary to send the standard letter in order to ensure consistency and transparency in managing sickness absence as a

whole. This respondent, in the majority view, made every effort to make clear to the claimant that in her case the capability review meeting 11 September 2021 was purely supportive because it was a means to find out necessary information. The fact that they include any invite an explanation that if, contrary to the present expectation, a resolution cannot be found that enables the claimant to sustain a reasonable pattern of attendance they may in the future have to make a decision about her continued employment was, in the view of the majority a proportionate step at that stage.

167. For that reason, by a majority decision, the claim under section 15 EQA fails.

Disability related harassment

168. As to the complaint of harassment, the factual allegation LOI 5.1.1 of the supervisor, Aisha, screaming at the claimant was not made out. Without the aspect of the underlying facts of shouting or screaming that incident could not, we conclude, be reasonably regarded as having the effect of harassment. In reaching that conclusion, we bear in mind that we must not cheapen the significance of the words of the definition in s.26 EQA as set out in para.136 above.

169. As to LOI 5.1.2, the underlying factual allegation of taking the claimant to a capability meeting is made out and the claimant did regard that as a potential threat. We are quite satisfied that none of those involved in the decision to call a capability meeting, Ms Lane, Ms Kemp or Mr Hooper, had the purpose of creating an intimidating or hostile atmosphere for the claimant. We refer back to but do not repeat our findings of fact in paras.58, 62, 67 to 69, 75 to 77.

170. Although the claimant interpreted the paragraph as meaning her contract may be finished in the near future we do not consider that it was reasonable to regard this meeting as having the harassing effect in all the circumstances. Those included the detailed explanation by Ms Lane prior to the meeting and the obvious need for the investigation to take place.

171. The conduct of Shane is also alleged to have been disability related harassment. The allegation has not been made out in full in that we have not accepted the claimant allegation that the supervisor became angry and aggressive and shouted at the claimant. We preferred Shane's account in the grievance investigation at page 770 (paras.107 – 110, and 113 above) as we explain she has embellished her account from saying Shane was rude to saying he was angry and aggressive and in oral evidence resiled from the allegation that he had shouted.

172. What the supervisor did ask was that she do light returns not as the claimant appears to suggest to work on the shop floor doing returns wherever they might need to be delivered. The only request Shane made was in an attempt to keep the claimant occupied doing tasks within her capability such as carrying a pillow that she had just returned. We are quite satisfied that his purpose was to keep her occupied throughout her working

hours not to harass her and in all those circumstances it is not reasonable to consider his conduct to have the harassing effect.

173. For those reasons the harassment claim fails and is dismissed

Victimisation

174. We analyse the grievance set out in the email of 4 August 2021 at paras. 37 & 53 above. We accept that it ought reasonably to be understood as an assertion that she is protected under the EQA is a disabled person and is complaining of harassment regarding a disabling condition. We conclude that this was a protected act within the meaning of s.27 (2) EQA.

175. Of the alleged detriments in LOI 6.2 we have already explained that the factual basis underpinning LOI 6.2.1 and 6.2.2 is made out. The allegation 6.2.3 is not made out because the occupational health referral did not include incorrect details or make an incorrect allegation about the claimant. See paras.93 to 96 and following above.

176. To the extent that LOI 6.2.1, 6.2.2 and 6.2.4 are made out we are satisfied that the fact of the claimant's grievance had nothing at all to do with the reasons for the respondent's actions.

177. The claimant has asked of a number of occasions why she was not referred for a capability review meeting in 2019 or 2020 when the respondent was first aware of her health conditions but only after she had raised a grievance. This seems to be an instance of an action happening after a grievance but not because of the grievance. We have explained in detail in paras.55 - 69, and especially para.75, above why the respondent took the step of inviting the claimant capability review meeting. We make particular reference to our findings in para.64 where we contrast what was known about the claimant's health condition at a return to work in 2020. A more complex health situation emerged through the grievance and capability processes. Quite simply the landscape did not appear to be the same and arguably the situation was under managed in 2020.

178. Although it is the case that the claimant was not sent a copy of the OH referral before the doctor contacted her by telephone she was told she could receive a copy on request and we accept that this was standard practice. Consequently the fact of her grievance was nothing more than the background against which the need for an occupational health referral became plain.

179. For those reasons the victimisation claim fails.

Less Favourable Treatment of Part Time Worker

180. The allegation of part-time workers less favourable treatment is made in respect of the allegation that she was not paid sick pay for a month in 2019 or for the first three days of her period of sick leave in 2021.

181. We have found that the claimant was not, as she alleged, absent on sick leave in July 2019 (paras 24 & 25 above) and that the respondent's records are accurate. As set out in RSA para 62 the only sicknote is dated 13 August 2019 and it is probable that the claimant made a typographical error in her email of 21 August 2019. A contemporaneous email of the respondent supports that conclusion. It also appears that the claimant was on holiday or at work according to the clocking in records at page 958 and her payslip at page 985. If there is any discrepancy it is not because of the failure to pay sick pay because the claimant was not absent on sick leave in July.

182. The failure to pay the claimant for her first three days of the sickness absence in 2021 was in accordance with policy (page 124) which provides that the first three working days are waiting days and are not paid. The claimant compares herself with two other named individuals (in the list of issues) and two others in evidence. Three of them were actually part-time workers on different hourly patterns and therefore are not suitable comparators for the PTWR. The fact that the claimant complains that all of them received payment when she did not suggests the reason for their payment was not part-time worker status.

183. Such evidence as there is suggests that the claimant is relying upon a conversation with a colleague which has caused her to misunderstand the purpose of the self-certification form. As we explain in para.51 above an individual who works more than three days a week will need to complete a self-certification form to be paid for working days in excess of the three waiting days if their absence has not lasted more than a calendar week. The claimant has 2 working days in a calendar week. In her case, three working days covers a week and ½ or 8 calendar days (Saturday to Saturday inclusive).

184. In short, the claimant was paid in accordance with the contract entitlement and this was not less favourable treatment let alone on grounds of part-time worker status.

Unauthorised deduction from wages

185. As to the unauthorised deduction from wages claim, the claimant complains that she was not paid for one week CSP for her sickness absence starting on 17 September 2022. At that time her earnings of £120.83 per week average fell below the Lower Earnings Level and she was not entitled to SSP. The reasons we explain above, we accept that CSP would be subject to the deduction of SSP whether or not the employee was eligible to be paid SSP. Custom and practice at the respondent was that no CSP at all was payable if an employee's wages were below the LEL. Furthermore, this was a new period of absence and therefore three days commencing 17 September would have been unpaid waiting days.

186. In any event, the earliest that the intention to bring an unauthorised deduction from wages claim was notified to the tribunal was 27 January 2023. Had there been a deduction in respect of the week beginning 17

September 2022 those wages would have been payable on 21 October 2022 meaning a claim should have been presented by 20 January 2023 unless it was not reasonably practicable to do so.

187. Whether one takes they earliest date of communication of 27 January or the hearing on 7 February 2023 the unauthorised deduction from wages claim is out of time whether or not the alleged deduction from 2019 forms part of a series with the alleged deduction from September 2022. In any event we accept that the gap between those two deductions is too long for them to be regarded as linked such as to amount to a series, applying Bear Scotland.

188. In the circumstances of an existing employment tribunal claim we are not persuaded that it was not reasonably practicable for the claimant to present her application to amend sooner and the fact that the amendment application was allowed did not involve a determination that those claims were in time, as we read the order of Judge Hawksworth.

189. Although our decision is that they were presented out of time and we have no jurisdiction to hear them we have considered them on the merits because we were presented with the underlying facts and had we had jurisdiction to consider them we would have found them not well founded.

_____

Employment Judge George

Date: …27 September 2023……..

Sent to the parties on:
28 September 2023

For the Tribunal