



EMPLOYMENT TRIBUNALS

Claimant: Ms F Khan

Respondent: The WKCIC Group

Heard at: London Central Employment Tribunal

On: 3, 4, 7, 8 and 9 October 2019 and (in chambers) on 10 and 11 October 2019

Before: Employment Judge Quill; Mr C Williams; Ms F Bond

Appearances

For the claimant: In person

For the respondent: Ms Murphy, counsel

RESERVED JUDGMENT

- (1) The claim of unfair dismissal fails.
- (2) The claim of unauthorised deduction fails.
- (3) The claim of direct discrimination because of race fails.
- (4) The claim of direct discrimination because of religion fails.
- (5) The claim of direct discrimination because of sex fails.
- (6) The claim of direct discrimination because of disability fails.
- (7) The claim of victimisation fails.

REASONS

Introduction

1. The Claimant is a former employee of the respondent.

The Claims and Issues

2. The Claimant brought a claim by claim form issued 30 April 2018, following early conciliation which lasted from 5 March to 5 April 2018. At a preliminary hearing before Employment Judge Elliott on 22 August 2018, the claims were clarified as being direct discrimination because of sex, race, disability, age and religion, and also unlawful deductions from wages. A detailed list of issues was produced.
3. At a preliminary hearing before Employment Judge Brown on 13 June 2019, the Claimant amended her claim to add a further allegation of direct discrimination due to disability, and also unfair dismissal and victimisation. Additions to the list of issues were produced.
4. The updated list of issues, incorporating the additional items, is as follows.

The List of Issues

5. Time

- 5.1 Were all or any of the claimant's complaints presented within the time limit set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")?
- 5.2 Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis and when the treatment complained about occurred (the discrimination claims).
- 5.3 Given the date the claim form was presented and the dates of early conciliation, there are complaints which may potentially be out of time, so that the tribunal may not have jurisdiction to deal with it.

6. Disability

- 6.1 Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): (i) sciatica and (ii) stress?

7. **Equality Act, section 13: direct discrimination because of sex, race, disability, age and religion**

- The claimant describes her racial group as Pakistani.
- The claimant describes her religious group as Muslim.
- The claimant relies on the age group of over 50.

- The claimant is female.
- The claimant relies on the conditions of sciatica and stress as her disabilities.

7.1 Has the respondent subjected the claimant to the following treatment?

Because of race and/or disability

- a. Ms Jane Jennings, Interim HR Business Partner, delaying the grievance process.
- b. Failing to respond to the claimant's expression of interest for a teaching position.
- c. Ms Jennings referring to the claimant as not being fit to return to an alternative position.
- d. Failing to pay the correct amount in wages.
- e. Ms Jane Jennings stating "threatfully" that the claimant would receive nil pay.
- f. Ms Bronagh Lintott and Mr Rene Garcia planned with management (Ms Laura Edwards and Ms Coral Romain) and contributed to the change of base rooms allotted to 4 or 5 highly challenging students. The claimant considered this isolating for her and that she was being set up to fail for the year in advance.
- g. Placing or removing sessions and activities within new timesheets to deprive or exclude the claimant from participation and allegedly "sabotaging" her career progression.

Because of age

- h. The claimant relies on an alleged age-related joke made deliberately and within her earshot between Mr Rene Garcia and his wife Ms Bronagh Lintott about the claimant being pregnant, Ms Lintott replying: "*she can't be, she's too old!*" and then "chuckled". The approximate date is the week commencing Monday 28 August 2017.

Because of sex and/or religion

- i. In August 2017 Ms Coral Romain, the Principal of Alexandra College and her assistant (female, name not known) "interrogating" the claimant on her decision to decline to do personal care for males over the age of 12 years. Ms Romain allegedly stated that she came from a Jewish background and that in her religion Jewish women would have no problem in doing personal care for men and why the claimant as a Muslim was finding it a problem.

Religious discrimination only

- j. The grievance outcome by Mr Geoff Mitchell (grievance officer) and Ms Claire Collins (appeal officer) expecting the claimant to perform personal care for males over the age of 12 and females upon her return to work.

Sex discrimination only

- k. Being expected to accompany men into male toilets when supporting students on outings. The claimant's case is that the same is not expected from male staff who she says are not expected to accompany females.

Because of race and/or religion

- i. Being declined for promotion and training into a teaching role despite named comparators being promoted with lesser experience and without teaching qualifications. Ms B Lintott, Mr R Garcia, Ms A Arsalan, Chris (last name not known) and Ms L Edwards.
 - m. The way in which the investigation has been carried out by Mr Paul Nee, Interim Head of LLDD and High Needs. Ms Lintott is a named comparator as the claimant said she was excused questioning because she was pregnant and her partner Mr Rene Garcia was dealt with “in a lighter way” meaning that he should have been disciplined and dismissed.
 - n. Not being kept up-to-date by Ms Jane Jennings in a timely manner.
 - o. Ms Claire Collins conducting the appeal hearing in an unfair manner being insensitive to the claimant’s stress and impact on her health.
 - p. The appeal outcome of 16 March 2018 blocking the claimant’s career progression.
 - q. Ignoring OH recommendations for a return to work meeting, Mr Geoff Mitchell, Deputy Group Director HR & OD, Ms Claire Collins, Mr Paul Nee, Ms Janet Lancaster and Ms Jane Jennings insisting on a return to work meeting at Alexandra College with Mr Nee. This is relied upon as race discrimination.
 - r. Failing to pay full wages in contravention of the respondent’s own policies.
- 7.2 Was that treatment “*less favourable treatment*”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on the comparators stated above and/or hypothetical comparators.
- 7.3 If so, was this because of the protected characteristic(s) relied upon in each case?
- 7.4 If the matters relied upon as age discrimination are proven, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?
8. Unlawful deductions from wages
- 8.1 Did the respondent make unlawful deductions from the claimant’s wages contrary to section 13 ERA by failing to pay her full pay during the whole of her sickness absence. The claimant says that the respondent delayed investigation and her grievance process.
9. Amended Claim
- 9.1 Did the Respondent dismiss the Claimant unfairly on 16 November 2018?
- 9.2 Did the respondent subject the Claimant to direct disability discrimination because of the Claimant’s sciatica and stress conditions by dismissing?
- 9.3 Did the Respondent victimise the claimant by dismissing her because of the claimant’s protected act of bringing the current claim?

The Evidence

10. The tribunal had a hearing bundle of around 900 pages.
11. We had two written statements (as well as a third document which was less than a page) from the Claimant which were in a slightly unusual format in that they consisted largely of extracts from other documents which were copied and pasted together with some additional comments from the Claimant. The Claimant gave oral evidence and was cross-examined.
12. The Respondent called 5 witnesses: Jane Jennings (HR Business Partner); Geoff Mitchell (Deputy Group Director, Human Resources and Organisational Development); Amanda Whelan, (Director for Health, Foundation Learning and Learners with Disabilities); Pau Nee (Head of Learners with Learning Disabilities) and Claire Collins (Group Director of Human Resources and Organisational Development). There were written statements from each and each attended and was cross-examined.

The findings of fact

13. The claimant became an employee of the respondent because of a TUPE transfer on 1 September 2017. Her place of work was Alexandra College. The claimant had continuity of employment commencing from 29 June 2015. The claimant was employed as a community learning facilitator (CLF). The Claimant was born in late 1958, meaning that she was 58 at the time of the TUPE transfer.
14. Prior to the TUPE transfer her employer had been Macintyre. Macintyre lost a contract with London Borough of Camden and as a result, the respondent took over the running of Alexandra College.
15. At Alexandra College, Macintyre provided educational services to students, including students with special needs. The duties of a CLF included providing learning programmes to learners with severe behavioural, emotional and social difficulties, and/or autistic spectrum disorders and/or communication and interaction difficulties.
16. The CLFs at Macintyre reported to program coordinators ("PCOs"). A classroom session was typically attended by several learners and was under the control of one or more PCOs. CLFs were also present to provide support to the learners and to assist the PCOs. PCOs also had some non-teaching duties. Some of the time, when a PCO was attending to those other duties, the CLFs were left in charge of the classroom session.
17. In principle, the number of staff allocated to a particular classroom session would be dictated by the needs of the particular students attending that session. Some of the time, if there was a shortage of staff, it was necessary to rearrange the students and/or the staff between the groups in order to ensure that each classroom session had the correct number of staff (or as close to that number as possible) for that

particular group of students.

18. In addition to classroom work, the CLFs had to provide personal care to the learners. From time to time, but not frequently, the learners and staff went on a trip away from the Alexandra College site and the CLFs then also had to provide personal care for the learners during such trips.
19. When the TUPE transfer took place all of the community learning facilitators had a change of job title to teaching assistant. There was no change to their duties or to their rates of pay and no other change to their terms and conditions.

Events while the Claimant was employed by Macintyre.

20. The Claimant had a supervision meeting with the then Principal of Alexandra College, Sean Cannon, in September 2016. A written record of this meeting was produced. Amongst various other matters discussed in the supervision record:
 - 20.1 under the printed pro forma heading "learning/training identified to complete," there was the handwritten comment "to progress through to PCO standard - more of a long-term goal";
 - 20.2 In the next column along, under the printed text "date agreed to attend or complete the learning identified i.e. e-learning, read a book, et cetera," there was the handwritten entry "to start by September 2017 if possible";
 - 20.3 On the same row, in the final column, under the printed heading, "How will this learning be disseminated to the wider team? Will you be observed in practice?" was the handwritten entry "would be disseminated through the lessons."
21. Both the claimant and Mr Cannon signed this document. Mr Cannon was no longer the principal by the time of the TUPE transfer. By the time of the TUPE transfer, the principal of Alexandra College was Ms Coral Romain.
22. On 24 October 2016, Rosie Maxwell, a human resources adviser for Macintyre, wrote to Mr Cannon to ask him how he had previously handled an issue with somebody who did not wish to carry out personal care duties. Mr Cannon replied on 26 October 2016 to say that there were a couple of members of staff who would not work with male learners when it came to personal care and he said that the solution for that was to put those members of staff with females. Although the Claimant is not mentioned by name, we are satisfied that she was one of the employees to whom Mr Cannon was referring.
23. At Macintyre, the staff did not generally have specifically allocated iPads. Rather

iPads were shared communally on a first come, first served basis. The claimant tended to use the same iPad all the time, and Macintyre allowed this to continue. In October 2016, the claimant informed Macintyre that one of the other staff members had taken the iPad which she usually used, and onto which she had stored some work, which she had not saved elsewhere. Macintyre asked the other employee to allow the claimant to have access to the iPad.

24. Starting approximately 3 March 2017, and continuing until approximately 30 June 2017, the claimant was on medical suspension from Macintyre. The claimant had not been signed off by her own GP or declared herself to be unfit for work. Macintyre had believed it was necessary to place her on medical suspension due to comments that she had made in a meeting which Macintyre had interpreted as indicating that she was feeling as if she was at risk of a heart attack.
25. An occupational health physician, appointed by Macintyre, produced a report dated 11 June 2017, which was based on a review of information from the claimant's GP. The report stated:
 - 25.1 The claimant had no significant cardiac risk factors.
 - 25.2 There was mention of sciatica in GP records from September 2016.
 - 25.3 The GP had not documented any allergies but had noted that the claimant had told her GP that she was allergic to eggs.
 - 25.4 The claimant had been given medication for asthma in 2014 but had not had repeat prescriptions for those inhalers.
26. The report indicated that the occupational health physician did not have enough information to comment on whether sciatica was or was not likely to fall under the classification of disability as per the Equality Act 2010. It noted that asthma would be likely to meet the statutory definition.
27. The report stated that the information provided by the claimant's GP did not suggest any reason as to why the claimant should not be regarded as medically fit for the role of community learning facilitator, but commented that a face-to-face consultation with an occupational health physician to explore in more detail the claimant's health issues, as reported by the claimant, might be advisable. The referral to OH had stated that the claimant had reported having problems with lifting as part of personal care. The occupational health physician noted that the claimant was not receiving treatment for sciatica at present, as far as the GP notes revealed.
28. On receipt of the occupational health advice, Coral Romain wrote to the claimant, on 30 June 2017, to state that the medical suspension was lifted with immediate effect and fixing a return to work meeting for 5 July 2017, ahead of a potential return to work for the claimant. The letter also mentioned that the claimant had raised

concerns about other members of staff, and that Ms Romain proposed to discuss those informally with her at the return to work meeting. In due course, the meeting went ahead on 20 July 2017.

29. The return to work meeting was to discuss amongst other things, whether the claimant was medically fit to do the personal care that was required as part of her role. Prior to the meeting, Ms Romain received HR advice which, amongst other things, suggested that the claimant be reminded that personal care was part of her role, and if the claimant was unable to carry out any duties, that Ms Romain should explore the reasons and ask the Claimant what other support Macintyre could put in place for her.
30. The 20 July meeting was attended by the Claimant, her union rep, and Ms Romain. The Claimant made an audio recording during this meeting. The claimant's evidence to the tribunal was that she had the permission of those present to make the recording; neither Ms Romain nor the union rep gave evidence. The Claimant stated that the audio recording which she had provided to the respondent and to the tribunal was the entirety of the recording made during that meeting.
31. The full transcript of what was disclosed was:

Coral: You know I'm Jewish and very similar, my understanding is about boundaries, and indeed you know I have researched this and it is considered to be a blessing, a blessed thing to support a young person whose specific needs with regards... blessed ...

Claimant: Well, I feel blessed when I'm changing women but I would also like it respected that you know males of a certain age, not above a certain age, those younger than 12, then I would be able to support them but ...

Claimant's union rep: Sorry, can I ask why you are raising this now? This isn't the issue. It concerns [the claimant's] return to work.

32. On the face of this transcript, there is nothing which would explain why the claimant started recording immediately prior to Ms Romain's remark and nothing to explain why the claimant would cease recording immediately after her union rep's remark. The Claimant's account was that she had a feeling, based on years of experience, that Ms Romain was about to say something discriminatory, and that she had no need to continue with the recording after her union rep had intervened.
33. The claimant also provided some other audio recordings.
 - 33.1 She provided 5 separate audio recordings from one meeting, attended herself and Carly Murray. The claimant's evidence was that each of these 5 recordings was complete and unedited and they were the only recordings of the meeting that she had made. In other words, according to the claimant

she had not made one long continuous recording from which she had taken 5 extracts. Rather, she had started to record 5 times and had ceased to record 5 times during the meeting. We think this is implausible, and on the balance of probabilities, it is our opinion that the claimant recorded the full meeting (or at least a large portion of it) and took 5 extracts which she thought supported her case and for one reason or another, decided to withhold the recording of the remainder of the meeting.

- 33.2 The claimant also provided two separate recordings which she said were of her last day at work (4 September 2017). Each of these two recordings was very short and there was no means of verifying the identities of the people (other than the claimant) speaking on the recordings. In neither of these short conversations is it clear what the subject matter was or what was said immediately before or each immediately after the short extracts provided by the claimant. Nor is there any means of knowing why the Claimant would have started to record immediately before each (very) short exchange or why she stopped immediately afterwards. The Claimant's account was that she had intended to make a continuous recording, but had had to stop to make/receive a phone call. However, it seems to us that each short extract is from the middle of a conversation, not the start or the end, or the entirety.
34. Neither the recordings made of Carly Murray, nor the short extracts from 4 September 2017 contained information that we believed was relevant to the issues in dispute in these proceedings. However, taken as a whole, we found it very improbable that the Claimant recorded only the set of recordings that she provided to the tribunal and the respondent and nothing else. Our finding, in relation to the 20 July 2017 meeting, is that, on the balance of probabilities, the claimant recorded more of the meeting than she has disclosed, and she provided just one short extract only because she believed that particular extract assisted her, and that it assisted her more than if that extract had been put in context of the overall discussion.
35. The claimant did not submit a grievance about the contents of the meeting immediately following the meeting on 20 July 2017. The Claimant returned to work.
36. On 20 August 2017, the claimant wrote to the principal, and also Natalie MacPherson, with a copy to the local authority. Stating that she wished to raise a grievance against two employees, namely Bronagh Lintott and Rene Garcia. She alleged that these two individuals had harassed her, on 16 August and 17 August. She alleged that there had been bullying on previous occasions, and that, on this occasion, they had bullied her into doing a risk assessment for a particular student in circumstances in which the claimant felt unable to do a risk assessment due to her having been absent during her medical suspension.

Events just before and just after the TUPE transfer

37. Prior to the TUPE transfer, the CLFs at Macintyre reported to PCOs. As part of the consultation process, with a view to implementing a new structure, the respondent proposed that it would be deleting the PCO posts. It also proposed to delete the posts of principal of the college and catering instructor respectively.
38. New posts were proposed. These included a Head of Learners with Learning Disabilities and High Needs, a Course Manager, and some teacher roles. The teacher roles were intended to replace the former PCO roles, but without replicating the non-teaching duties of the PCO posts. In the Respondent's opinion, the PCO model was flawed as it did not allow the employee to focus sufficiently on leading classroom sessions and, in the Respondent's opinion, that was part of the reason that Macintyre had lost its contract. In the first instance, these newly created roles were ringfenced to those employees whose roles in the old structure were to be deleted. People were not automatically slotted in, but rather had to express interest and go through a selection process to demonstrate that they had the qualifications required for the new roles.
39. On 9 August 2017, the claimant sent an email to Jane Jennings, who was, at the time, HR business partner for the respondent. The email was entitled "expression of interest" and the claimant said that she was expressing interest in the position of teacher. She described her past experience and qualifications. In the email, the claimant stated that she worked well under pressure and that she thrived in an atmosphere of challenge, creativity and variety. She said she was able to juggle situations whilst at the same time remaining focused on achieving goals and striving to perform to the best of her ability. She said she was extremely flexible and able to quickly adapt to changing needs. She said that she had qualified in graphic design with a two-year national diploma and two-year Higher National Diploma. She said she had teaching experience including teaching adults art, graphic design and English. In addition, she referred to having a City and Guilds Level 3 teaching qualification. She referred to the discussion that she had had with the previous principal, Sean Cannon, and to the signed supervision record described above.
40. On 15 August 2017, Ms Jennings replied to the claimant to say that she acknowledged receipt of the claimant's expression of interest and CV, but that at that time the respondent was not planning to open the roles up to all staff. Ms Jennings stated that the claimant's CV would be put forward if and when the roles were opened to others.
41. In August 2017, in preparation for the forthcoming academic year (and the forthcoming TUPE transfer), staff at Macintyre made plans for which learners would have which rooms as their "base" rooms, and drew up timetables in relation to which sessions would be offered by Alexandra College, and which staff would be allocated to those sessions and those learners. It was necessary to draw up such

plans in advance so as to assess the resources that were likely to be necessary for the anticipated students; however, it was always known to Macintyre and the Respondent that these provisional plans had to be sufficiently flexible in order to cope with students and/or staff members coming and going, or being unexpectedly absent.

42. Along with the principal, and other senior staff responsible for making the plans for the new academic year, Macintyre's Resource Allocation Coordinator and Senior Care and Health Facilitator had responsibility for planning parts of the curriculum, including ensuring that equipment and resources were in place.
43. Mr Rene Garcia and Ms Bronagh Lintott were Macintyre employees who were married to each other. The claimant alleges that on some date between 28 August and 4 September 2017, there was a conversation between Mr Garcia and Ms Lintott in her earshot. She says that Mr Garcia stated that the Claimant might be pregnant, and Ms Lintott replied: "*she can't be, she's too old!*" and then chuckled.
 - 43.1 We have not been satisfied, on the balance of probabilities, that Ms Lintott did make the alleged remark;
 - 43.2 The allegation is not mentioned in the Claimant's 5 September complaint (which refers to Mr Garcia's alleged remark, but not the alleged reply from Ms Lintott);
 - 43.3 The allegation was not mentioned when the Claimant met Ms Jennings on 9 November 2017 (in which the Claimant made allegations about the treatment that she received from Mr Garcia and Ms Lintott but did not refer to this remark);
 - 43.4 The allegation was not mentioned when the Claimant met Mr Mitchell on 13 December 2017;
 - 43.5 The allegation was not mentioned in the Claimant's written response (dated 2 February 2018) to Paul Nee's questions about the occasion on which Mr Garcia had (allegedly) stated that the Claimant was pregnant. Indeed, in that document, the Claimant writes that "knowing my full age, character and personal beliefs" Mr Garcia and Ms Lintott knew "that it was highly unlikely that I was pregnant". If the Claimant believed - at the time that she wrote this 2 February 2018 response - that Ms Lintott had said "*she can't be, she's too old!*" then there was every reason for the Claimant to specifically mention that in this document, rather than simply ask Mr Nee to infer that Mr Garcia and/or Ms Lintott did not genuinely believe that she was pregnant.
 - 43.6 The Claimant did not mention this alleged remark to Mr Nee and Ms Lancaster when she met them to discuss her grievance on 15 March 2018.

- 43.7 The Claimant did not mention this alleged remark when submitting her written appeal against the grievance findings.
44. On 31 August 2017, the claimant wrote again to Jane Jennings in relation to her expression of interest. In this email, the claimant said that people were being put into teaching positions and she alleged that those people were being favoured over her, despite - according to the claimant - holding no teaching qualifications, and/or in some cases being external people. She said this was "wholly unfair and discriminatory". The people mentioned in the email were:
- 44.1 Bronagh Lintott
 - 44.2 Rene Garcia
 - 44.3 Lesley Coward
 - 44.4 Annisa Arslan
 - 44.5 Laura Edwards
 - 44.6 Remiya Badru
 - 44.7 Franka Kalvelage
 - 44.8 external staff, "Aaron, James"
 - 44.9 A person named Melanie whose surname was unknown to the claimant.
45. On Tuesday, 5 September 2017, the claimant sent an email to Ms Romain which had the subject line "harassment". In the email, amongst other things, she referred to a dispute between herself and Rene Garcia. The Claimant said that Mr Garcia had allocated a particular student to a particular room, and that he had placed photographs of the student in that room. The claimant believed that this was inappropriate and had taken those photographs down from the wall. According to the claimant, Mr Garcia had threatened to check the CCTV with a view to possibly using it as evidence against the claimant. The claimant accused him of bullying. She also made the following allegation. "He has sexually harassed me by suggesting that I was pregnant as a dirty joke he shared with Bronagh Lintott, of which they were laughing in the staff kitchen." The claimant was referring to events which she said had happened the previous day, 4 September. The claimant never returned to work after this.
46. The claimant's email was sent at 1508 and receipt was acknowledged by Ms Romain at 1526, she stated that she was going to look into the concerns as soon as possible.

Events from 5 September 2017 until the end of 2017

47. In September 2017, Ms Romain left her employment with the Respondent on negotiated terms as a result of the respondent's decision to delete the post of principal. No progress was made in investigating the matters raised by the claimant's emails of 20 August and 5 September 2017 prior to Ms Romain's departure from the respondent.
48. Mr Chris Egwuma was a PCO at Macintyre who TUPE transferred to the Respondent. He was, at the point of transfer, more than halfway through his two year training course to become a fully qualified teacher. He had several years' experience of teaching. He applied for the post of Lead Behavioural Teacher in the respondent's new structure. He was successful and was appointed in October 2017. He became fully qualified in July 2018.
49. Ms Laura Edwards was a PCO at Macintyre who TUPE transferred to the Respondent. She was appointed as Course Manager in the Respondent's new structure in October 2017.
50. Mr Rene Garcia, Ms Bronagh Lintott and Ms Annissa Arslan TUPE transferred to the Respondent from Macintyre and their roles remained the same before and after the transfer. Their roles were, respectively: Resource Allocation Coordinator; Senior Care and Health Facilitator; Senior Mobility Facilitator.
51. The claimant was assisted by two union representatives. These were Nicola Eyidah and Adam Hartman. On Thursday, 12 October 2017, Mr Hartman and Ms Eyidah met Jane Jennings. The claimant was signed off sick by her GP, but her union representatives suggested to Ms Jennings that a referral to occupational health would not be appropriate at this time. The union representatives wanted the respondent to follow procedures for a formal investigation into the claimant's complaint, rather than any investigation of medical issues. The union representatives asked Ms Jennings to arrange an informal meeting with the claimant to discuss her concerns.
52. By email dated 20 October 2017, Ms Jennings stated that she believed that an occupational health referral might be useful to support the claimant back into the workplace and to provide the respondent with guidance on her return and to suggest any adjustments that the respondent might Need to consider. Ms Jennings said that the investigation of the claimant's complaints could continue in parallel with the occupational health referral but asked for clarification of whether the Claimant wanted to have an informal meeting before the formal investigation started.
53. The claimant, and all the other former Macintyre employees, having TUPE transferred to the respondent were still on Macintyre's terms and conditions. In relation to sick pay, the Claimant's contractual entitlement was to one month's basic salary and one month's half salary. This was because the claimant's length of

service at the time was more than 2 years and less than 3 years.

54. The claimant had been off work, with her last day being 4 September 2017. Therefore, her entitlement to full pay ran out on 4 October 2017, and her entitlement to half pay was from 5 October to 4 November 2017. She was entitled to no contractual sick pay from 5 November 2017 onwards.
55. By letter dated 1 November 2017, Ms Jennings wrote to the claimant stating the sick pay entitlement and informing the claimant that she had been overpaid for the month of October. The letter said that the repayment terms for the overpayment would be discussed once the claimant had returned to work. It also informed the claimant of the respondent's employee assistance programme and supplied the telephone number for the 24-hour confidential helpline.
56. On 8 November 2017, Mr Hartman wrote to Ms Jennings to argue that a referral to occupational health was not necessary at that time, and that the claimant should be placed on full pay until her complaint was investigated.
57. The claimant and Ms Jennings and Ms Eyidah met on 9 November 2017. In the meeting, the claimant said that she had several concerns, including the fact that she did not agree with the timetable she had been given for the academic year starting September 2017. She believed she was being set up to fail. She informed Ms Jennings that she had taken down the pictures of the student from the room and she said that she thought that was appropriate. She said that Mr Garcia had sworn at her and said he was going to check the CCTV. She complained in relation to her pay and her tax codes following the TUPE transfer. She said that she did not feel the transfer process had been handled well, and that Mr Garcia and Ms Lintott had been bullying and harassing her. She said she was receiving advice from her GP and therefore it was not necessary to have an appointment with occupational health.
58. The notes of the meeting were emailed to the claimant on 15 November 2017. On 16 November 2017, the claimant replied, suggesting some additions to the notes and indicating that she believed that the pay query was an important one and that the stoppage of her wages was stressful. The claimant asked for the notes to be amended as the claimant said that she had not specifically been asked whether she could work at an alternative location in in a different job. The claimant stated, "I would welcome automatic promotion to the position as previously promised and that would give me greater opportunity to work across the college". The alleged promise was the supervision record of September 2016.
59. On 17 November 2017, Ms Eyidah also emailed Ms Jennings and stated that the claimant had concerns for her personal health and safety and did not want to return to an unsafe environment, but the claimant would consider working in an alternative position, and/or location. The email stated that the claimant would like to be developed into a more senior role.

60. Ms Jennings doublechecked with human resources at Macintyre as to whether there was potentially any entitlement to full pay, under any of Macintyre's policies (and specifically the bullying and harassment policy), if an employee was on sick leave. The reply was that there was no such provision in Macintyre's policies. The reply added: "if someone is injured as a result of an incident at work, sometimes they remain on full pay, but this is not in all cases or automatic; it is at the discretion of the Director on a case by case basis."
61. By around November 2017, the respondent had completed the exercise of deciding whether any former Macintyre employees in posts which had been deleted from the structure would be appointed to the new teacher vacancies. Some teacher posts at Alexandra Colleges remained vacant. The claimant was not offered automatic appointment to one of these posts. This was because the Respondent's processes for filling vacancies required competitive recruitment. The teacher posts were advertised to the public and appointments were made in due course. On or around 12 October 2017, Paul Nee, the Head of Learners with Learning Disabilities received claimant's 9 August expression of interest from Ms Jennings (as per Ms Jennings 15 August email to the Claimant). He decided not to shortlist the claimant, because – in his opinion - she lacked the qualifications and experience that the Respondent was seeking. No communication was sent by the respondent at the time to say that she had been considered and she was not shortlisted. Mr Nee sent no letter or email because the Respondent's processes were that no specific response was sent to unsuccessful applicants who were not shortlisted, though unsuccessful applicants could be given feedback if they requested it. He did not think it necessary to adopt a different process for the Claimant.
62. On 27 November 2017, the claimant sent an email to Erica Shannon Turner, interim head of the respondent's HR department, to complain about the delays in investigating her grievance up to that point. The claimant's grievance complaint stated that:
- 62.1 Ms Jennings had delayed meeting the claimant and her union reps
 - 62.2 Ms Jennings had failed to keep the claimant up to date.
 - 62.3 There been a shortfall in the claimant's wages due to tax code issues.
 - 62.4 Ms Jennings had been insensitive in her dealings with the claimant.
 - 62.5 There had been a further delay since 9 November, and Ms Jennings had not communicated what opportunities might exist towards the claimant's development of her career.

Outcome of 27 November Grievance and the Appeal Against That Outcome

63. Geoff Mitchell, Deputy group director of HR and OD, was appointed to respond. He met the claimant and Mr Hartman on 13 December 2017 to discuss matters. He issued his outcome letter dated 19 January 2018. In his letter, Mr Mitchell:
- 63.1 Commented on the pay issue thoroughly and noted that what the claimant had been told about her contractual entitlement to sick pay was correct.
 - 63.2 Explained the difference between the claimant's medical suspension from Macintyre (for which she had paid in full) and the current situation (which was that the claimant was absent due to sickness).
 - 63.3 Stated that evidence had been sought from Macintyre about whether sick pay was ever paid in full on a discretionary basis, and that he had been told it would be done only if the absence was caused by an injury at work, and it would be discretionary, not obligatory.
 - 63.4 Stated that he had investigated whether the respondent itself ever extended sick pay beyond the contractual entitlement, and that his investigation had revealed that, in the previous 18 years, only one extension of sick pay had been agreed, and that was to an employee who was terminally ill.
 - 63.5 Declined to extend the claimant's sick pay, but "as a gesture of goodwill", agreed to waive the recovery of the difference between full and half rate for the period 5th to 31 October 2017, meaning that Claimant was not required to repay anything.
 - 63.6 Rejected any allegation that the tax code problem was caused by the respondent, and noted that the respondent was legally obliged to apply the tax codes as notified by HMRC.
 - 63.7 Reported that he had spoken to Paul Nee in relation to career progression, and that Paul Nee had told him that the claimant was not suitable for the role of teacher within the new structure because she did not have the relevant qualifications.
 - 63.8 Noted the Claimant's allegation that Jane Jennings had given preferential treatment given to other employees: Ms Lintott and Ms Coward. He stated that Ms Coward had left the organisation on the grounds of redundancy because her post of catering instructor/tutor had been deleted. He also stated that Ms Lintott was a Senior Care and Health Facilitator and therefore not in the same post as the claimant. Ms Lintott was also on maternity leave. He stated that the evidence did not support the claimant's allegation that she been treated differently to others in the same position as her.

- 63.9 Said that he wanted to remove any obstacles to the Claimant's return to work as soon as possible. He wanted to progress the claimant's referral to occupational health. He assured the claimant that this was standard practice for the respondent and that the claimant should not feel unsettled by this action. He said that the referral would enable the respondent to consider how best to support the claimant upon her return to work, and that the appointment was an opportunity for the claimant to update the independent occupational health advisor about the claimant's health and to mention any adjustments that she thought should be put in place for her return to work (including phased return to work, for example).
- 63.10 Stated that the claimant's allegations of bullying and harassment would be investigated separately as soon as possible by a senior manager.
64. By email dated 25 January 2018, the claimant exercised her right of appeal against Mr Mitchell's grievance outcome. The appeal:
- 64.1 Said that the delay in investigating her grievance had been unacceptable and she did not accept Mr Mitchell's reasons as given, and she said that her health and well-being were affected.
- 64.2 Again requested that she be paid in full during her absence.
- 64.3 Again asserted that the 20 September 2016 supervision record (signed by Sean Cannon) should be regarded as a commitment for the claimant to progress from CLF to PCO.
- 64.4 Argued that she did have the necessary qualifications for the position of teacher and referred back to her previous email to Ms Jennings which set out those qualifications. She alleged that, prior to the TUPE transfer CLFs had progressed to PCO on the basis of qualifications similar to hers, and in particular, based on a City & Guilds level 3 qualification.
65. The Claimant's appeal against Mr Mitchell's outcome was dealt with by Claire Collins, the Respondent's Group Director of Human Resources and Organisational Development. A hearing date was set for Friday 2 March 2018. The claimant did not receive the letter notifying her of the appeal date and therefore the appeal was rearranged for Monday, 12 March 2018.
66. By outcome letter dated 15 March 2018, Ms Collins stated that she did not uphold the appeal, and she gave her detailed reasons for that decision. She concluded her letter by stating that she would ask the HR team to arrange for the claimant to attend an appointment with occupational health with the aim of obtaining independent medical advice to identify what support, if any, the respondent could provide to facilitate the claimant's return to work (in her current post or an alternative post). Ms Collins noted that the claimant had told her that if she had to attend

occupational health then it would be under duress. Ms Collins said that the respondent had mechanisms in place specifically designed to support and address the health issues raised by the claimant, and that there was therefore a requirement for the claimant to engage in the process.

66.1 In relation to the complaint about going onto half pay and then nil pay, Ms Collins said that that Ms Jennings and the respondent had acted appropriately. She noted that Mr Mitchell had agreed to waive the overpayment.

66.2 She acknowledged that there had been a delay in investigating the complaints of bullying and harassment, but noted that this was now taking place.

66.3 She agreed with Mr Mitchell's opinion that the supervision record dated 20 September 2016 meant that progressing to the PCO standard was an aspiration and a long-term goal, and it was not a guarantee of a promotion with effect from September 2017 (or at all).

67. Ms Collins letter also addressed the list - supplied by the claimant in her email of 31 August 2017 - of people who had allegedly been treated more favourably. The letter addressed the posts which the people had held, none of which matched the Claimant's CLF post, and concluded that the positions were not comparable.

67.1 Ms Lintott had TUPE transferred as a Senior Care and Health Facilitator.

67.2 Mr Garcia had TUPE transferred as a Senior Mobility Facilitator.

67.3 Ms Coward had been Catering Instructor and was no longer employed by the respondent.

67.4 Ms Arslan had TUPE transferred as a Senior Mobility Facilitator.

67.5 Ms Edwards had TUPE transferred as Programme Coordinator.

67.6 None of the other people mentioned by the claimant in the Claimant's email were employed by the respondent

Paul Nee's Investigation and the Appeal Against That

68. On 22 January 2018, Paul Nee wrote to the claimant to inform her that he had been appointed to investigate the claimant's allegations under the Macintyre grievance policy. He noted that the allegations which he would be investigating were those set out in the claimant's emails to Coral Romain dated 20 August 2017 and 5 September 2017. In his letter, he set out 8 specific questions for the claimant,

outlining matters about which he sought further information. The claimant sent a detailed response to these questions by email on 2 February 2018. When printed her response was about 7.5 pages of A4.

69. On 15 March 2018, the claimant, accompanied by her union representative, Mr Hartman, met Paul Nee, who was investigating her grievance and Janet Lancaster an external HR consultant who was assisting Mr Nee with the investigation. The meeting had previously been arranged for earlier dates, but had been postponed.

69.1 Amongst other matters raised, the claimant stated that she had been given an exemption in relation to personal care for older male students by a previous principal, Bob Rose. Based on this exemption, the claimant had to carry out personal care for females of all ages and for males up to the age of 11, but not for males who were older than 11. The claimant alleged that while with Macintyre, despite this exemption, she was pressurised by staff who were junior to the principal, but senior to her, to do personal care for males who were 12 and over.

69.2 The claimant mentioned a history of some of her previous grievances against other members of staff. Around 25 November 2016, she raised a grievance in relation to Mr Garcia and Ms Lintott. (Thus, the 20 August 2017 email was her second grievance against those employees, and 5 September 2017 email was the third).

69.3 The claimant's grievance in relation to Lesley Coward had been raised on 21 February 2017. Grievances relating to other staff members had been sent on 26 February 2017.

69.4 The claimant stated that Lintott and Garcia bullied the claimant by influencing managers to remove staff members from the room in which the claimant was working, leaving the claimant alone, with students and unsupported. She suggested that they prevented her reporting matters to the principal by standing near the doorway to the principal's office when they suspected that the claimant might be intending to go to visit the principal.

69.5 In relation to what the claimant termed a "dirty joke" about the claimant being pregnant, the claimant said that she did not believe there was any witness to the remark. She said it happened in the hallway opposite the kitchen. She said that Mr Garcia and Ms Lintott had a habit of making joke to everyone, "saying silly stuff and stupid comments".

69.6 She said that she believed that Mr Garcia and Ms Lintott deliberately disrupted her sessions with students by bringing other students into the room without good cause.

70. In conducting the investigation into bullying and harassment, Mr Nee and Ms

Lancaster met several individuals.

71. On 22 March 2018 they met Laura Edwards.

71.1 Ms Edwards view was that Ms Lintott and Mr Garcia had not exercised inappropriate influence over other members of staff, and that she had not witnessed them bullying anybody, including the claimant.

71.2 She stated that staff did sometimes have to move in and out of classes due to the fact that Macintyre had had staff shortages and that those shortages, coupled with, for example, staff sickness sometimes meant that the timetable had to be adjusted and staff members and learners sometimes had to move around at short notice.

71.3 She said she had not been made aware of the claimant having an exemption in relation to personal care.

72. Mr Nee and Ms Lancaster met Mr Garcia on 28 March 2018.

72.1 He stated he became a senior around November 2015. He said that once he became Resource Coordinator, he visited staff in their rooms and, if necessary, commented on any health and safety issues.

72.2 He stated he was not aware of any arrangement by which the claimant was not required to carry out personal care for male learners who were 12 and over. That being said he would not have expected to have been aware of such arrangements because he was not directly involved in such matters.

72.3 He denied having blocked the claimant from seeing management by standing in the doorways, or otherwise.

72.4 In relation to the risk assessment for a student in August 2017, he recalled that the claimant had been asked to do a risk assessment for a particular student, but that it had subsequently been agreed that she did not need to do so. He said he thought this was a reasonable stance by the claimant, because of her view that her recent absence meant that she did not have up to date information.

72.5 He denied making a joke to Ms Lintott about the claimant being pregnant.

72.6 He said that in preparation for the academic year starting September 2017, he had arranged for printed pictures to be laminated of each student to go up on the walls in the rooms to which they were to be allocated. He subsequently found the photos of the claimant's student placed on top of a locker having been taken down from the walls. He suspected that it might have been the claimant, and he asked the claimant and other staff members if they knew about this prior to his checking the CCTV. He said that he

wanted to make sure that the student was not being targeted in any way by an unknown person. He said he had checked the CCTV and it appeared to show the claimant leaving a classroom with what could have been photos in her hand. He denied saying "I'm going to check you up on CCTV. You're fucked. You naked." He denied any bullying or harassment.

73. Mr Nee and Ms Lancaster met Ms Arslan on 28 March 2018.

73.1 She reported that, when she been working with the claimant, she had never seen Ms Lintott or Mr Garcia bring students into the classrooms in a disruptive way.

73.2 She stated that she had not been told by management that the claimant did not have to do personal care for males but that the claimant frequently mentioned this. When Ms Arslan was doing personal care for males, the claimant would look away until Ms Arslan said that it was finished and she could turn round. In Ms Arslan's opinion, there was a rota for people to do personal care and everybody was on it.

73.3 On 4 September 2017 Ms Arslan had been in the staffroom and the claimant had told her that she was going home. Since that day, Ms Arslan had had perhaps one phone call from the claimant but no other contact.

73.4 She had not witnessed Mr Garcia or Ms Lintott bully or harass the claimant.

74. Mr Nee did not seek to interview Bronagh Lintott. She was still an employee of the Respondent, but she was on maternity leave at the time. Her baby was young and Mr Nee's understanding was that Ms Lintott had had some illness. He believed that he could arrive at appropriate conclusions on all relevant matters based on what other witnesses had told him. At the time of his investigation, the Claimant had not alleged that Ms Lintott had made an allegedly age-related comment that the Claimant was too old to be pregnant.

75. Mr Nee produced a report that was 22 pages (plus appendices). This report was sent to the claimant by letter dated 3 May 2018, from Geoff Mitchell. The letter informed the claimant that none of the grievance complaints were upheld, and that the recommendations would be followed by the Respondent. The claimant was informed of her right to appeal. The recommendations from the investigation report were that:

75.1 Steps should be taken to assist the claimant return to work, and these should be with the benefit of further occupational health.

75.2 In relation to working relationships, a plan of action should be put in place to reassure all those involved that steps would be taken by management to support effective working relationships in the future, and that this would be

discussed with the claimant by her line management upon her return to work.

- 75.3 In relation to communications, there should be steps taken to further develop the channels of communication between staff and management so that misunderstandings are to be minimised. This would be implemented locally by management.
- 75.4 In relation to roles and expectations, these were to be clarified. This was to include explaining expectations around personal care of females and males, and requirements to work with all learners. This would include one particular (female) learner whom the claimant had said was a health and safety risk. There was to be clarity in relation to the allocation of iPads and personal care resources and the importance of working effectively as part of a team. These areas were to be addressed with the claimant when she returned to work and confirmed in writing thereafter.
76. It was the intention of Mr Mitchell and the respondent that when the Claimant returned to work she would be told that the respondent's policy was that all staff members would only provide personal care in relation to learners of the same sex (other than in an emergency). The intention was also to tell the Claimant that – based on the medical advice received up to that point - she might be required to provide personal care to all female students, but that was a matter which they intended to discuss with the claimant fully in the light of her comments and the light of any further medical advice obtained prior to her return to work.
77. Mr Nee's report did not comment on whether female Macintyre staff had been required to enter male toilets on trips away from Alexandra College, because that was not something she had raised with him.
78. By email dated 21 May 2018 to Claire Collins, the claimant stated she wished to appeal against the outcome. Amongst other things in her appeal, she stated that she had taken Mr Mitchell's 3 May letter, and the investigation outcome report, to mean that she would have to provide personal care for all students, including males. In her appeal, she stated an objection to this, based on her religion.
79. The appeal meeting to discuss this grievance took place on 26 June 2018 and the claimant was accompanied by her union rep Adam Hartman. Mr Mitchell was the HR adviser to Ms Collins, who conducted the appeal. Mr Nee presented his grievance report accompanied by Janet Lancaster.
- 79.1 Amongst other things, the claimant produced a copy of a letter dated September 2016, from Dr Lucinda Dunlop to Carly Murray, which referred to the claimant's duties of personal care as a community learning facilitator. The letter mentioned that the claimant was occasionally scratched by a female student and that in those circumstances, the claimant should be protected from hepatitis B. Dr Dunlop stated that the claimant was allergic

to the hepatitis injection and therefore appropriate protection was to prevent the claimant from being scratched.

79.2 The letter added that the claimant had problems hoisting students as this could aggravate the sciatica on her right leg and cause difficulty breathing due to asthma. The letter said that it was imperative that the claimant had amended duties to ensure enable her to avoid situations which put at risk.

79.3 The claimant made various suggestions that Mr Nee had not properly considered the evidence and could have interviewed other witnesses. She also repeated her complaints about the length of time that the investigation had taken to get started, meaning that matters were not fresh in the minds of the witnesses when they spoke to Mr Nee.

79.4 The claimant said that Ms Arslan had not given accurate evidence to Mr Nee.

80. During the appeal hearing, Ms Collins listened carefully to what each side had to say. The Claimant's closing arguments were made by Mr Harman on her behalf, and Ms Collins asked the Claimant not to interrupt Mr Hartman during that part of the hearing, because matters had now reached the summing up stage.

81. The appeal outcome letter was 13 pages and was dated 3 July 2018. Ms Collins rejected the argument that Mr Nee had not investigated properly and fairly. Ms Collins noted that the complaint initially had been about bullying and harassment by Mr Garcia and Ms Lintott. Ms Collins believed that Mr Nee had attempted to thoroughly investigate the specific allegations which the claimant had made, and that it had not been necessary for him to investigate every passing comment that the claimant had raised in several pages of statements and supporting documents. It had been appropriate for Mr Nee to interview Mr Garcia and, at the claimant's request, Ms Arslan. Ms Lintott had not been interviewed and Ms Collins noted that in an ideal world, she would have been. However, Ms Collins decided that it had been reasonable for Mr Nee to decide that it was not necessary to interview, Ms Lintott given that she was on maternity leave at the time.

82. Ms Collins also rejected the appeal in relation to the recommended outcomes. As noted in the appeal outcome letter, at the appeal hearing, Mr Nee said that the reason that he made the recommendation for personal care to be discussed with the claimant on her return was that (since the respondent had taken over Alexandra College), the personal care rota had been arranged so that female staff undertake personal care for female learners and male staff undertake personal care for male learners (unless there is an overriding service reason). In her appeal outcome letter, Ms Collins noted that while it was the claimant's view that historically she had been asked to carry out personal care for male learners over 11 (when she should have been exempt from this), there was no evidence that Mr Garcia or Ms Lintott had put inappropriate pressure on the claimant in relation to this matter, and no

evidence that they had been aware that she did have an exemption. However, and in any event, given Mr Nee's evidence, Ms Collins conclusion was that it had indeed been appropriate for him to recommend that the personal care discussion take place with the claimant on her return to work. Ms Collins acknowledged that there had been significant delays but stated that she did not believe that there had been deliberate unfairness in the investigation, or that any evidence had been fabricated.

The 21 March 2018 Medigold Health Report

83. On 15 March 2018, the claimant had a telephone consultation with the respondent's occupational health provider, Medigold Health. The purpose of the referral was so that the occupational health provider could provide advice on workplace restrictions and on fitness for work. Kate Naylor, Occupational Health Advisor, produced a report dated 21 March 2018, which was sent to the Claimant and the Respondent.
84. The report noted that the claimant had stated that she was absent from work due to stress triggered by her work situation. The occupational health advisor's opinion was that the claimant remained unfit for work at that time. She stated that the claimant's return to work seemed unlikely until all the management issues had been addressed and there was a resolution to the claimant's satisfaction. She stated that the absence from work appeared to be due to unresolved work factors and the pending grievance.
85. In relation to any adjustments that should be considered, the report suggested that the grievance should be completed in a timely manner to enable claimant to move forward. It recommended that the respondent consider conducting a risk assessment in accordance with HSE's management standards on work stress and that, on current completion of the assessment there be a written action plan formulated and reviewed on a regular basis.
86. It was noted that it might be helpful if there was a discussion with the claimant about career progression and reassurance that the Claimant could return to a safe work environment free from bullying. It was suggested that transfer to a different site might benefit the Claimant. A phased return was suggested, for example, 2 weeks at 50% of normal working hours, followed by one further week at 75%.
87. The report stated that the claimant was fit to attend meetings to discuss any work issues prior to her return to work.
88. In terms of manual handling including hoisting students and travelling with students. The advice was that the management issues should be addressed so that the claimant could return to work, but that once that was achieved the advice was that the claimant would be fit to resume the full remit of her role, and no adjustments in relation to the claimant's physical capabilities were suggested or believed necessary at that time.

Attempts to arrange meeting with Claimant and/or further occupational health advice

89. Following the 3 May 2018 outcome letter attempts were made to contact the claimant to arrange a return to work meeting. The meeting was due to take place on 19 June 2018 at the respondent's Kings Cross premises. The meeting was to be held by Paul Nee. Through her representative, the claimant expressed dissatisfaction with the proposal that Paul Nee conduct the return to work meeting. This was stated to be for 2 reasons: firstly, that the claimant was still in the process of appealing against Mr Nee's investigation outcome; secondly, that the claimant wanted to be redeployed to a different site, and so wanted the meeting to be with someone more senior than Mr Nee, who was in charge of the Alexandra College site.
90. The meeting was postponed until after the appeal outcome was known. Following the grievance appeal outcome, Ms Lancaster wrote to the claimant's union representative, Mr Hartman, on 6 July 2018, to propose 12 July for a return to work meeting with Mr Nee. Mr Hartman replied to state again that he did not regard Mr Nee as the appropriate person and he suggested instead that the meeting should take place with Amanda Whelan. He said that the meeting should not take place at the Alexandra College site.
91. By letter dated 6 July 2018 (sent to the claimant by email at 1448), Mr Mitchell wrote to the claimant in relation to return to work. The letter stated that the claimant was invited to a return to work meeting with Paul Nee and the meeting would take place on 12 July 2018 at Kings Cross. Janet Lancaster would also attend. His letter noted that the previous occupational health report had suggested that the claimant would be fit to return to work once her grievance had been resolved, but noted that a further appointment with occupational health to confirm that the claimant was fit to return to work might be required. He indicated that time permitting, there could be a discussion at the meeting about roles and expectations and communications, but the priority was to discuss return to work arrangements and if time ran out, then discussion of the other matters would need to be deferred until a later date.
92. Mr Hartman was copied in on that email, and he replied 9 minutes later to say that in his opinion, the meeting should be with Amanda Whelan rather than Paul Nee, and that it should be confirmed that the option of returning to work at another site and potentially in another role should be discussed. Mr Mitchell replied the same day to state that his decision was that the meeting should be with Mr Nee.
93. On 9 July 2018, the claimant wrote to Mr Mitchell stating that she believed she was unable to attend the appointment on 12 July citing stress. Her email added, "I hold you accountable for failing to provide me an alternative site and for blocking my career progression."
94. Mr Mitchell replied by email the same date stating that he was sorry the claimant

was unable to attend the meeting. He said that the meeting had been an attempt to remove any obstacles to the claimant return to work, now that her grievance and appeal had been concluded. He stated that he would arrange for a further report from occupational health. He said that once the respondent had that medical information, it would make a determination about whether the claimant's employment could continue, and that the claimant would have a full opportunity to give her views during any process that followed.

95. The claimant's reply stated "your last communication to me, accompanying threats of dismissal is very ill-advised. I am now acting according to legal advice and will escalate the matter as is necessary."
96. On 17 July 2018, Ms Jennings wrote to the claimant with details of an appointment with an occupational health on 25 July 2018. The proposed adviser was male. The claimant replied by email dated 18 July 2018 and said that the respondent had not followed recommendations proposed by her doctor and by occupational health. She asserted that her consent had not been sought before sending copies of her GP's reports to occupational health. She objected to the fact that the proposed clinician was a male and stated that she should have been asked if she had any preferences in accordance to her religious beliefs. She stated in her letter, "the discrimination that I have suffered and non-payment of my full wages since September 2017, has had me seeking out legal counsel. This matter is been escalated. I am following and acting upon professional legal advice".
97. On 20 July 2018, Ms Jennings responded to this email. She referred to the Macintyre sickness procedure and pointed out that that procedure required that employees cooperate with their employer, including attending occupational health appointments. She stated that she had arranged for a female clinician and supplied a new appointment date being Monday, 30 July 2018. The location was different because Medigold Health had no female clinicians at the other site. The claimant did not attend this appointment. The claimant sent a reply which indicated that she had no intention of attending the revised appointment. The reply said, "Whether you're following the Macintyre policy or not you're still acting in breach of my rights. A policy is in no way a law. If you execute such a flawed policy, you will be made to account for this is you are acting in breach of the law. Your last communication was felt very ill-advised."
98. Mr Mitchell received a copy of this latter communication to Ms Jennings and he wrote to the claimant on 7 August 2018. He expressed concern about the tone in which the claimant had expressed herself towards Ms Jennings. He noted the refusal to attend the 30 July 2018 appointment, despite it being with a female clinician and noted that no good reason had been offered. He said that an appointment would be made for a final time. He said if the claimant did not attend the rescheduled appointment, she would be in breach of contract and the respondent would have no option but to make decisions about her employment

without the benefit of up-to-date occupational health advice. Mr Mitchell wrote on 10 August 2018 to say that the next appointment was for Wednesday, 22 August 2018, with a female clinician.

99. On 30 April 2018, the claimant had issued employment tribunal proceedings. By letter dated 25 June 2018. The parties had been notified of a preliminary hearing to take place on 22 August 2018.
100. Mr Mitchell did not deliberately arrange the occupational health appointment to coincide with the preliminary hearing. Furthermore, and in any event, the claimant did not reply at all to his email either to seek a rearranged date, or to say that it clashed with the preliminary hearing, or at all.

Claimants new job

101. While signed off sick from the Respondent, the Claimant applied for work in a large and well-known retail establishment. She did not inform the respondent of this.
102. On or around 28 July 2018, the Claimant received an offer of employment to start 4 August 2018 and she began working with effect from that date. She did not inform the respondent of this.
103. During these hearing, the Claimant was reluctant to disclose the identity of her new employer. She disclosed only redacted copies of some documents to the Respondent and gave unredacted copies to the tribunal only. The documents which were disclosed did not specify give the total hours worked, or the dates on which work was performed or the duties worked. The documents implied that the hourly rate of pay was £8.84. She was paid £723.79 for each of September and October, implying that her contractual hours at that time were slightly under 82 per month. She did about 74 hours in August and was paid for approximately 178 hours in November (some of which appear to have been as a result in an increase in contractual hours, and some of which were overtime).
104. The Claimant's oral evidence was that between 4 August and the date of her dismissal by the Respondent, she worked only Saturdays and Sundays. In other words, she did not work on any dates on which she was contracted to work for the Respondent. She stated that she worked on the shopfloor, sometimes serving customers and sometimes sitting down.

Claimant's dismissal

105. On 17 October 2018. Ms Jennings wrote to the claimant to say that there would be a long term absence review meeting on 31 October 2018. The meeting was to be

chaired by Amanda Whelan. The meeting would be held in accordance with the Macintyre sickness absence policy and procedure. One possible outcome was that the claimant would be dismissed on the grounds of capability. The letter informed the claimant that she was entitled to be accompanied by a work colleague or trade union representative. The letter requested that the claimant contact Ms Jennings to confirm attendance. There was no reply to this letter.

106. On 29 October 2018, Mr Mitchell wrote to the claimant pointing out that the claimant had not replied to Ms Jennings' letter and enclosing a copy of an impact statement submitted by Paul Nee, which was to be considered at the hearing. This document was 3 pages of A4 and summarised the claimant's employment history and sickness absence history, including the referrals to occupational health.
107. The claimant did not attend the meeting on 31 October 2018, and nor did she contact the respondent. Ms Whelan convened the meeting and in the absence of the claimant decided to adjourn it until 14 November 2018. She wrote to the claimant on 1 November 2018 to inform the claimant of the time and place of the hearing for 14 November 2018 and informed the claimant that the hearing would take place in the claimant's absence, if she did not attend. The letter pointed out that the claimant had several options if she was not able to attend in person. These included nominating somebody else to attend to make representations on her behalf; participating by telephone; by participating by way of written submission. This letter was sent by special delivery and the claimant signed to receive it on 2 November. The claimant did not attend the meeting on 14 November 2018, the meeting took place in the claimant's absence. Ms Whelan took into account the contents of the Macintyre policies and of Paul Nee's report. She noted that the claimant had been absent for more than 14 months (a total of 293 days absence as of the date of Mr Nee's report). She noted that the respondent had waited for a lengthy period of time before instigating the capability process in order to allow the grievance processes and their appeals to reach conclusion. There had also been a significant length of time after that the claimant's medical condition to improve, given the advice from OH had been that she might be able to attend work once her grievances were resolved.
108. In the absence of any up-to-date medical information (which was because of the claimant's refusal to attend appointments), and in the absence of any further information from the claimant (as a result of the claimant's failure to contact the respondent), Ms Whelan formed the conclusion that there was no reasonable prospect of the claimant's returning to work in the near future. She noted the effect of the claimant's continuing absence on the students and on staff members. She noted there were no other suitable alternative roles for the claimant at other sites at that time, and that this situation was unlikely to change in the short term. Ms Whelan's view was that the claimant did not have the skills, experience or qualifications to be redeployed into a teaching role and that the claimant was several years away from achieving the standard required to be a teacher.

109. Ms Whelan decided to dismiss the claimant. The letter informing the claimant of this decision was dated 16 November 2018. It stated that the reason for termination of employment was “on the grounds of ill-health capability”. It stated that the last day of service was 16 November 2018 and the claimant would be paid one month’s salary notice in lieu of notice. It said the claimant had the right to appeal.
110. The letter was emailed and posted to the Claimant on 16 November 2018, and by email dated 29 November 2018, the claimant stated that she wished to appeal, giving grounds as “victimisation and discrimination (ie Dismissal for capability)”.
111. By letter dated 18 January 2019. The respondent notified the claimant that the appeal hearing would take place on Monday 25 February 2019.
112. The claimant did not attend the appeal. Ms Sheila Collins, one of the respondent's HR business partners, emailed the claimant to state that an appeal hearing had been rearranged for 4 March 2019 and giving the time and place. The email offered the claimant the option of dealing with the appeal on the basis of written submissions if the claimant was not well enough to attend. The email asked the claimant to confirm whether she still wanted to appeal, or whether she was withdrawing. The claimant replied the same day to state "*my position was made untenable. In my last communication I made it clear that I have been subject to a constructive dismissal. I'm making this clear again so that you understand it. This is my final communication*". Ms Collins replied to this email to state that she assumed from the email that the claimant did not wish to attend a rearranged appeal meeting or pursue the appeal in writing and so, the appeal was treated as having been withdrawn.

GP records and fit notes

113. On 12 September 2016, the Claimant reported to her GP that she was suffering from sciatica. No treatment was prescribed on that occasion. On 17 November 2017, the Claimant mentioned sciatica to her GP again. She was prescribed a medication to reduce inflammation, Naproxen. On 11 September 2018, her GP decided to refer her to a musculoskeletal service for further input to manage pain in her feet and legs.
114. In relation to sciatica, the Claimant’s evidence was that it affects her due to the need to place her weight alternately on one foot or the other. She said in oral evidence that this affected her ability to carry out household chores; for example, requiring her to stand on one leg while washing dishes.
115. In September 2017, the Claimant visited her GP to seek a fit note in relation to her absence. The statement was issued for the period 11 September to 18 October 2017 and referred to “stress at work” as the reason for absence. The Claimant

attended her GP again on 14 October 2017, but redacted the GP's notes and so the Respondent and the tribunal were not able to read the GP's notes of that meeting. A further fit note was issued for the period 14 October to 11 October 2017 and referred to "stress at work" as being the reason for absence. Similar notes were issued for the periods: 13 November to 13 December 2017; 14 December 2017 to 14 January 2018; 15 January 2018 to 14 February 2018. The latter two were based on phone calls with the GP.

116. On 20 November 2017, Dr Dunlop wrote a "to whom it may concern letter" (bearing the name but not the address of the Respondent) reporting that the Claimant had said that she felt bullied and that her communication skills were affected.
117. The Claimant visited her GP on 24 January 2018. She wanted a letter to say that her return to work was prevented because bullying and harassment had not been addressed. She informed her doctor that she would send an email outlining what she wanted the letter to say. She reported having headaches. This was the first time that she had mentioned to her GP that she was having headaches which might be stress-related. On 1 February 2018, Dr Dunlop wrote a "to whom it may concern letter" with no addressee, and stated, in relation to the Claimant "She has informed me that she is not currently working because the investigation into her concerns has been unacceptably slow. She had hoped to return to work within 28 days of her initial complaint." The letter went onto say that the Claimant would require adjustments of "staff resources and an alternative site if necessary so that she can fulfil her role and prevent others from bullying and harassing her".
118. The Claimant visited her GP on 15 February 2018, but she redacted the entire entry from the disclosed copy of the GP notes. A fit note covering the period 15 February to 15 March 2018 was issued.
119. On 20 March 2018, the Claimant had her annual asthma checkup and discussed with the clinician whether work-related issues might affect her asthma. The nurse suggested that she speak to her GP about whether a referral for counselling might be appropriate. She had a telephone conversation with her GP on 26 March and asked the GP to issue a fit note for the period 16 March to 15 April which said that she might be fit for amended duties.
120. On 2 May 2018, the Claimant saw her GP. Amongst other things, the Claimant reported to the GP that the asthma nurse had said (on 20 March) that the Claimant might benefit from counselling. A fit note for the period 16 April to 15 May 2018 was issued.
121. On 9 June 2018, the Claimant saw her GP and asked to be referred for counselling. A fit note for 16 May 2018 to 16 August 2018 was issued. A further note for the period 13 August 2018 to 13 September 2018 was issued. In the unredacted parts

of the GP notes, there is no indication that the Claimant informed her GP that she had applied for, and then started, her new retail job, with effect from 4 August 2018.

122. In the last entry that was disclosed, for 17 August 2018, the Claimant sought a letter from her GP to postpone the employment tribunal proceedings. The GP informed her that any letter that was issued would specify that it was anticipated that her stress symptoms would improve once work circumstances improved and the tribunal concluded. A further fitnote, dated 12 September 2018, was issued to say that the Claimant was not fit for work for the period 12 September 2018 to 12 October 2018.
123. The Claimant had an initial assessment for counselling on 6 August 2018 and was placed on the waiting list for therapy.
124. Other than the headaches discussed on 24 January 2018, none of the GP entries discussed any specific symptoms which the Claimant had or any effects which the stress had on her. She was not prescribed medication. A referral for counselling was not made until the Claimant requested this on 9 June 2018.
125. On 11 September 2018, the Claimant's GP surgery issued a "to whom it may concern" letter signed by Dr Zafarulla. The letter stated that the "*stress related to work ... has been documented in her notes regularly since 2016. The stress has had a significant impact on her in multiple ways, including affecting her confidence, thinking and speech. We gave (sic) therefore issued her with sick notes related to this stress caused by work at times*". This was not the letter which the Claimant spoke to her GP about on 17 August. The contents were different, and it was issued by a different doctor at the same practice. There is nothing in the letter which indicates that the GP intended the document to be used as expert evidence in an employment tribunal hearing. The only doctors at the surgery who saw the Claimant between 12 September 2016 and 17 August 2018, according to the unredacted parts of the notes, were Dunlop, Gulati and Smith.
126. In her evidence to the tribunal, the Claimant said that she had lost her ability to concentrate on things for a long time.

The Law

Unfair dismissal

127. Section 98 of ERA 1996 reads, in part

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason

of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

128. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for capability. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant lacked capability and that it genuinely dismissed her for that reason, then the dismissal will be unfair.
129. Provided the respondent does persuade us that the claimant was dismissed for capability, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we will take into account the respondent's size and administrative resources and we will decide whether the respondent acted reasonably or unreasonably in treating the capability as a sufficient reason for dismissal.
130. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the claimant lacked capability. We should also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).
131. It is not the role of this tribunal to access the evidence and to decide whether the claimant was or was not capable, and/or whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

Disability

132. Section 6 of EA 2010 states (in part)

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.
- (2) ...
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
- ...

133. Schedule 1 of EA 2010 states (in part)

2 Long-term effects

- (1) The effect of an impairment is long-term if—
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

5 Effect of medical treatment

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
 - (a) measures are being taken to treat or correct it, and
 - (b) but for that, it would be likely to have that effect.
- (2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

Direct Discrimination

134. Section 13 of EA 2010 states (in part)

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

135. Section 39 EA 2010 provides that an employer must not discriminate against an employee. The characteristics which are protected by the legislation include disability, religion, sex and race religion and include disability.

136. When applying the definition of discrimination in accordance with section 13(1) EA 2010, it is necessary to consider how the respondent has treated the claimant and to consider whether it has done so less favourably than it has treated a comparator. The comparator can either be an actual person or a hypothetical person. Either way, the comparator’s circumstances must be the same as the claimant's other than the protected characteristic in question.

137. If we are satisfied that the claimant has been treated less favourably than the comparator, then we must consider the reason for that difference in treatment. In particular, we must consider whether it is because of the protected characteristic or not. We must analyse both conscious and subconscious mental processes and motivations for actions and decisions.

Victimisation

138. Section 27 of EA 2010 states (in part)
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
 - (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.
139. The Claimant must show two things: first, that she has been subjected to a *detriment*; and, secondly, that she was subjected to that detriment *because* of a protected act.
140. Therefore, if we are satisfied that there has been a detriment, then we must determine what, consciously or subconsciously, motivated the Respondent to subject the Claimant to that detriment.
141. The protected act relied on is the issuing of this claim on 30 April 2018. It is conceded by the Respondent that this was a protected act.

Burden of Proof

142. Section 136 EA 2010 sets out the manner in which the burden of proof operates in a discrimination/victimisation case. A two stage approach is necessary.
- 142.1 At the first stage the tribunal considers whether the claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination/victimisation. At this stage it would not be sufficient for the claimant to simply prove that she has been treated badly, or even that she has been treated less favourably than her comparator. There has to be some evidential basis upon which the tribunal could reasonably infer that the claimant's protected characteristic or protected act (consciously or subconsciously) caused the alleged discriminator to act in the way that they did. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.
 - 142.2 If the claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic or protected act.

Time Limits

152. Section 123 of EA 2010 states (in part)

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

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

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

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

(3) For the purposes of this section—

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

153. The Claim was issued on 30 April 2018 which is less than one month after the end of the early conciliation period. Early conciliation commenced on 5 March 2018. Therefore, the dismissal and any acts or omissions occurring on or after 6 December 2017 are in time.

154. Therefore, and subject to Section 123(3)(a) of EA 2010, the other Equality Act allegations relating to acts prior to 6 December 2017 are out of time, subject to the tribunal's ability to extend time in accordance with Section 123(1)(b).

155. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period (up until 6 December 2017 or later) or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

Analysis and conclusions

The Disability Issue - Stress

156. Dr Zafarulla is not recorded as having seen the Claimant for any of her appointments from 12 September 2016 to 17 August 2018 (the only period for which the notes were disclosed) and the notes do not refer to effects on “confidence, thinking and speech” (albeit there is the letter from Dr Dunlop dated 20 November 2017). Our conclusion is that Dr Zafarulla's comments were not based on an analysis of the Claimant's medical history, as noted contemporaneously, for 12

September 2016 to 17 August 2018, but rather on what the Claimant reported to Dr Zafarulla in September 2018. By the time of Dr Zafarulla's letter, the Claimant had issued tribunal proceedings, attended a preliminary hearing and commenced work in a retail job. The Claimant was still in receipt of "Statements of Fitness to Work for social security of Statutory Sick Pay" which stated that she was not fit for work, and a further one was issued on 12 September 2018. Our conclusion is therefore that the Claimant had not disclosed to her GP surgery that she was now working again in a different job, and that that was a relevant piece of information which ought to have been disclosed to Dr Zafarulla. Therefore, we cannot place great reliance on that letter (which was, of course, written in good faith by the doctor).

157. The Claimant's concentration and communication abilities were not affected to the extent that she could not attend hearings and submit grievances and appeals. Neither Medigold nor the Claimant's GP suggested that she need have adjustments for such issues.
158. The GP notes and Medigold report are consistent with the view that the Claimant was dissatisfied with her work situation and did not feel able – in those circumstances – to do the work of a CLF (or Teaching Assistant, as the post was renamed) for the Respondent. However, the Claimant made clear throughout her absence that if a teacher job was available, or a post at another location, then she would potentially be fit to work. Furthermore, she informed her GP that she would have been to work as of October 2017 if the grievance outcome had been issued by then. The Claimant did, in fact, start a new job in August 2018, and there is no evidence before us that this was because the Claimant had had an impairment which had now improved. On the contrary, based on the contents of the Claimant's reports to the GP (and the sick notes) the Claimant was no more or less able to work in a retail job starting in August 2018 than one starting in (say) September or October 2017. The fact that the Claimant may have been fit for work on any particular date does not mean that she cannot have been disabled within the EA 2010 definition. However, the mere fact alone that she was not attending work does not imply that she had an impairment which was affecting her day to day activities.
159. The Claimant has not satisfied us that, on the balance of probabilities, she had a mental impairment which had a substantial effect on her day to day activities. In her own submissions, the Claimant acknowledged that there was nothing in any of the medical evidence to suggest that any medical expert had suggested that she did have such an impairment.

The Disability Issue - Sciatica

160. Based on the evidence, including the oral evidence of the Claimant, and the fact that she was prescribed medication, we are satisfied that the effects of the

Claimant's sciatica were more than de minimis. The condition caused her pain, and that pain had some substantial effect on her day to day activities. There may not have been things that she could not do, but she had to adjust the way in which she went about certain tasks.

161. There was no clear evidence before us about when the condition began to have substantial effects on the Claimant's day to day activities. It was mentioned in the Claimant's GP notes in September 2016, but she was not being treated for it at the time, and nor was she being treated for it in June 2017 when the GP surgery supplied information to Medigold for its 11 June 2017 report. There was no evidence before us to suggest that sciatica was having an effect on the Claimant when she started work at Macintyre in 2015.
162. Our conclusion is that the sciatica began to have a substantial adverse effect on the Claimant's ability to carry out day to day activities on approximately 17 November 2017 when she first required treatment from her GP for the condition. Furthermore, our conclusion is that it was likely that the condition was going to have a long-term adverse effect from that day (in that it was a condition which was likely to recur in the future, and for more than 12 months).
163. It follows, therefore, that our conclusion is that the Claimant is a disabled person (due to her sciatica) with effect from 17 November 2017. We are also satisfied that the Respondent should be deemed to have knowledge of the disability from that same date, given that it was referred to by Medigold in the June 2017 report (albeit, at the time, Medigold noted that there was insufficient information about the condition to give detailed advice as to whether it was having a substantial effect.)

Religious Belief

164. We accept that the Claimant had a genuine belief that it was a requirement of her religion that she should not attend to the personal care of males of the age of 12 and over.

Allegation a - Ms Jane Jennings, Interim HR Business Partner, delaying the grievance process (because of race and/or disability)

165. The Respondent took a long time to commence an investigation into the Claimant's grievances raised in August 2017 and September 2017 respectively, against Mr Garcia and Ms Lintott. The investigation only got underway in the second half of January 2018 when Mr Nee was appointed.
166. We do not accept that the fact that there had been a TUPE transfer was a reasonable excuse for the delay. Furthermore, our conclusion is that an employer

with the administrative and financial resources of the Respondent could reasonably have been expected to have commenced the investigation much sooner.

167. Breaking down the periods, we have:

167.1 5 September 2017 (date of grievance, and start of Claimant's absence) to 12 October 2017 (meeting between union reps and Jane Jennings);

167.2 12 October to 9 November 2017 (meeting attended by Claimant with Jane Jennings);

167.3 9 November to 15 November 2017 (date Ms Jennings sent the minutes to the Claimant);

167.4 15 November 2017 to 27 November 2017 (the date the Claimant complained to Ms Shannon-Turner about the delay);

167.5 27 November 2017 to 22 January 2018 (the date that Mr Nee contacted the Claimant to inform her that he was investigating).

168. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that any of these delays were because of the Claimant's race (Pakistani) or disability (sciatica).

169. The second of these periods is explicable by the fact that the parties were seeking dates for a meeting; the third is not unreasonably long in itself. The first, fourth and fifth delays are longer than reasonable. However, while the respondent did delay in appointing an investigator regarding the complaints against Garcia/Lintott, it did deal with other matters in the meantime, including seeking to arrange an occupational health appointment, and investigating the pay situation with Macintyre. The reasons for the delay were a combination of lack of efficiency and of prioritising other matters (and we do accept that processing of the transferred staff and the reorganisation made significant calls on the time of the Human Resources department during this period). The reasons for the delay were not the Claimant's race or the Claimant's sciatica.

170. This allegation is not out of time. The Respondent's delay in commencing the investigation continued until after 6 December 2017.

Allegation b - Failing to respond to the claimant's expression of interest for a teaching position (because of race and/or disability)

171. The Respondent did send responses to the Claimant in relation to her expression of interest. On 15 August 2017, Ms Jennings replied to the 9 August email. Later, Mr Mitchell (19 January 2018 letter) and Ms Collins (15 March 2018 letter) gave the Claimant detailed and specific responses to her claims that other people had been treated more favourably than her.

172. When Mr Nee, on behalf of the Respondent decided around October or November 2017 that the Claimant would not be shortlisted for the teaching post, the respondent did not write to the Claimant to say that this decision had been made. The reason for this was that the Respondent did not generally write to job applicants who had not been shortlisted to inform them that they were unsuccessful.
173. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that the lack of a communication to the Claimant around October or November 2017 was because of the Claimant's race (Pakistani) or disability (sciatica).
174. Our finding is that the respondent treated the Claimant in the same way that they would have treated a hypothetical comparator of a different race, or without a disability.
175. This allegation is out of time. The initial response, by Ms Jennings, was almost 4 months before 6 December 2017. The failure to write to the Claimant to inform her that she was not being shortlisted (after the posts had been advertised to the public) occurred some time after 12 October and before the end of November 2017. It is not just and equitable to extend time given that the Claimant had already alleged (on 31 August 2017) that other people were being treated more favourably than her in relation to the allocation of teaching positions. She knew (as a result of Mr Mitchell's 19 January 2018 letter) that a decision not to shortlist her had been made not long after 12 October 2017, and she therefore had all the information which she needed in order to bring a claim in time.

Allegation c - Ms Jennings referring to the claimant as not being fit to return to an alternative position (because of race and/or disability)

176. Our conclusion is that Ms Jennings produced her draft of the minutes of the 9 November meeting in good faith. She wrote that the Claimant was not fit to return to any job because that was her genuine understanding of the Claimant's position.
177. She sent the draft minutes of the meeting to the Claimant and Ms Eyidah so that they could comment and suggest any corrections. She had also sought to encourage the Claimant and her union representatives to agree to the Claimant's attending a meeting with Occupational Health, at which the Claimant could have explored whether she was fit to return to different duties.
178. None of the fit notes from the Claimant's GP up to that point had suggested that the Claimant was fit to return to different duties.
179. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that the statement in the minutes (that the Claimant was not fit to return to an alternative position) was because of the Claimant's race (Pakistani) or disability (sciatica).

180. Our finding is that if Ms Jennings' draft was inaccurate, then her mistake was not an unreasonable one in all the circumstances. Furthermore, the mistake (if any) was one that would have been made regardless of the Claimant's race or sciatica.
181. This allegation is out of time. The Claimant received Ms Jennings's draft minutes on 15 November 2017 and sent her proposed corrections to them on 16 November 2017. It is not just and equitable to extend time given that, if the Claimant wished to allege that the contents of the draft minutes were discriminatory, by 16 November she had all the information which she needed in order to bring a claim, and there was nothing to prevent her bringing a claim promptly after that.

Allegation d - Failing to pay the correct amount in wages (because of race and/or disability).

182. The Respondent did not fail to pay the Claimant (at least) the correct amount of wages. The respondent paid the Claimant more than her entitlement to sick pay and wrote off the overpayment.
183. This claim fails because the alleged act or omission did not occur. The Claimant was paid in accordance with Macintyre's terms and conditions (and policies), and that was lawful, and was the same treatment that other Macintyre employees received.
184. To the extent that the Claimant argues that there was an on-going failure to pay the "correct" salary, that argument is in time. However, the Claimant was informed that (a) she was being treated in accordance with Macintyre contract and (b) had therefore exhausted her sick pay entitlement, by letter dated 1 November 2017, and therefore a claim in relation to either of those matters is out of time. It is not just and equitable to extend time given that, if the Claimant wished to allege that the decision to decide her sick pay in accordance with Macintyre terms and conditions was discriminatory, she had all the information which she needed in order to bring a claim by the start of November, and there was nothing to prevent her bringing a claim promptly after that.

Allegation e - Ms Jane Jennings stating "threatfully" that the claimant would receive nil pay (because of race and/or disability).

185. Ms Jennings made an accurate statement that the Claimant's contractual entitlement could be to nil pay. It was not a threat. It was correct for her to supply that information to the Claimant, especially if the Claimant incorrectly thought that her entitlement was to something more than nil pay.
186. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Ms Jennings' comments about "nil pay" – either in tone or content – were because of the Claimant's race (Pakistani) or disability (sciatica).

187. Our finding is that the reason for Ms Jennings comments about “nil pay” was that she was acting appropriately and in accordance with her obligations as a Human Resources officer. The reason was not the Claimant’s race or sciatica.

188. This allegation is out of time. The Claimant received Ms Jennings’s letter by email on 1 November 2017. It is not just and equitable to extend time given that, if the Claimant wished to allege that the contents of the letter were discriminatory, she had all the information which she needed in order to bring a claim by early November, and there was nothing to prevent her bringing a claim promptly after that.

Allegation f - Because of race and/or disability, Ms Bronagh Lintott and Mr Rene Garcia planned with management (Ms Laura Edwards and Ms Coral Romain) and contributed to the change of base rooms allotted to 4 or 5 highly challenging students. The claimant considered this isolating for her and that she was being set up to fail for the year in advance

189. The reason that Macintyre management allocated particular students to particular rooms was that it was believed that was the most appropriate way to manage finite resources

190. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that the room allocation was because of the Claimant’s race (Pakistani) or disability (sciatica). The Claimant has not satisfied us that her race or disability were factors which influenced Macintyre’s (or the Respondent’s) decision-making.

191. This allegation is out of time. All of the information which she received about proposed room allocations was on or before 4 September. It is not just and equitable to extend time. If the Claimant wished to allege that the proposed room allocations were discriminatory, she had all the information by (at the latest, early September), and there was nothing to prevent her bringing a claim promptly after that. Furthermore, given that the principal, Ms Coral Romain, no longer works for the Respondent, the prejudice to the Respondent outweighs any benefit to the Claimant.

Allegation g - Placing or removing sessions and activities within new timesheets to deprive or exclude the claimant from participation and allegedly “sabotaging” her career progression (because of race and/or disability)

192. We are not satisfied that either Macintyre or the Respondent, or any of their employees, sought to sabotage (or inappropriately prevent) the Claimant’s career progression.

193. We are not satisfied that either Macintyre, or any of its employees arranged or rearranged sessions and activities for any reason other than to benefit the students.

194. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that the arrangements for sessions and activities was because of the Claimant’s race (Pakistani) or disability

(sciatica). The Claimant has not satisfied us that her race or disability were factors which influenced Macintyre's (or the Respondent's) decisions in this regard.

195. This allegation is out of time. The Claimant's last day at work was 4 September 2017. All of the information which she received about proposed arrangements for the new academic year was on or before that date. Any changes to sessions in the previous academic year were matters which were in the Claimant's knowledge from before her medical suspension in March 2017. It is not just and equitable to extend time given that, if the Claimant wished to allege that the arrangements were discriminatory, she had all the information which she needed in order to bring a claim by the end of August (and, at the latest, early September), and there was nothing to prevent her bringing a claim promptly after that. Furthermore, given the vague and imprecise nature of the allegations, and the lack of a clear explanation of exactly who is alleged to have done exactly what, the prejudice to the Respondent outweighs any benefit to the Claimant.

Allegation h – an alleged age-related joke made deliberately and within her earshot between Mr Rene Garcia and his wife Ms Bronagh Lintott about the claimant being pregnant, Ms Lintott replying: “she can't be, she's too old!” and then “chuckled”. The approximate date is the week commencing Monday 28 August 2017.

196. This claim fails because we are not satisfied, on the balance of probabilities, that the alleged act occurred.
197. This allegation is out of time. Ms Lintott's reply was alleged to have been before 5 September 2017. It is not just and equitable to extend time. When interviewed by the Respondent, Mr Garcia denied making the comment attributed to him. He was not asked about his wife's alleged remark, because the claimant had not yet made that allegation. Ms Lintott was not asked (during the grievance investigation) about any such alleged remark. Based on what the Claimant had alleged up to that point, Mr Nee decided not to seek to speak to Ms Lintott because her maternity leave. The prejudice to the Respondent of having to seek to defend itself against an allegation raised so long after the date of the alleged incident outweighs any benefit to the Claimant of extending time.

Allegation I – (Because of sex and/or religion) in August 2017 Ms Coral Romain, the Principal of Alexandra College and her assistant (female, name not known) “interrogating” the claimant on her decision to decline to do personal care for males over the age of 12 years. Ms Romain allegedly stated that she came from a Jewish background and that in her religion Jewish women would have no problem in doing personal care for men and why the claimant as a Muslim was finding it a problem

198. The actual date of the meeting in question was 20 July 2017. The primary reason for Ms Romain raising the issue of the requirement for CLFs to undertake personal care was in order to consider whether the Claimant was physically capable of doing this work, and/or whether further medical advice might be required.

199. It is not expressly clear from the audio recording whether it was the Claimant or Ms Romain who first raised the topic of religion. Our inference is that it was the Claimant and that Ms Romain was responding to something which the Claimant had said during part of the meeting that was recorded by the Claimant, but for which the audio recording was not disclosed. Ms Romain's remarks about "very similar" and "researched **this**" (emphasis added) only make sense if the topic of religion (and religious beliefs in relation to personal care) had already been raised. Based on the agenda for the meeting which Ms Romain had discussed in advance with HR, it does not seem to us that Ms Romain had planned to raise the topic of religious beliefs during the meeting.
200. We are satisfied that the Claimant has disclosed the excerpt which – in the Claimant's opinion – most supports her claim to have been "interrogated". She was not "interrogated". She was informed that the medical advice received by the Respondent up to that point did not show that she was unable to do personal care, and she responded by referring to a religious belief. Ms Romain sought to explore that idea further, and referred to her own religion as part of the conversation, and the Claimant's union representative interjected to assert that the meeting was supposed to focus on the Claimant's return from medical suspension.
201. During the meeting, the Claimant was not treated less favourably than another person because of her religion or because of her sex. Any CLF who asserted that they could not do (some) personal care would have been asked some questions about the assertion. Neither the tone nor the content of Ms Romain's brief remarks were unreasonable or inappropriate to the circumstances.
202. This allegation is out of time. It is not just and equitable to extend time. No grievance or complaint was raised promptly in relation to this matter. The Claimant has a full audio recording of the 20 July 2017 meeting but only disclosed a small part. Given that Ms Romain is no longer employed, and given that the Respondent does not have access to the audio recording, the Respondent would be unduly prejudiced if time was extended.

Allegation j – Religious discrimination. The grievance outcome by Mr Geoff Mitchell (grievance officer) and Ms Claire Collins (appeal officer) expecting the claimant to perform personal care for males over the age of 12 and females upon her return to work.

203. This allegation fails on the facts. The Respondent did not expect the Claimant to routinely have to do personal care for any males of any age on her return.
204. We accept that Mr Nee's investigation report (as forwarded to the Claimant on 3 May 2018 by Mr Mitchell) does not make this point clearly. We also accept that the Claimant did genuinely interpret that report as meaning that she was going to be required to do personal care for males. However, Mr Nee's actual intention was to convey to the Claimant that the Respondent was willing to discuss any medical reasons that she might have for being unable to do personal care, and also to discuss the matter generally with her. He did not intend to imply that the outcome would be that she might be told that she had to do non-emergency care for males.

205. The point is made clearly in Ms Collins' lengthy and thorough appeal outcome letter, and it was also made orally by Mr Nee at the appeal hearing (in the presence of the Claimant and her union representative).

206. This allegation is not out of time.

Allegation k – Sex discrimination - Being expected to accompany men into male toilets when supporting students on outings. The claimant's case is that the same is not expected from male staff who she says are not expected to accompany females.

207. This allegation is out of time. No specific information was provided by the Claimant in relation to the dates of any alleged examples of her being required to do this. However, she accepted that she was not alleging that it had happened after the TUPE transfer (1 September 2017) and we are not satisfied that there were any incidents occurring any later than the medical suspension (in March 2017).

208. It is not just and equitable to extend time. To the extent that the Claimant ever had to undertake such activities while working for Macintyre, it was clear to the Claimant by no later than June 2018 that the Respondent would not require her to provide (non-emergency) personal care to males. The Respondent would be unduly prejudiced if it had to seek to defend itself in relation to allegations about incidents which were more than a year before the claim was issued, and more than 6 months before the TUPE transfer.

Allegation l – Because of race and/or religion, being declined for promotion and training into a teaching role despite named comparators being promoted with lesser experience and without teaching qualifications. Ms B Lintott, Mr R Garcia, Ms A Arsalan, Chris (last name not known) and Ms L Edwards

209. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that the fact that the Claimant was not offered the post of "teacher" was because of the Claimant's race (Pakistani) or religion (Muslim). The Claimant has not satisfied us that her race or religion were factors which influenced the Respondent's decision-making.

210. The reason that the claimant was not offered the post of teacher (or the chance to apply for one of the newly created teacher posts) in August 2017 is that the Respondent had ring-fenced those posts to Macintyre employees in posts which the Respondent proposed to delete (Principal, PCO, Catering tutor). The Claimant, as a CLF (to be relabelled Teaching Assistant) was not in such a post.

211. The reason that the Claimant was not shortlisted shortly after 12 October 2017 is that Mr Nee did not believe that she had the necessary qualifications and experience. The Respondent was not seeking to have teaching done by persons who would have met the criteria to be a PCO in the Macintyre structure. It abolished the PCO roles because it believed that a higher standard of teaching qualifications and experience was required for the person leading the classroom sessions, and thus introduced teacher posts to the structure.

212. None of Ms Lintott, Mr Garcia, Ms Arslan, Mr Chris Egwuma or Ms Edwards is a valid actual comparator. Each of them was in a different post than the Claimant prior to the transfer.
213. None of Ms Lintott, Mr Garcia or Ms Arslan have been treated more favourably than the Claimant. In particular, they were not appointed to teacher posts. More generally, they retained the same posts that they had had pre-transfer.
214. Each of Mr Egwuma and Ms Edwards was appointed to a new post (though only Mr Egwuma was appointed as teacher). In part, the reason for this was that their PCO posts were deleted and so, if not appointed to a new post, then they would have been dismissed. In part, the reason for this was that the Respondent was satisfied that they met the selection criteria for their respective new posts.
215. Our finding is that the respondent treated the Claimant in the same way that they would have treated a hypothetical comparator of a different race, or different religion.
216. This allegation is out of time. The initial response, by Ms Jennings, was almost 4 months before 6 December 2017. The appointments of the former Macintyre PCOs to the new structure was in October 2017. The decision not to shortlist the Claimant for those remaining teacher vacancies which were publicly advertised occurred after 12 October and before the end of November 2017. It is not just and equitable to extend time given that the Claimant had already alleged (on 31 August 2017) that other people were being treated more favourably than her in relation to the allocation of teaching positions. She knew (as a result of Mr Mitchell's 19 January 2018 letter) that a decision not to shortlist her had been made not long after 12 October 2017, and she therefore had all the information which she needed in order to bring a claim in time.

Allegation m – Because of race and or religion - The way in which the investigation has been carried out by Mr Paul Nee, Interim Head of LLDD and High Needs. Ms Lintott is a named comparator as the claimant said she was excused questioning because she was pregnant and her partner Mr Rene Garcia was dealt with "in a lighter way" meaning that he should have been disciplined and dismissed.

217. Mr Nee was appointed in January 2018. He wrote to the Claimant with a list of questions. He interviewed the Claimant and he interviewed potential witnesses. He completed his report towards the end of April, and it was sent to the Claimant on 3 May 2018. The report was thorough and detailed, and its production did not take an unreasonably long period of time in all the circumstances.
218. Mr Nee's reasons for deciding not to interview Ms Lintott were that she was absent on maternity leave and that he believed that he could reach the correct decisions on the Claimant's grievance based on the evidence supplied by the Claimant and other persons.
219. The reason that Mr Garcia was not disciplined or dismissed was that the Respondent did not conclude that he had committed any misconduct.
220. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Mr Nee conducted the grievance investigation in the way that he did because of the Claimant's race (Pakistani) or religion (Muslim). The Claimant has not satisfied us that her race or

religion were factors which influenced Mr Nee's decision to not interview Ms Lintott or to conclude that Mr Garcia had committed no misconduct.

221. This allegation is not out of time.

Allegation n - Not being kept up-to-date by Ms Jane Jennings in a timely manner because of race and/or religion.

222. Our conclusions are broadly similar to those we reached in relation to Allegation a. During the period September to December 2017, the Respondent was unreasonably slow to progress the investigation of the Claimant's complaints. The Claimant was not updated as to the progress of the investigation, because the investigation had made no progress.

223. Other than in relation to the investigation, Ms Jennings did respond to other points raised by the Claimant (responding to the expression of interest on 15 August 2017; notifying the Claimant of the overpayment of sick pay on 1 November 2017; liaising with Macintyre re whether there was an entitlement to full pay while off sick).

224. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Ms Jennings communicated with the Claimant at the times that she did because of the Claimant's race (Pakistani) or religion (Muslim). The Claimant has not satisfied us that her race or religion were factors which influenced Ms Jennings timings.

225. This complaint is out of time. To the extent that it refers to a reply to the expression of interest, Ms Jennings had no further responsibility for that after she replied to the Claimant on 15 August 2017 (and, in any event, she forwarded the item to Paul Nee). To the extent that it relates to sick pay, Ms Jennings informed the Claimant of the situation on 1 November 2017. To the extent that it refers to any updates re the grievance investigation, the Claimant formally escalated the matter to Ms Shannon-Turner on 27 November 2017 and that, therefore, is the latest date from which time she be deemed to start running in relation to Ms Jennings' role. It is not just and equitable to extend time in all the circumstances, including the fact that the Claimant received updates from Mr Mitchell and Mr Nee in January 2018.

Allegation o – Because of race and/or religion - Ms Claire Collins conducting the appeal hearing in an unfair manner being insensitive to the claimant's stress and impact on her health

226. This allegation fails on the facts. Our finding is that Ms Collins conducted the appeal hearings in a manner that was fair and reasonable. She was not influenced by the Claimant's race or religion in the manner in which she conducted either appeal hearing.

227. The allegation is not out of time.

Allegation p – Because of race and /or religion - The appeal outcome of 16 March 2018 blocking the claimant's career progression

228. The opinions stated by Ms Collins in her 15 March 2018 appeal outcome letter were her genuine opinions. She genuinely concluded that Mr Cannon's signature on the 20 September 2016 supervision record did not amount to a promise of advancement to

PCO (and this tribunal thinks that she is correct in that opinion). She genuinely concluded that (a) the Claimant was not in a comparable situation to the alleged comparators who had allegedly been promoted and (b) that the Respondent had given due consideration to the Claimant's expression of interest and decided that the Claimant did not meet the criteria to be shortlisted for interview for the teacher posts in the new structure, which had been advertised to the public.

229. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Ms Collins would have reached different conclusions if the Claimant's race (Pakistani) or religion (Muslim) had been different. The Claimant has not satisfied us that her race or religion were factors which influenced Ms Collins' decision to reject the appeal.

230. The allegation is not out of time.

Allegation q - Ignoring OH recommendations for a return to work meeting, Mr Geoff Mitchell, Deputy Group Director HR & OD, Ms Claire Collins, Mr Paul Nee, Ms Janet Lancaster and Ms Jane Jennings insisting on a return to work meeting at Alexandra College with Mr Nee. This is relied upon as race discrimination.

231. The Respondent did not ignore recommendations for a return to work meeting. It both sought to arrange such a meeting, and it sought to arrange a meeting between the Claimant and the Respondent's occupational health provider. A report based on the latter could have been useful at the former. However, the latter was not made a pre-condition of the former.

232. It is false that the meeting was to be at Alexandra College. Each time the meeting was proposed, the Claimant and her representative were given details of the proposed location (Kings Cross) in writing.

233. It is true that the proposal was for the meeting to be with Mr Nee. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that the Respondent's reasons for proposing Mr Nee were because of the Claimant's race (Pakistani) or religion (Muslim).

234. Mr Nee, as the person in overall charge of Alexandra College was an appropriate person to conduct the meeting, and he was familiar with some of the issues that would need to be discussed. The Claimant has not satisfied us that her race or religion were factors which influenced the Respondent's decision that Mr Nee should conduct the meeting. For completeness, we add that the fact that the Claimant wanted the respondent to consider relocating her to another site is not a factor that made it inappropriate for Mr Nee to conduct the meeting (this factor being, in any event, not related to the Claimant's race or religion).

235. The allegation is not out of time.

Allegation r – Because of race or religion - Failing to pay full wages in contravention of the respondent's own policies

236. The Claimant was paid the correct amount based on Macintyre's terms and conditions and policies.

237. It was not a contravention of the Respondent's policies to apply Macintyre's terms and conditions and policies to the Claimant and to all the other former Macintyre employees.
238. The Claimant was paid the full wages to which she was contractually entitled. The reason that she was not paid more is that she was not entitled to more.
239. There was no discrimination due to race or religion in connection with the decisions made in relation to the Claimant's wages.

Allegation of Unlawful Deduction from Wages.

240. There was no unlawful deduction. The Claimant was paid more than her contractual entitlement and the overpayment was written off.

Allegations connected to dismissal.

- Did the Respondent dismiss the Claimant unfairly on 16 November 2018?
 - Did the respondent subject the Claimant to direct disability discrimination because of the Claimant's sciatica and stress conditions by dismissing?
 - Did the Respondent victimise the claimant by dismissing her because of the claimant's protected act of bringing the current claim?
241. We have found that the Claimant's did not have the protected characteristic of "stress" as a disability. Her sciatica was a disability.
242. The Claimant issued her claim on 30 April 2018, and it was a protected act.
243. The dismissal followed a lengthy period absence (from 4 September 2017 to dismissal more than 14 months later) during which the Claimant was supplying notes from her GP to say that she was not fit for work. It also followed efforts by the respondent to hold a return to work meeting, and/or to have the Claimant attend an occupational health appointment. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer the dismissal was because of the Claimant's sciatica or the fact that she had issued employment tribunal proceedings.
244. We are satisfied that the reason stated in the dismissal letter (termination "on grounds of ill health incapability") was the Respondent's genuine reason for the dismissal. The Claimant was not dismissed because of her sciatica and nor was her lengthy absence caused by sciatica. The Claimant was not dismissed because she had issued employment tribunal proceedings.
245. The dismissal reason was a potentially fair one, namely capability.
246. Ms Whelan had reasonable grounds to believe that the Claimant was not capable of performing her duties and would not be capable of doing so within a reasonable period of time. Had she known that the Claimant was actually working in another job, then she might have reached a different conclusion, but the Claimant had not informed the Respondent of this.

247. The Respondent had made clear to the Claimant that it would prefer to have an up to date medical report before making a decision. In August 2018, Mr Mitchell made clear to the Claimant that if she failed to attend the occupational health appointment then decisions might be made anyway. The fact that the third and final appointment was fixed for 22 August 2018 (the same day as a preliminary hearing in these proceedings) is an unfortunate coincidence but does not – in itself – render the process unfair. We are satisfied that the Claimant would not have attended the appointment had it been on a different date. In any event, she did not ask the Respondent to rearrange it. She had already started work for a new employer by this date and had started sending increasingly belligerent emails to the Respondent on the subject of occupational health appointments.
248. Had the Claimant sent any response to Ms Whelan, then Ms Whelan would have taken that into account. She did not do so, even after Ms Whelan – of her own initiative – adjourned the hearing to another date when the Claimant did not show up the first time.
249. The Respondent’s decision to dismiss the Claimant, and the procedure it followed prior to making that decision, were within the band of reasonable responses.
250. The Claimant was offered the opportunity to appeal. She did not submit detailed grounds and did not attend the appeal hearing on the date that it was arranged. In light of her response to the enquiry about whether she would attend the re-arranged appeal hearing, it was within the band of reasonable responses for the Respondent to treat that response as a withdrawal of the appeal.
251. The dismissal was not unfair. The dismissal was not an act of disability discrimination or of victimisation.

Conclusion

252. For the reasons stated above, all of the claims fail and are dismissed.

Employment Judge Quill

01 Jan 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

02/01/2020

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FOR EMPLOYMENT TRIBUNALS