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EMPLOYMENT TRIBUNALS

Claimant: **Mr K Awan**

Respondent: **Astra Zeneca UK Ltd**

Heard at: **East London Hearing Centre** **On: 10-11 May 2017 & (in chambers) on 20-21 July 2017**

Before: **Employment Judge C Hyde**

Members: **Miss S Campbell**
Ms H Edwards

Representation

Claimant: Mr A Johnston (Counsel)

Respondent: Ms K Skeaping (Solicitor)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. **The complaints alleging victimisation under the Equality Act 2010 were dismissed forthwith on withdrawal.**

2. **It was declared that the Respondent made unlawful deductions from wages under section 13 of the Employment Rights Act 1996 in relation to the sales bonus and salary between 20 July and 25 August 2016; and it was ordered that the Respondent should pay to the Claimant the sales bonus, and the salary to which he was entitled consistent with a termination date of 25 August 2016.**

3. **If the parties are unable to agree on what payment is due in relation to the sales bonus and salary within 28 days of the date of this**

Judgment, the Claimant may apply for a remedy hearing to be listed to resolve the dispute.

4. **The complaints alleging disability discrimination under section 15 of the Equality Act 2010 were not well founded and were dismissed.**

5. **The claim of entitlement to statutory redundancy pay under section 141 of the Employment Rights Act 1996 was not well founded and was dismissed.**

6. **The claim of wrongful dismissal was not well founded and was dismissed.**

REASONS

Preliminaries

1. These reasons are set out in writing as the Judgment was reserved. Further, they are set out only to the extent that the Tribunal considers it necessary to do so for the parties to understand why they have won or lost. And the reasons are set out in writing only to the extent that it is proportionate to do so.

2. The facts were found on the balance of probabilities.

3. By a claim form which was presented on 17 November 2016, the Claimant alleged that he had been discriminated against under section 15 of the Equality Act 2010 in relation to disability; that he had been victimised, having done protected acts under the 2010 Act; and that the Respondent had failed to pay him statutory redundancy pay, and notice pay to which he was contractually entitled. Finally, he complained that the Respondent had failed to pay him a sales bonus thus making unlawful deductions from his wages.

4. The Respondent indicated that they intended to resist the claim on grounds set out in Grounds of Resistance attached to the Response which was submitted on 19 December 2016.

5. A Case Management Order was made by Employment Judge Gilbert and sent to the parties on 11 January 2017. On the same day, a letter was sent to the Claimant by the Tribunal at the Employment Judge's direction seeking clarification of the Claimant's disability (pp184 – 190). In a document dated 20 January 2017, the Claimant provided the further information.

Documents produced/Evidence Adduced

6. The Claimant gave his evidence in chief by way of a witness statement marked [C1]. The agreed list of issues was marked [C2].

7. The Respondent prepared the agreed bundle which was marked [R1]. In addition, the Tribunal heard from two witnesses on behalf of the Respondent. The first

was Ms Dawn Plowman (Human Resources Project Lead) and the second was Ms Charlotte Clarke (Head of Regional Business and the Claimant's second line manager). Their witness statements were marked [R3] and [R2] respectively.

The Issues

8. In a nutshell, the complaint arose out of a dispute between the parties about whether the Claimant had been dismissed by reason of redundancy on 20 July 2016. If he had been, he would be entitled to most of the financial benefits being claimed in these proceedings.

9. He further contended that because he had a musculo-skeletal physical condition he could not take up the alternative posts on offer and therefore the termination of his employment and the loss of the redundancy dependent benefits constituted disability discrimination under section 15 of the Equality Act 2010.

10. The Respondent's case was that even if the Claimant's physical condition was taken into account, suitable alternative employment had been offered to the Claimant during the dedicated consultation period and subsequently, therefore he was not redundant by 20 July 2016, or indeed at any point thereafter while he remained in their employment. The Respondent argued that the correct construction of the events was that the Claimant had voluntarily left his employment and was therefore not entitled to any of the benefits of a redundancy dismissal.

11. The issues were set out in detail in section 4.1 of the agreed agenda for the closed preliminary hearing. The numbering of the relevant issues in the List of Issues is repeated below. The Issues as agreed by the parties at the commencement of the Tribunal Hearing were as follows: -

Disability discrimination

1.1 Is the Claimant a disabled person?

1.2 If so, was the Claimant treated less favourably for a reason arising in consequence of that disability: -

1.2.1 It is agreed that the Claimant was refused a redundancy payment, refused permission to retain his PAC Code, and charged an early termination charge for his company car.

1.2.2 Does this amount to unfavourable treatment?

1.2.3 If so, did the Respondent subject the Claimant to unfavourable treatment because of the Claimant's position that the Essex role offered to him was unsuitable?

1.2.4 If so, is this a reason arising in consequence of disability?

Victimisation

1.3 Does the Claimant's correspondence to the Respondent direct and via

his solicitor (e-mail Claimant's solicitor to Respondent's solicitor 5 August 2016; e-mail Claimant's solicitor to Respondent's solicitor 12 August 2016; letter Claimant's solicitor to Respondent 18 August 2016; and Claimant's letter to Respondent 12 September 2016) asserting that the Respondent's position amounted to disability discrimination amount to protected acts?

1.4 It is agreed that the Respondent did not pay the sales bonus, denied the Claimant the opportunity to retain his PAC code, and sought to charge the Claimant for early termination of his car contract.

1.5 Did the Respondent delay before confirming their position?

1.6 Does said conduct amount to subjecting the Claimant to a detriment?

1.7 If so, was it because the Claimant had done protected acts?

Statutory redundancy pay

1.8 Did the Claimant's employment end by reason of redundancy?

1.9 In June 2016 was the Claimant's employment terminated by the Respondent on the ground of redundancy or was the Claimant displaced in accordance with the Respondent's redundancy and redeployment policy?

1.10 If the Claimant was displaced, was suitable alternative employment offered to the Claimant during the displacement period?

1.11 Did the Claimant reasonably decline suitable alternative employment?

Wrongful dismissal

1.12 Was the Claimant entitled to three months' notice pay when his employment ended for the reason to be determined by the Tribunal?

Unlawful deductions

1.13 Was the sales bonus properly payable to the Claimant?

1.14 If so, it is agreed that the Respondent had no authority to deduct it from the Claimant's wages.

12. In a document headed 'Claimant's Further Information' dated 20 January 2017 (pp191-192), the Claimant provided further information about his disability discrimination complaint. He stated that his case was that following a road traffic accident on 4 June 2014, he suffered from a neck, shoulder and back condition ("the Condition"). The symptoms of the Condition were (a) severe neck (cervical spine) pain; (b) severe lower back (lumbar spine) pain; and (c) severe left shoulder pain. He

stated that the diagnosis was of cervical and lumbar disc prolapses and adhesive capsulitis of the left shoulder joint.

13. He further stated at paragraph 8 of that document that the Condition affected him in the following ways:

(a) Mobility in that he was unable to or had difficulty in carrying out any activity that involved raising his left hand above his head, including dressing/undressing and that he had restricted movement of the head over the left shoulder, thus limiting his view on the left side;

(b) Dexterity in that he had a slight loss of grip in his left hand;

(c) Lifting, carrying or moving everyday objects in that he was unable to carry out his recreational activities (e.g. going to the gymnasium and gardening), to lift shopping or a work lap-top bag or to lift his small grandchildren;

(d) Resting, in that he needed to take regular breaks from sitting down by moving around;

(e) Driving, in that he was unable to drive for longer than 30 minutes without experiencing pain and aggravating the Condition; and

(f) His sleep was disturbed because of the pain.

Findings of fact and conclusions

14. The Respondent is a global biopharmaceutical business engaged in the research, development, manufacture, and marketing of prescription pharmaceuticals and other related technologies. The Respondent is a large company with around 6,700 employees based across its multiple UK sites.

15. The Claimant commenced employment with the Respondent in March 2003. His post was Senior Therapy Account Specialist (referred to hereafter as a "TAS"). The date on which his employment ended was the subject of controversy. His role entailed calling on primary care based Healthcare Professionals such as General Practitioners and Practice Nurses. Prior to the restructuring exercise which took place in 2016, he was one of 17 TASs working in the London Region. Each TAS was responsible for one geographical area referred to as a "patch". The Claimant's patch was the area covered by the Barnet Clinical Commissioning Group ("CCG").

16. The TAS role was relatively autonomous. Each TAS was responsible for selling specific medication in their patch. The TAS would agree a target list with their manager, and also determine which GP surgeries and customers would be targeted by them within the patch. The Claimant was responsible for selling diabetic medication and as such within his patch targets would for example include GP surgeries and clinics running a dedicated diabetic service for patients. Once the list of targets was agreed and signed off by the manager, the TAS would then be responsible for arranging appointments and meetings, and securing commitments from the Healthcare

Professionals to use the medicines with appropriate patients. The manager was responsible for providing assistance to the TAS by way of support, coaching and mentoring as needed.

17. As the TAS was responsible for making the appointments, they had a significant degree of control over their working day. The Respondent's expectation was that the TAS would be on the patch from 8.30/9.00am each day. The drive to the patch was not part of the TAS's working day. The reason for this expectation was that the Respondent's employees were competing with the employees of other pharmaceutical companies for the attention and custom of the targets. TASs were expected to make around 3 appointments per day which would mean driving round to more than 3 surgeries to "drum up" the appointments.

18. There was no set time for breaks or rest periods by the TAS – they were free to schedule these to suit themselves during the work day, subject to the constraints of the timing of their visits to the targets and appointments, and the need to achieve their targets. The Claimant was one of a team of 50 members of staff managed by his second line manager, Ms Clarke. She had 8 members of staff who reported directly to her, one of whom was his first line manager. Her evidence, which the Tribunal accepted, was that it had never been a problem for any TAS within her area of responsibility to organize and schedule the breaks appropriately, thus the Claimant would have been able to ensure that he did not drive for too long without a break.

19. There were electronic records of the visits made by the TAS on a system known as 'VEEVA', but in the event no evidence was adduced by either side about these records.

20. On 4 June 2014, the Claimant was involved in a road traffic accident. As a result, he suffered from pain in his neck and shoulder, restricted range of movement in his neck, and intermittent symptoms of numbness and tingling in his left arm/hand.

21. The Occupational Health report prepared by Dr Sallyanne Roblin, Occupational Physician dated 9 April 2015 (pp 72 – 73) reported that when she saw Mr Awan on that date, his symptoms had improved. She reported that he now had days where he was pain – free and did not require any painkillers.

22. Dr Roblin also reported, in the context of whether there were any work modifications or restrictions required, that the workstation needed to be set up correctly and she recorded that she believed that Mr Awan had bought himself a height adjustable chair. In addition, she suggested that Mr Awan may benefit from ergonomic assessment of his car. She advised Mr Awan that he could request these from Access to Work, but he would need to refer himself. She advised that there may need to be a risk assessment with regards to his current role because Mr Awan needed to avoid heavy awkward manual handling (p73).

23. In answer to the question (p73) whether there was an underlying health condition that may account for current attendance behaviour performance, the doctor stated:

> "*His neck and shoulder pain have been impacting on him, but I believe that they have improved to a degree that they should not now impact on his workplace performance. If any new medication is decided upon that has potential to cause drowsiness or impair concentration, then further advice should be sought on this, particularly regarding his ability to safely drive a car. Currently he is not taking any medication that would impact on his performance.*"

24. The Claimant returned to work following the accident on 1 May 2015 on reduced duties (p76).

25. A further Occupational Health report dated 11 May 2015 following an assessment on 6 May 2015 identified that he was restricted to 4 hours a day driving with a rest after an hour to stretch and change position. There was an issue on the evidence before the Tribunal as to whether the Claimant returned to his duties full-time by around mid-June 2015, as had been anticipated in the Occupational Health report of May 2015. In paragraph 7 of her witness statement Ms Clarke stated that in the event the phased return to work lasted some eight months, as compared to the more usual duration of a phased return of some 4 to 8 weeks. The Claimant received full pay during the phased return to work. It was likely that Ms Clarke was referring to the interval between the accident in late 2014 and the return to work in June 2015. There was no documentary evidence which supported the phased return to work lasting beyond June 2015. On the contrary, a contemporaneous management record referred to the Claimant having returned to work full time by mid-June 2016 (p81).

26. The only other matter which occurred in the Claimant's employment which was of relevance to the current case was that the Claimant was the subject of a performance improvement process. This ultimately led to the Claimant being placed on the final improvement notice of the Respondent's Global Performance Improvement Plan ("GPIP"). The Claimant's first line manager by this stage was Mr Raj Thakkar, and his second line manager who gave evidence in the hearing was Ms Charlotte Clarke.

27. The Claimant commenced sick leave around 18 April 2016 after the issuing of the final improvement plan.

28. Throughout the period of sickness absence from April 2016 all the sick/fit notes submitted to the Respondent contained a diagnosis of work-related stress. None of the sickness absence was said to be attributable to the shoulder or neck or skeletal conditions.

29. The Respondent decided to reorganise various roles within the UK Sales and Marketing division in May 2016 (p90). This was a Global Business Change programme referred to within the Respondent as "Focus to Win' and was one of a number of such exercises that had been carried out by the Respondent over recent years. In the Focus to Win exercise, the Claimant's position was at risk of redundancy as the Respondent's proposal was to reduce the number of Therapy Account Specialists ("TAS") across the primary care business units. This inevitably impacted on

the patches previously covered by each TAS also. Primary care TASs were in a pool of potentially redundant employees therefore.

30. After the Respondent engaged in a process of collective consultation, it was confirmed that the method of selection to be used to achieve the required reduction in TAS roles was to be a desktop assessment. This was carried out by the line managers of the "at risk" employees. In the Claimant's case, the exercise was conducted by Mr Thakkar Regional Business Manager who was the Claimant's first line manager. The selection process was subject to a full calibration exercise across the business unit, involving the second line managers (Heads of Regional Business) and the aligned HR Business Partner ("BP"). Thus, Ms Clarke was involved in the calibration process as the Head of Regional Business for that business unit and the respective BP who supported the calibration was a senior HR BP, Ms Redcliffe. In the event the Tribunal was not asked to consider the fairness or otherwise of the redundancy selection process.

31. The Claimant was informed on 19 May 2016 that he was at risk of redundancy (p90). The Claimant was informed that the next stage would be that he would be invited to meet his line manager to discuss the company's proposals in more detail on how this may affect him personally. He was also referred to an external counsellor who was available to assist employees who felt they needed support or the opportunity to talk things through in an informal and strictly confidential manner. The letter confirming this information was at the centre of this dispute, and its terms are set out in more detail below.

32. As the Claimant was still on sick leave at this stage, the Respondent consulted with him by way of a telephone conference call. The conference call with Mr Thakkar took place on 26 May 2016. The manager followed a pre-prepared script (pp92-93). He noted that in answer to the question whether there were any personal circumstances that the employee would like to be taken into account, the Claimant mentioned matters to do with the location of any new patch but made no reference whatsoever to any health or disability related issues.

33. As the Claimant remained on sick leave, he was referred to the Occupational Health Service ("OH") on 20 May 2016. The report (p91) noted in relation to his current health status that his GP had now diagnosed that he was suffering from depression. It also noted that he had continued to report that he felt anxious about the complaint made against him relating to his company car and the consequent proposed change in his performance grading. It finally noted in this context that the pain in his neck, back, left leg, foot, left shoulder and arm was currently manageable.

34. Following the consultation process the Claimant was invited to a meeting which took place on 20 June by telephone and which was attended by his first line manager Mr Thakkar and Ms Plowman. Ms Clarke, his second line manager did not attend. Once again, the Respondent had prepared a script (pp118-120) which ran to some

three pages for the managers to follow during the discussion. In addition, there was space on the script for the managers to note contemporaneously what was said during the meeting. The meeting script was headed "Outcome of Selection Pool: Displacement & Notice of Redundancy (with PILON)".

35. The fourth section of the template (p118) had a pre-prepared script in relation to the meaning of 'displacement'. This is a term of art which was used within this employer and is defined in the Respondent's Redundancy Policy. The script required the manager to tell the employee that displacement did not mean that the employee had been confirmed as redundant; however, it started a period of one month within which the employee had the opportunity to find and hopefully secure an alternative role within the Respondent.

36. Mr Awan was told that his displacement period would commence from 20 June, the date of the telephone meeting. If he had not found an alternative role within the Respondent during the month, his notice period would automatically commence one month after the date of his displacement. He was told that he would be paid in lieu of notice. He was further told that his employment would cease on 20 July and all benefits would cease on that date – private healthcare, insurances, company car. The script continued that payment was based on the full Advantage Fund so would cover funding for any flexible benefits taken such as insurances, retail vouchers, childcare vouchers or company car.

37. This statement in the script was consistent with the description and operation of the displacement period as set out in the Respondent's Redundancy Policy and also with the description which was set out in the briefing paper about the Focus to Win programme and this redundancy exercise. In particular in the bundle at page 110 there was a Frequently Asked Questions and Answers section. The answer set out at the bottom of a page 110 was also consistent with the description of the displacement period just set out.

38. The script covered a number of issues that would normally as a matter of good practice arise for discussion during such a redundancy process, but which are not relevant to the determination of the issues in this case, so they are not set out in these reasons.

39. The only other relevant issue covered in the script was the section in relation to redeployment opportunities/vacant positions. The Claimant did not dispute that he was asked whether he wanted to stay with the Respondent and if so what his preferred roles were.

40. Mr Thakkar noted on the script (p119) that the Claimant said he preferred redundancy or an MSL role. He also noted that the Claimant was told that he would be sent the regular list of vacancies produced by the Respondent. At the Tribunal hearing, the Claimant disputed that he had said that he preferred redundancy.

41. Ms Plowman who made her own notes of the meeting (p121) also made a note of the reference to the MSL (Medical Science Liaison) role but noted that this was an aspiration, that the Claimant enjoyed science and had previously applied in 2005 for that post. She also noted that he said that he would want to stay [with the Respondent] for the right role; and that he would never say no to an MSL role. Ms Plowman's note continued that the Claimant had worked previously in the North Central London patch and indeed that he had always done this. She noted that he said he would consider other geographies but that he was not keen on other areas. Further, she noted in this context that he said he probably did not want to stay; and that he said he would stay for an MSL role only.

42. Mr Awan declined the opportunity to appeal against the selection.

43. The Tribunal considered on balance having looked at the notes of the two managers who held the meeting with the Claimant on 20 June 2016 that they correctly understood him to be saying that he preferred to take redundancy. The Tribunal also took into account that the benefits payable to the Claimant in the event of redundancy, under the Respondent's policy were generous.

44. The Claimant was then sent a letter dated 20 June 2016 (pp123 – 125 (b)) headed 'Formal Displacement Notice' and signed by his first line manager, Mr Thakkar. The first paragraph of the letter stated:

> "*Following discussions between you and the company, I am writing that as a result of business restructuring the future need for your job has ceased and you have therefore been 'displaced' for a period of 1 month with effect from* ***20 June 2016****, your employment will terminate on* ***20 July 2016***. *I explained that the reason for this situation is Focus to win. I emphasised that this is as a result of business restructuring.*"

45. The wording cited above of this letter of 20 June 2016 was essentially the source of the Claimant's case. He argued that the effect of it was that his employment terminated on 20 July 2016 and that he was therefore redundant as of that date and that his employment terminated with payment in lieu of notice and all the other benefits of the redundancy package.

46. The Respondent disputed this and contended that although this was not expressly stated in the letter of 20 June 2016, it was clear from the wording of the Redundancy Policy, the accompanying documents in relation to Focus to Win, and indeed from the discussions that had taken place with the Claimant that the redundancy would only be confirmed if among other things there had been no suitable alternative employment offered to the Claimant during the one-month displacement period.

47. Both parties were agreed that the notice period did not begin to run during the displacement period of one month.

48. Mr Thakkar had also recorded during the discussion on 20 June 2016 about the displacement period and the status of the Claimant being a displaced employee, that the Claimant was "*clear on one month period*" (p118).

49. The letter dated 20 June 2016 setting out the displacement notice and its consequences, was sent to the Claimant by email on 21 June 2016 just before 10 am. In the letter which ran to some three pages, the Claimant was also given detail about what would be available to an employee in his position and an estimate of the redundancy payment to which he was entitled under the Respondent's enhanced contractual redundancy scheme - some £79,000. He was also told what notice he would be entitled to, and a consequent calculation of the notice payment to which he would be entitled in lieu of working the notice. Under the Respondent's enhanced contractual redundancy provisions, he was entitled to six months' notice. The Claimant's contractual entitlement in a normal situation was to 3 months' notice of termination. The enhanced PILON payment in the event of redundancy would have been £31,000 odd.

50. It was relevant that the Claimant was also given further information about the redundancy process in the body of this letter. Moreover, in the final paragraph of the letter, he was asked to note that he should print off copies of the information contained in the Employee Checklist – I am being made redundant - as that also formed part of the redundancy letter (p125 (a)). At the beginning of the checklist which consisted of three pages (p52), the employee was told they should read the Redeployment & Redundancy Policy "*to fully understand the situation*" the employee was in. This advice was set out in bold text at the beginning of the checklist. The reference was to information which appeared in the Tribunal's bundle at page 45 and which was part of the Redeployment and Redundancy Policy. This made it clear that the displacement notice would confirm notice of termination of employment in accordance with the employee's contract of employment and the details of the redundancy payment that they would receive, "*should a suitable alternative role not be secured.*" That last phrase was not set out in the text of the Formal Displacement Notice letter that was sent to the Claimant dated 20 June 2016, but the Tribunal considered that it was clearly incorporated into the letter by the last paragraph of the letter cited above and the reference to the checklist. The Tribunal has already noted and found that this was also explained to the Claimant during the telephone meeting that he had with his first line manager also on 20 June 2016.

51. Having reviewed the document which was sent to the Claimant on 20 June 2016 and the other documents to which he was referred in that letter, and the records of the conversation between the Claimant and his line manager on 20 June, the Tribunal considered that the first paragraph contained a poorly drafted description of the effect of the displacement notice, but that it would have been clear to the Claimant and indeed to anyone else who read the letter in full and who had been party to the conversation with Mr Thakkar that the termination of the employment would only occur

if the displacement month expired and there had been no offer of a suitable alternative post.

52. Indeed, this was consistent with the contents of paragraphs 30 and 31 of the Claimant's witness statement in which he reported attending the telephone displacement meeting and that he was "*told that I would be made redundant if an alternative role could not be found within one month"*.

53. On 21 June 2016, the Claimant was assessed by the Occupational Health specialist within the Respondent, Ms Ann Bolton who wrote a report (p126) on the Claimant's depressive illness which was the condition which was recorded on his fit notes. There was no reference in her report to any physical impairment or difficulties that the Claimant might experience in relation to driving. Finally, she noted that the next step was that he would be reviewed by the Occupational Health Physician and she noted that an appointment for this had been made for 24 June 2016.

54. On 22 June 2016, the Respondent became aware that two jobs had become available which they considered to be suitable alternatives for the Claimant. Ms Plowman made a note of a telephone conversation which took place at 10am on that day. The other participants were the Claimant and his second line manager Miss Clarke. It was not in dispute that there were two vacancies referred to in the discussion although the Respondent focused on the vacancy in West Essex. The other vacancy had arisen in the Hertfordshire area. The Respondent focused on the West Essex area because it appeared to be the more convenient patch for the Claimant. Ms Plowman's contemporaneous notes record that she explained the geography of the West Essex patch to the Claimant and informed him that he was therefore no longer at risk (p128).

55. The note continued that the Claimant was not happy and questioned where the West Essex patch was. There was a disagreement at the hearing as to whether Miss Plowman's note was accurate in this regard. She recorded that the Claimant said he did not know where Waltham Forest was. Given that the Claimant lived in Waltham Forest, the Tribunal considered that this note was probably an error by Ms Plowman. It was likely that he was questioning not the location of Waltham Forest, but the West Essex patch and that since Ms Plowman sought to describe it relative to Waltham Abbey she erroneously wrote Waltham Forest. This error was not however a matter of crucial significance.

56. Of more note was the record that the Claimant indicated during this conversation that he did not want another TAS role. This note was also consistent with the note of Mr Awan's stated preference for redundancy during the meeting of 20 June 2016.

57. The Respondent then followed up the telephone conversation by sending an email to the Claimant timed at 11:49am on 22 June 2016 (p130). It was sent by Ms Clarke and the subject was: 'Territories that are vacant'. Ms Clarke referenced the earlier conversation and confirmed that there were two vacant territories and listed the

Hertfordshire and Essex territories. She also attached links to four websites which she stated would give the Claimant additional information about the patches and more information about the respective roles.

58. When considering the criticisms of the Respondent's actions in terms of offering an alternative to the Claimant, the Tribunal took into account that the Policy under which the Respondent was operating placed a responsibility on the employee in the displacement situation also to search for and fully participate in the exercise of identifying an alternative post (p46). The Tribunal also took into account that the Claimant occupied a relatively senior position and was well educated.

59. The Tribunal noted that even though the geography of the patches was clearly discussed, the Claimant did not raise at this stage any potential difficulty with driving due to the condition of his shoulder or any other part of his body.

60. Later that day at 1pm, the Claimant telephoned Ms Plowman to discuss the situation further. Once again Ms Plowman made contemporaneous notes of the conversation (p129). She first noted that the Claimant stated that he felt upset and could not understand why redundancy was no longer an option. She noted that she explained that a role had become vacant which was suitable for the Claimant and so it was the Respondent's obligation and desire to take the necessary steps to mitigate redundancy. She noted then that the Claimant explained that he had had anxiety and depression because of the GPIP process and he asked whether if he came back to work his GPIP would be wiped clean. Ms Plowman told him that this would not be the case, that he had a four-week trial period but that the GPIP remained in place as he was not performing at the level required in the TAS role. She reminded him that he was nearly at the final stage of that process and it was therefore neither appropriate nor reasonable for the Respondent not to continue to require an improvement in his performance.

61. The Claimant then expressed his deep concern about his record of employment and that his main objective was a clean reference. Mr Awan and Ms Plowman clearly discussed the possibility of an exit settlement for the Claimant. She noted that the discussion closed with the Claimant stating that he was "*very angry about not getting full R* [redundancy] *and PILON"*. He indicated that he would speak to his lawyer and confirm those details directly to Ms Plowman the following day.

62. The Tribunal also noted that although the Claimant raised issues relating to his health during this telephone conversation, they were all related to his mental state and he made no reference to the physical impairments which he relied on in this litigation, nor indeed to any physical impairments. This was particularly notable because it was inconsistent with the Claimant's case during the Tribunal hearing that he had been happy to return to work and take up a suitable TAS role, had one been available. He argued during the hearing that the posts which the Respondent offered him were not suitable because of his physical condition.

63. The Tribunal also took into account that by the time this conversation took place at 1pm on 22 June, Ms Clarke had sent to the Claimant the links to the Internet sites which gave the Claimant more information about the patches he had been offered. There had also been a discussion during the earlier telephone call about the patches.

64. In a short letter dated 24 June 2016 the Claimant's treating Consultant, Mr Brian Cohen, Consultant Orthopaedic and Trauma Surgeon wrote to Dr Patel (GP) of the Wentworth Medical Practice, following a review of the Claimant's progress on 24 June 2016, two weeks after the Claimant had received ultrasound treatment and a steroid injection in relation to his left shoulder condition – on 10 June 2016. Mr Cohen reported that there had been a:

> "*clear improvement in his symptoms of pain and also in his range of shoulder movement, although he feels that the shoulder is perhaps regressing over the past day or two*".

He continued:

> "*Mr Awan also reports that his work involves a fair amount of driving and this tends to exacerbate his symptoms when he is driving for long distances or for more than 30 minutes*" (emphasis added).

65. Mr Cohen did not posit an explanation for the reported deterioration in the Claimant's condition over the preceding couple of days. Nor did he, in the Tribunal's view, express a view or tender advice about the amount of driving that the Claimant could undertake, given the condition of his shoulder.

66. Mr Cohen indicated that he was arranging for the Claimant to undergo another round of the same treatment with a further review of his progress provisionally booked for three weeks' time.

67. In Ms Clarke's witness statement, she confirmed that the Claimant sent the letter dated 24 June 2016 (p131) from Mr Cohen to the Respondent later in June. On the evidence before the Tribunal, this was the first piece of correspondence that the Respondent had received for some time with regard to the Claimant's shoulder injury.

68. Also in late June 2016, the Claimant underwent an Occupational Health assessment by Dr Paul Baker, Consultant Occupational Physician to whom he had been referred by Ms Bolton. Dr Baker's report (pp134 – 135) was unfortunately undated. It simply stated that it was written in June 2016. There was no dispute however that the appointment had been made by Ms Bolton for 24 June 2016. The report was therefore treated by the Tribunal as having been written on that date or shortly thereafter.

69. The referral to Occupational Health related to the Claimant's psychological/mental state only. In that context Dr Baker reported that he agreed with

the Claimant's GP that the pattern of symptoms that the Claimant was experiencing was suggestive of an underlying depressive episode and that medical treatment was therefore warranted. He continued that there had been an indication of response to medication with some improvement of symptoms, but that the Claimant's symptoms appeared to:

> "*have deteriorated in the last week related to aspects described in the next paragraph* [of his letter]".

70. The next paragraph of the letter then referred to the Claimant's possible redundancy. Dr Baker's understanding from the Claimant was that he had initially been advised that he had been made redundant, and had received confirmation of this in writing on 22 June 2016 – a reference to the Respondent's letter of 20 June. Dr Baker reported that the Claimant was then contacted later that day by telephone by Human Resources who intimated to him that they were seeking to "*revoke the redundancy*" by mutual agreement.

71. Dr Baker's understanding of recent events relating to the redundancy could only have come from the Claimant. The Tribunal considered that it was clear from the way in which Dr Baker set out his understanding of the recent events in the letter and from the fact that the Claimant raised this issue with Dr Baker, that the Claimant had not been happy about the possibility of no longer being made redundant. It also tended to support the evidence from the Respondent's witnesses that he had expressed to them a reluctance to remain employed by the Respondent and that his preferred option at that stage was to be made redundant. These findings were relevant in terms of assessing subsequent events and the evidence about the feasibility of the options that the Claimant was presented with as suitable alternatives.

72. In terms of the feasibility of the alternatives and also the Claimant's disability complaint, it was relevant that in the course of this meeting the Claimant in effect raised for the first time with the Respondent in 2016 in the context of the possible redundancy, the issue of his ability to drive for protracted periods because of an ongoing shoulder problem.

73. In the letter, Dr Baker reported that the Claimant told him that in the telephone call on 22 June, HR had mentioned the possibility of consideration of redeployment either to a role covering locations including Chelmsford and Billericay, or a role covering the geographical area of the county of Hertfordshire. It appeared to the Tribunal that these were references to the West & Mid-Essex and Hertfordshire roles discussed on 22 June and referred to in the email from Ms Clarke later that day. Dr Baker continued:

> "*I have to advise that I do not think he is medically capable of being considered for such deployment certainly at this time. That is as much if not more in relation to ongoing shoulder problem (for which he is due further treatment) and the effect that has on his capability to drive for more protracted duration within his working day.*

He reported to me that his treating consultant has also advised him against more protracted driving".

74. In relation to the last sentence quoted above, the Tribunal did not consider that there was adequate evidence to substantiate the contention that Mr Cohen (the Claimant's treating Consultant) had advised Mr Awan against more protracted driving, as the Claimant had apparently informed Dr Baker. As set out above the Tribunal considered that there was no such advice from Mr Cohen contained in his letter dated 24 June 2016 (pp131/246).

75. More importantly however, in relation to the issue of whether the Claimant was a disabled person within the meaning of the 2010 Act as of the date of this assessment, Dr Baker advised (p135) the Respondent that the Claimant should be considered to be a disabled person within the meaning of the Equality Act in relation to "*his musculoskeletal problems*". He also stated that in his view it was not possible to advise in relation to any impairment related to his depression diagnosis because it was too soon to come to a view as to whether there was a likelihood of impairment lasting more than 12 months.

76. In answer to the question whether the Claimant was fit to return to work undertaking a phased return rehabilitation programme, Dr Baker advised that this was not appropriate at that stage. He referred the Respondent to his comments above. In the earlier paragraphs of his letter, Dr Baker had expressed the view that it was not feasible to conduct an assessment with regard to fitness for return to work in the usual manner. His advice was that it would now only be realistic to assess fitness for return to work in the longer term, "*once the employment situation has been clarified*". After reporting what he had been told by the Claimant about the developments in relation to the redundancy situation, Dr Baker had earlier stated that there was now "…*something of a conflict situation, with possible if not probable legal involvement*…". He considered that it was understandable in those circumstances that the Claimant's symptoms had worsened, particularly the anxiety component.

77. He was also asked what if any adjustments he would advise on the Claimant's return, and he indicated that this appeared not to be applicable at that time and that the employment situation needed to be progressed before a return to work could be considered.

78. The Tribunal noted in this context that a GP in the Practice Dr Siriwarnasinghe had written a letter dated 28 June 2016 (p132) addressed "To whom it may concern" in relation to Mr Awan. There was no evidence to suggest that the Respondent had received a copy of the 'To whom it may concern' letter from the Claimant's Wentworth group practice (GP). In the letter, the doctor stated that the Claimant was under the hospital for back, neck and shoulder problems. Dr Siriwarnasinghe repeated the information set out in Mr Cohen's letter to the effect that the Claimant had had left shoulder pain for about two years with limited movement and that he was being treated for adhesive capsulitis. He noted that the Claimant had just had a second steroid

injection with the Consultant (Mr Cohen) recently. The letter also recorded that the Claimant had had three bulging discs; two of which were in the neck, and one in his lumbar spine. The GP indicated that the Claimant and his Consultant were at present trying to manage the disc conditions conservatively. There was no other medical evidence produced about the disc conditions. The GP concluded that as a result of the above conditions, "*a job role which involves prolonged driving would be unsuitable*". In the entry in Claimant's GP notes relating to 24 June 2016 and the consultation on 28 June 2016 (p195), it was apparent that the GP had received the letter from Mr Cohen dated 24 June 2016, and that the Claimant asked the GP for a letter confirming the advice about the Claimant not working in a new job which involved long driving. The notes record that the GP believed this to have been the effect of Mr Cohen's letter.

79. The Claimant presented a sick note dated 28 June 2016 (p133) to expire on 31 July 2016 which indicated that the relevant condition was stress at work. The sick note appeared to have been issued by the same doctor who wrote the 'To whom it may concern' note. The Tribunal did not receive an explanation for why there was no reference in the fitness for work statement to the physical conditions which were referred to in the 'To whom it may concern' letter.

80. The Claimant presented his next sickness certificate dated 29 July 2016 after an assessment on that date (p136). The words noting the diagnosis were not legible on the copy of the certificate produced for the Tribunal (p136). His GP Dr Patel stated that the Claimant was not fit for work for three weeks.

81. The Claimant made no further contact with the Respondent until 20 July when he contacted the Human Resources Department to ask for his PAC code (p140), which it was agreed was something that he needed in order to transfer his mobile phone number from the one that he had used when working for the Respondent.

82. The Respondent did not take any immediate action in relation to the Occupational Health report from Dr Baker which they were sent in June 2016. The Tribunal considered that this was in all probability because the Claimant was still on sick leave and the Occupational Health doctor had said that there was no action to be taken at that stage given that the Claimant was off work.

83. In response to the Claimant's contact with the Respondent on 20 July 2016, the HR Department got back in touch with him on 25 July 2016 (p139) and confirmed that the Respondent was operating on the basis that the Claimant was no longer displaced and was therefore not leaving the business. The Claimant pursued the issue of the PAC code further by email sent on 25 July 2016 and the Respondent's HR Department responded to him on 03 August 2016 (p137) in the same terms as before.

84. At around this time, solicitors acting on behalf of the Claimant then wrote to the Respondent by email on 28 July (p142) to enquire as to when he would be receiving his contractual entitlements. In an email sent on 4 August 2016 (p141), Ms Skeaping

from Messrs Hill Dickinson solicitors on behalf of the Respondent confirmed their position namely that the Claimant had not been dismissed, and that there had been and were still suitable alternative roles for him. She explained that the Respondent's position was that once the Claimant returned to good health, he would commence the TAS West Essex role on a trial basis.

85. The correspondence between the solicitors continued and they put their positions to each other. They each maintained their positions in the subsequent correspondence.

86. Of note however was that in the email from the Respondent's solicitor to the Claimant's solicitor on 4 August 2016 (p141), having made clear that the TAS West Essex role was still available, they added that they were aware that the Claimant had said that he considered that the role was not suitable for him due to his shoulder problem. They indicated that they remained of the view that the role was entirely suitable and that it would not increase driving time or time spent in the car. They invited the Claimant to discuss his concerns further with the relevant manager so that his concerns could be addressed directly with him.

87. Further, the Respondent through Ms Skeaping informed the Claimant's solicitor in the 4 August email that they were now able to offer Mr Awan the option of continuing in his original role covering the same area as before as that role had now become available again (p141).

88. It appeared to the Tribunal that as the Claimant had not raised any concerns about performing his role in terms of his shoulder or neck condition (the physical impairments that he relied on in this case) prior to the commencement of the sick leave for different reasons in April 2016 and the redundancy process, there was no good reason to conclude that Mr Awan could not have continued to perform that role on his return to health. His relevant sick absence remained throughout on grounds of stress.

89. The Tribunal did not consider that the Occupational Health report from Dr Baker excluded the Claimant taking up a TAS role. It simply raised adjustments that may have needed to be made. The Tribunal has referred to the period before the Claimant went off on sick leave as a comparison in terms of the need for adjustments in the TAS role and particularly in the same patch as before. As set out above also, the Claimant had considerable flexibility in terms of scheduling breaks for himself.

90. The Tribunal was satisfied that the Respondent had taken on board as of August 2016 that they had to consider the distance and length of time that the Claimant was required to drive in his role. Thus, as set out above, the Claimant was invited (in the 4 August email) to discuss his concerns with the Respondent so that they could be addressed directly. The Tribunal also noted that on previous occasions the Respondent had taken Occupational Health advice in terms of adjustments designed to assist the Claimant to perform his duties. Finally, the Tribunal also accepted the evidence from the Respondent's witnesses that the Claimant had a fair degree of

control over the way in which he structured his day such that he could reduce the impact on himself of needing to drive for long periods of time. He could take breaks before and after appointments as needed and he could schedule his own appointments. The Tribunal accepted the undisputed evidence that there were peak times during which the appointments needed to be made. However, given the number of appointments that the Claimant was actually making, the Tribunal found that there was no reason why he could not have structured his day in such a way that the performance of his duties did not adversely impact on his physical impairments.

91. The Claimant did not take up the invitation to discuss matters with the Respondent and his position remained that his employment terminated as of 20 July 2016, for redundancy and that he was entitled to the benefits set out in the displacement notice letter.

92. By letter dated 12 August 2016 Ms Dawn Plowman, Head of HR for the Respondent then wrote to the Claimant (pp148 – 149) to confirm once again the availability of the West Essex role which they considered was a suitable alternative; and that the start date of that role had been delayed because of the Claimant's ongoing sickness absence and their ongoing discussions; that yet another TAS role had become available which the Respondent was "happy to accommodate" the Claimant in. This was a TAS role in the Waltham Forest CCG. Ms Plowman, the author of that letter noted that that was in the area in which the Claimant currently lived and therefore involved even less driving for him.

93. In the letter of 12 August, Ms Plowman also reiterated to the Claimant that he was entitled to a 4-week trial period in the new role he chose and she proposed, his health permitting, that the trial period should commence on 22 August 2016 and end on 16 September 2016. She stated that in order to assess the Claimant's fitness to commence the trial of the new role, she had made an appointment with the Respondent's Occupational Health Department on 17 August 2016 at 11am in Luton. She said that she would also ask that the shoulder injury that the Claimant had referred to was assessed at the Occupational Health appointment and that Occupational Health should inform the Respondent of any adjustments they should make to facilitate his return to work.

94. She asked the Claimant to confirm his attendance at the appointment by contacting her by email by 16 August 2016. She also returned to the issue of the Claimant's shoulder condition and acknowledged that he had raised concerns about it. She therefore invited him to discuss the alternative roles with her in advance of accepting if he so wished and also to discuss whether any reasonable adjustments were necessary to support him. She indicated that if he wished to do this she would arrange a meeting at his earliest convenience. She concluded that paragraph by stating that it was important that the Respondent heard of the details of his concerns and also listened to his representations in respect of the various roles.

95. She concluded the letter by informing the Claimant that if he continued to believe that this was not a suitable alternative offer of employment, he should notify her of this by 18 August 2016. She then made a further offer of a meeting to discuss any concerns that he may have in more detail. She told him that she had provisionally held the date of Thursday 25 August at 11am open for that purpose.

96. The Claimant's stance in relation to his employment did not change after receiving that letter (pp155- 156).

97. By letter dated 19 August 2016 to the Claimant from Ms Leslie Bright, UK Employee Relations Specialist (pp157 – 158), the Claimant was informed that the Respondent noted that he had failed to attend the appointment and to take up the invitation in the letter just referred to from Dawn Plowman. The letter dated 12 August 2016 from Dawn Plowman had been sent to the Claimant via email as well as recorded delivery. The Respondent recorded that the email was read by the Claimant on 12 August 2016 and that he had signed to confirm receipt of a hard copy letter on 13 August 2016, but that he had subsequently failed to acknowledge or respond to the letter.

98. In the letter of 19 August 2016, the Respondent also specifically referred to the Claimant's failure to attend the Occupational Health appointment on 17 August 2016 which he had been told about. Also, Ms Bright referred to the fact that the Claimant had failed to advise Ms Plowman whether he wished to accept or decline the offer of the TAS role in West Essex. The Respondent informed the Claimant that in the light of his lack of response and engagement with the company he was required to attend a meeting on 25 August 2016 at 11am. He was told that the meeting was to be with Ms Clarke the Claimant's second line manager and Head of Regional Business and that the author of the letter would also be present in an advisory and note-taking capacity. The letter went on to make clear that the purpose of the proposed meeting on 25 August was to discuss the offer of suitable alternative employment and to understand details of any concerns the Claimant may have in relation to this. It also made clear that they would discuss any reasonable adjustments that were necessary to support the Claimant. The Claimant was also told that if he failed to attend the meeting, the Respondent would make a decision regarding his ongoing employment in his absence. The position was then summarised again in relation to offers of suitable alternative employment. They also made it clear to the Claimant that if they made the decision to terminate the Claimant's employment, he would forfeit any entitlement to either a statutory redundancy payment or the enhanced contractual redundancy payment because he would be deemed to have unreasonably refused a suitable alternative position with the company. The Respondent indicated however that he would be entitled to his outstanding pay in lieu of notice.

99. In the meantime, the Claimant's solicitor had written on 18 August 2016 to the Respondent's solicitor. Ms Skeaping replied by email to the Claimant's solicitor on Sunday, 21 August 2016. She reiterated the Respondent's position and set out what the Respondent considered to be the position in relation to suitable alternative

employment. She also stated in the letter that if the Claimant failed to engage in discussions by Thursday, 25 August 2016, the Respondent would assume that he had exited the business voluntarily as this seemed to be his position in correspondence.

100. The Claimant did not attend the meeting on 25 August 2016 nor indeed did he contact the Respondent about it.

101. The Respondent then wrote to the Claimant by letter dated 26 August 2016 (pp163-164). They advised the Claimant that he had received an overpayment of salary and bonus from the company on 25 August 2016. In essence, 25 August 2016 was the payday for August 2016. The Claimant had been paid his salary on that date as usual, with the sales bonus. The Respondent indicated that they considered that the Claimant's employment had ended during July 2016 therefore he should not have been paid for the month of August 2016. They also stated that the receipt of the sales bonus payment was in error as the Claimant was no longer employed when the bonus was payable in August 2016.

102. The Tribunal was satisfied that it was correct to say that the terms of the bonus required the employee to be in employment when it was payable, unless stated exceptions applied. One of these was if an employee had been made redundant. In that case, they were exceptionally entitled to receive the bonus.

103. The Claimant complied with the Respondent's request for reimbursement of the salary and bonus payments of just below £5,000.

104. The Tribunal then reviewed the issues against the findings of fact above.

105. The first question was whether the Claimant was a disabled person at the material time, which the Tribunal considered to be from the beginning of May 2016 through to the beginning of September 2016 – the time span of the discrimination allegations.

106. The Tribunal was satisfied on the basis of the report and advice from Dr Baker that the Claimant was a disabled person from around late June 2016 by reason of his "*musculo-skeletal problems"* (p135) and that the Respondent was aware of this at the time of the Claimant's 24 June 2016 appointment with Dr Baker.

107. The Tribunal next considered when the Claimant's employment ended. The Claimant's position was that this occurred on 20 July 2016.

108. In the light of our findings about the conversations between the Claimant and the Respondent's managers and the letter of 20 June 2016 read as a whole and in the context of the incorporated and supporting documents, the Tribunal considered that the employment did not come to an end on 20 July 2016.

109. In this context, the Tribunal also had to make findings about whether in the period from 20 June to 20 July 2016 the Respondent had offered the Claimant suitable alternative employment and also taking into account his disabled status and his continued sickness absence due to stress and later depression.

110. The Tribunal found in relation to the MSL post that the position was not a suitable alternative position for the Claimant because it was at a higher level and involved some different skills as compared to the Claimant's substantive post. The Claimant did not seek to argue that it was a suitable alternative within the context of a redundancy situation.

111. The Respondent emphasised the alternative position in Mid & West Essex although as a matter of record there was also an alternative position available in the Hertfordshire patch. During the June – July displacement timeframe, we had to take into account the information the Respondent had about the Claimant's shoulder and the impact of the Claimant's ability to do the work in the mid-Essex role. The Tribunal considered that there was no evidence to suggest that the Claimant could not undertake the TAS role in Mid & West Essex and that had he been certified fit to return to work or been in a position to return to work imminently, it was likely that there would have been discussions about adjustments to accommodate his physical Condition. However, the fact that adjustments might have been needed in order to enable for him to carry out the alternative role did not mean that the role on offer was not a suitable alternative. The Tribunal also took into account our findings above about the degree of flexibility that the Claimant had in terms of scheduling his day, such that he should have been able to make the necessary adjustments for his Condition.

112. Importantly the Claimant did not indicate at any stage prior to late July 2016, after the expiry of the displacement period, that he would not be taking up the position.

113. In all the circumstances, the Tribunal considered that the position was that the Claimant remained in employment pending his return to work to take up the suitable alternative position either on trial or on a permanent basis. He therefore was not dismissed on 20 July 2016.

114. The Tribunal further took into account in assessing the period after 20 July 2016, that the Respondent's managers and Lawyer had offered the roles to the Claimant and they invited him to discuss any desired adjustments.

115. The next question was then when the employment was terminated. After 20 July, the Claimant continued to assert that he had been dismissed for redundancy on 20 July and the Respondent continued to assert that the Claimant was still employed until 25 August 2016. The Respondent gave him the ultimatum of 25 August 2016 although different scenarios were put to him on their behalf. The first was in the letter directly to him from Leslie Bright in which she stated that the Respondent would make a decision as to the future employment of the Claimant on 25 August if he did not attend the meeting. The second was in the email from Ms Skeaping to the Claimant's

solicitor on 21 August 2016 in which she stated that if the Claimant failed to attend the meeting on 25 August, he would be treated as having voluntarily exited the Respondent.

116. In the event as the Tribunal set out above, the Claimant did not attend the meeting and the Respondent did not expressly write to the Claimant after 25 August to indicate whether they had indeed terminated his employment and if so for what reason or whether, as had been foreshadowed in Ms Skeaping's letter, the Respondent had treated the Claimant's non-attendance at the meeting as an indication that he had voluntarily exited the Respondent.

117. In the event, a third position was taken by the Respondent at this stage - which was that they decided to in effect accept the Claimant's assertion that he had been dismissed in July. It was somewhat concerning that the letter of 26 August from the Respondent did not specify the date in July when the Claimant's employment was said to have ended. The Tribunal did not think that the Respondent in the circumstances of this case could effectively backdate a termination as they apparently attempted to do in this letter.

118. The Tribunal considered that prior to 26 August the Claimant was not tendering his resignation but was indicating that he believed that the Respondent had dismissed him on 20 July. The Respondent in contrast asserted that the Claimant's employment was continuing. The letter of 26 August was the first occasion on which the Respondent indicated that they also considered that his employment was no longer ongoing. Thereafter there was no action taken by either party which was consistent with ongoing employment. In the circumstances, therefore the Tribunal considered that the employment terminated on 26 August 2016.

119. The Tribunal considered that there was no decision taken by the Respondent to dismiss the Claimant. The effect of the facts found was that certainly from late June 2016 onwards the Claimant failed to engage with the Respondent and from late July 2016 he declined several invitations to do so. He was then warned in a letter sent to him that he was at risk of having a decision made in his absence if he failed to turn up at the 25 August meeting, which could be a decision by the Respondent to terminate his employment. His solicitors were also advised by the Respondent's solicitor that the Respondent was at liberty to treat the Claimant's non-participation in the meeting of 25 August which was a culmination of the history of non-engagement already referred to, as an indication that he was voluntarily leaving the business. The Respondent then accepted the Claimant's persistent assertion made both directly and indirectly by solicitors acting on his behalf, that he was no longer employed by them and had not been since 20 July 2016. They notified the Claimant of this in the letter dated 26 August 2016 (pp163-164).

120. The effect of this therefore was that up to and including 25 August 2016 the Claimant remained an employee of the Respondent. He was therefore entitled to receive the **sales bonus** as he remained employed on the date on which payment was

made namely 25 August 2016. The sales bonus claim was brought as an unlawful deductions of wages complaint. We found that in the Claimant's favour.

121. Because of the way the Claimant's case was put, he had not made a claim for **unpaid salary** between 20 July and 25 August 2016. However, it appeared to the Tribunal that as we had found that he remained employed in that time frame, he was entitled to be reimbursed in relation to that period also, at the appropriate rate.

122. The Tribunal has not given judgment in respect of the specific sums due to the Claimant in this respect because it was not completely clear from the evidence that we heard what the exact figures were. The Tribunal was also unclear whether he was in receipt of full pay or of a reduced sick pay amount. The Tribunal considered that the parties are capable of agreeing the figures given our decision in principle. If they fail to do so we can determine this issue at a further, remedy hearing.

123. The Claimant also claimed **notice pay** on the basis that he had been wrongfully dismissed. Our conclusion above is that the Claimant was not dismissed by the Respondent. There was no basis for concluding that the Claimant had been constructively dismissed. On the contrary, in the run-up to the termination of the employment, the Respondent sought to persuade the Claimant to remain in its employment, acknowledging the need to discuss his concerns and to make adjustments to his role if required. The Tribunal did not find that the Respondent had acted unreasonably or improperly in relation to the redundancy process such that the Claimant would have been entitled to treat himself as constructively dismissed. He was therefore not entitled to notice pay.

124. The Tribunal noted that the Claimant was initially paid as part of the normal pay run for July and August 2016 although there were subsequently arrangements made for recouping funds from the Claimant which he complied with. The effect of our judgment is of the Claimant should receive normal or sick pay if that is lower or different until 25 August 2016 but no further pay for salary or notice.

125. The Tribunal also considered the Claimant's claim for a **statutory redundancy payment** under section 141 of the Employment Rights Act 1996. As the Claimant was not dismissed by reason of redundancy and indeed we concluded that he was not dismissed at all, the claim was not well founded and was dismissed.

126. The Claimant had made a claim alleging **victimisation** under the Equality Act 2010. However, this was withdrawn in submissions in acknowledgement that it had no reasonable prospects of success on the facts. The Tribunal therefore dismissed that complaint on withdrawal.

127. We next considered the **disability discrimination** complaints under section 15 of the 2010 Act.

128. The Claimant alleged that he had been treated less favourably for a reason arising in consequence of the disability when he was refused a redundancy payment (para 2(a)). The Tribunal considered that the reason why the Claimant was refused a redundancy payment was because he was not redundant, the Respondent having offered him suitable alternative employment both in the Essex post and also subsequently during his ongoing employment, the posts in Barnet and in Waltham Forest.

129. In relation to the PAC code, the Claimant was refused it by the Respondent when he requested it on 20 July 2016 because they considered, correctly as the Tribunal has determined, that the Claimant's employment was ongoing therefore he was not entitled to receive it at that point.

130. The Tribunal then considered what the position was thereafter. In his closing submissions Mr Johnston accepted in the context of withdrawing the victimisation claims that there was no evidence one way or another as to why the Claimant was not given the PAC code and that the suspicion was that an individual who had no way of knowing about the Claimant's allegations had made the decision. The Tribunal are also took into account the explanation given by the Respondent in the letter addressing the Claimant's grievance dated 23 September 2016 from Dawn Plowman in which she also indicated that the issuance of a PAC code on termination was a matter which was arranged at the discretion of the Human Resources department.

131. The likelihood on the evidence was that the PAC code was not given after 20 July up to 26 August 2016 because the Respondent was treating the Claimant as still employed in that time frame. A satisfactory explanation has been provided for why it was not given on 20 July. In the circumstances therefore, the complaint about the PAC code was not well founded and was dismissed.

132. As to the complaint about being charged are for the early termination costs in relation to the Claimant's company car, the Tribunal accepted the Respondent's explanation (at p183) that this was something which was typically recoverable. An exception was made in relation to a member of staff who was made redundant from the Respondent. As the Tribunal has found above that the Claimant was not made redundant by the Respondent it followed that their explanation was not a matter which arose from the Claimant's disability in that we accepted the Claimant failed to consider suitable alternatives.

133. In the circumstances therefore, the section 15 complaint about the Respondent recouping the early termination costs of the company car was not well founded and was dismissed.

134. For the avoidance of doubt the Claimant confirmed that that there was no claim being made before the Tribunal for the full enhanced contractual redundancy pay as this matter fell outside the jurisdictional limits of the Employment Tribunal.

135. Also, consistent with the Claimant's position in relation to his assertion that he had been dismissed by reason of redundancy and that he was entitled to the enhanced redundancy benefits, there was no complaint of unfair dismissal under the 1996 Act.

Closing Submissions

136. In the course of these reasons the Tribunal has referred to the submissions made by each party on the respective points. The parties' representatives each addressed the Tribunal orally at the end of the evidence. The Claimant's representative relied on two cases namely *Bird v Stoke-On-Trent Primary Care Trust* UK EAT/0074/11 and the case of *Knott v the Southampton and South West Hampshire Health Authority* [1991] ICR 480. The Respondent did not rely on any specific authorities.

Employment Judge C Hyde

15 November 2017