



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A King

**Respondent:** Costco Wholesale UK Ltd

**Heard at:** Reading Employment Tribunal

**On:** 16-19 May 2022, 23 May 2022 (and 24 and 26 May 2022 in Chambers)

**Before:** Employment Judge Eeley  
Ms D Ballard  
Ms H Edwards

## Representation

Claimant: Mr A Bachu, counsel

Respondent: Mr P Gorasia, counsel

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of constructive unfair dismissal fails and is dismissed.
2. The claimant's claims of disability discrimination contrary to sections 13, 15, 20, 21 and 26 of the Equality Act 2010 fail and are dismissed.
3. The claimant's claims of victimisation contrary to section 27 of the Equality Act 2010 fail and are dismissed.

Further:

4. The claimant's claim in respect of holiday pay/unauthorised deductions from wages is dismissed upon withdrawal by the claimant.

# REASONS

## Background and procedure

1. The claimant presented claims of discrimination, victimisation, constructive unfair dismissal and unauthorised deductions from wages/breach of contract in respect of holiday pay. The ET1 was presented on 21 August 2020. Early Conciliation began on 9 July 2020 and concluded on 9 August 2020. Following filing of the ET3, case management orders were given at a preliminary hearing on 11 June 2020.
2. The issues for determination in the case were agreed between the parties as set out at in the case management summary of 11 June 2020 [89] save that the claimant provided further and better particulars of the comparators relied upon on 25 June 2021 [99] and gave further particulars of the holiday pay claim (which was subsequently withdrawn) on 21 July 2021. The list of issues was agreed with the Tribunal at the outset of the hearing save that the claimant provided further particulars of the matters relied upon as the breach(es) of contract which formed the basis of the constructive dismissal claim. This was agreed with respondent's counsel and provided to the Tribunal in paper format during the course of the hearing.
3. The respondent admitted that the claimant was a disabled person in accordance with the Equality Act 2010 at the relevant times because of a physical impairment in his spine.
4. The Tribunal was referred to documents within an agreed trial bundle of 419 pages and an agreed supplemental bundle of 94 pages. The Tribunal received written and oral witness evidence from the following witnesses:
  - a. The claimant, Mr Alan King
  - b. Jo Northwood, respondent's Bakery Manager
  - c. Neil Boscott, respondent's Service Deli Manager
  - d. Sue Knowles, respondent's Marketing and HR Director
  - e. Andrew Westwood, Regional Manager at the respondent.
  - f. Paul Alexander, respondent's Assistant General Manager.

The claimant also provided written witness statements from Peter Bailey, Zbigniew Kaminski and Daniel Brooks. Respondent's counsel indicated that he did not need to cross examine these witnesses and so they did not appear at the Tribunal to give oral evidence.

5. The Tribunal had the benefit of an agreed chronology and cast list and was grateful for the written and oral submissions of both counsel.
6. Numbers in square brackets are references to page numbers within the agreed hearing bundle unless otherwise indicated.

## Findings of fact

7. The respondent is a cash and carry membership club operating through a network of about 29 warehouses in the UK. The claimant started work with

the respondent as a Supervisor on 17 June 2013 working at the respondent's Farnborough warehouse.

8. The claimant's offer letter [140A] contained the following clauses which were of particular relevance in the circumstances of this case:

*"This is an offer of a full-time position on the terms set out in this letter which, together with the Employee Agreement (to the extent that it applies to full-time employees and except as otherwise provided in this letter), sets out the terms and conditions of employment that will apply to you during your employment. In the event of a conflict between the employee agreement and the terms of this letter the terms of this letter prevail. This incorporates the particulars of your employment required by section 1 of the Employment Rights Act 1996."*

*"You acknowledge, however, that Costco may change your job title and duties from time to time and reserves the right to transfer you to other parts of the Costco or Costco online business on either a temporary or permanent basis as business needs dictate."*

*"Your normal place of work will be café Farnborough warehouse or such other place within the UK as we may reasonably determine."*

*"You will normally be required to work 40 hrs per week, Mondays to Sundays inclusive. However, you acknowledge that given the nature of the business of Costco and Costco online you may be required to work nights from time to time as business needs dictate. You may also be required to work additional hours as business needs dictate, which will be paid as outlined in section 5.6 of the Employee Agreement."*

9. In light of the written offer of employment we find that it was the norm for the respondent to expect a certain amount of flexibility from all its employees. The starting point was flexibility to accommodate business needs. We also note that the Employee Agreement was incorporated into the contract of employment, at least in part. The requirement for flexibility is also borne out by the fact that the claimant did a number of different jobs in different places during the course of his employment with the respondent.

10. At paragraph 2 of his witness statement, the claimant says that in July 2018 his contract was varied by agreement following a conversation with Steve McDonald and Paul Alexander. He says that after this time he was guaranteed that he would only be required to work on early shifts. We do not accept this. The general position within the respondent organisation was that all employees worked flexible shifts with no guaranteed working pattern from week to week. In order for employees to obtain guaranteed working patterns they would have to make a formal flexible working application. We heard evidence to this effect from Paul Alexander who confirmed that he indicated to the claimant, even in March 2020, that a formal flexible working request would be required in order to obtain guaranteed early shifts. There is nothing on the claimant's personnel file (or elsewhere within the available documentation) to confirm that a change to his shift pattern was agreed at this point. Rather, we find that the claimant preferred to work early shifts, particularly in order to fit around his childcare requirements. He let his managers know his preference and, to the extent that the particular

department could accommodate it, his managers generally offered him early shifts. However, early shifts were never guaranteed and the needs of the business would always have to come first. This was an example of flexible and cooperative line management on a day-to-day basis.

11. In August 2018 the claimant transferred from working on “Front End” to the café at the Farnborough warehouse. We find that he transferred to the café because Elena (the Café Manager) was new to the post and needed to settle in. She benefited from the claimant’s experience and guidance. In particular, he helped her to set the café up for the day. At around this time the claimant had actually asked for a transfer to be a forklift truck driver in order to obtain permanent early shifts to fit around childcare responsibilities. However, he was not given a forklift truck role and he transferred to the café in order to help meet business needs. By coincidence, the support that he provided within the café was best provided at the start of the working day. As indicated, the claimant could go in and set up the department before the café opened and he could provide support to the café manager. However, this did not mean that his working hours formally changed so that he was guaranteed early shifts. Rather, the shift pattern followed the needs of the job rather than the other way around. The arrangement suited everybody involved (including the claimant) but that does not mean that there was a contractual variation or a permanent change to his working patterns.
12. The claimant sent a series of text messages complaining about back pain/absence between 19 August 2018 and January 2020 including to the café manager and Neil Boscott, the Deli Manager.
13. In June 2019 the claimant transferred to work in the Service Deli. Generally speaking he carried on working early shifts. Once again, this was because of business need within the department. In normal times the work in the Service Deli is concentrated in the early part of the working day. Products which were prepared within the Deli were usually prepared in one go at the start of the working day before the store opened. However, as before, there was no express agreement guaranteeing the claimant early shifts when working in the Deli. His preferred working patterns naturally coincided with the peak demand time within the Deli. Furthermore, the claimant made no formal flexible working request and there was nothing on file to show that his contractual hours had changed, whether by agreement or by custom and practice.
14. On 30 January 2020 the UK recorded its first two cases of Covid 19.
15. The claimant met Jo Northwood and Paul Alexander on 16 February 2020 to discuss his work going forward. The claimant was asked to move to the Bakery from the Service Deli in February 2020 in order to provide cover as a Supervisor whilst one of the usual team was on maternity leave. Paul Alexander arranged the move with the claimant and the claimant had a brief meeting with Jo Northwood and Paul Alexander before the move so that they could introduce themselves to each other and the Department. There was no discussion of the claimant’s move to the Bakery being a permanent one, as the plan was that the employee on maternity leave would return to work in the Bakery after her leave ended. During the course of these discussions the claimant did not mention having a bad back or being unable to carry heavy weights. Consequently, Ms Northwood did not make any

arrangements for colleagues to assist the claimant with lifting after the meeting. Rather, they had a general discussion about who was working in the department at that time. We do not accept that Ms Northwood made any comments about specific team members or give the claimant any warning about Sam Trowsdale being 'difficult.'

16. We accept that the work in the bakery was split broadly into three different sections: skilled bakers; skilled cake decorators; and general bakery operations (moving ingredients/items around, packing, labelling, getting products ready for sale and so on). As the claimant was not a trained baker or cake decorator he was on the general operations side of the team.
17. Once again, the shifts that the claimant worked in the Bakery were early shifts but we do not accept that this was due to a contractual entitlement. Rather, it was because supervision of the Bakery is largely a morning job. The Bakery carries out its production early in the morning and consequently the Supervisor needs to be on site at that time. Once again, the claimant's shift pattern was designed to meet the needs of the business rather than to indicate that he had any legitimate expectation of guaranteed early shifts. We also find that the very fact that the claimant agreed to transfer to the Bakery role, even on a short-term basis, indicates that he was downplaying the extent of any back problems in his dealings with his managers at that time. We recognize that a role in the Bakery involves some of the heavier physical work within the respondent's warehouse. The claimant was not a trained specialist Baker so he would automatically be required to carry out tasks which focused on the heavy lifting part of the job. The claimant says that he was provided with specific assistance by a named employee "Sagar". He asserts that this employee helped him with any lifting tasks that he struggled to complete. We do not accept that such a specific arrangement was made for the claimant. Nor do we accept that it was an arrangement made because of his back condition. Rather, we find that the employees in the Bakery worked together as a team and would always cooperate in lifting heavy items together. This was their normal method of work. Team members habitually helped each other to lift items. In the context of manual handling practices in a modern workplace that is not at all surprising. If heavy lifting is required it is commonplace for employees to work together to carry out the task to ensure safe methods of working.
18. We do not accept that the claimant made significant complaints about the impact of his work on his back condition when he started work in the Bakery. The only complaint he raised was that repetitive lifting and twisting actions exacerbated or caused flare-ups in his back pain. He did not specify that he had problems lifting specific weights. In fact, he said that he was ok to lift 25Kg. Rather, it was the repetitive nature of some of the twisting and lifting that concerned him.
19. We accept that shortly after joining the team the claimant mentioned to Jo Northwood that he had a bad back and that some days he needed to take painkillers. She was understandably surprised by this information given that the claimant had agreed to move into the department and the Bakery was one of the areas of the warehouse which involved heavier work. The Bakery dealt with heavy items such as large baking trays and 25 kg bags of flour and icing sugar. However, we also accept that the claimant said that he was fine with lifting and that weights of 25 kg were not a problem. His position

was that it was the more repetitive movements that could aggravate his back. Ms Northwood told the claimant to let her know if anything was causing him a problem. We accept her evidence that he never raised anything with her and that she never needed to arrange assistance with any tasks, although she would have been happy to do so if necessary. We also accept that the claimant did not mention anything to Ms Northwood about being registered disabled or having a disability badge.

20. The claimant was absent from work with back pain on 7 and 8 March 2020. When he returned to work he attended a return-to-work meeting with Jo Northwood. He told her that he was being referred by his specialist for a scan and in the meantime would be taking some stronger painkillers. Ms Northwood asked him about his duties and he said that he was happy and able to continue with everything as before as he was used to having these flare-ups from time to time but was able to manage them. She told him that she would make a note of the medication he was taking and that he should let her know straight away if there are any issues. We accept that the claimant did not report any problems to Jo Northwood and she did not detect any issues with him carrying out his duties or activities following his return to work. The written record of the return-to-work meeting is in the Tribunal bundle [159]. It records that the claimant was taking diazepam and morphine as needed and stated *“Alan’s back is an ongoing issue he is under a specialist regarding this. He is due to have an MRI in next 10 days. Although Alan is happy and able to continue his duties.”*
21. The World Health Organisation declared a Covid 19 Pandemic on 11 March 2020. On 12 March the U.K.’s medical officers raised the UK Covid risk to high. On 16 March the Prime Minister advised against non-essential travel and advised that people should work from home where possible. On 18 March the Prime Minister ordered that schools should close.
22. On 19 March the claimant sent an email to Jo Northwood entitled “Grievance”. The text of the email was as follows: *“Today at around 11:20 am 19/03/2020 I ask Sam to start doing rolls and I would carry on labelling as he is quicker at this than myself (I have only just joined so therefore I would be slower, this is something he would know but maybe not that I’m disabled unless I explain that to him). He turn around to me and said no, that I need the practice because he has been watching me in the morning comparing himself against me and that I was slower than himself. I explained to him that I’m disabled and that I struggle with a bone growing into my spinal nerves and a ruptured disc which slows me down, he turned around and told me it doesn’t stop my hand from moving. I explained it does affect everything including movement to my hands I struggle because I’m disabled do you have a problem with that, he replied yes.”*
23. We accept that the incident occurred as described by the claimant in his email. The first part of the exchange between the men is relatively innocuous given that the claimant accepts that Sam probably did not know that the claimant was disabled. However, after the claimant explained the disability, Sam’s comments were more problematic. (We pause to note that the fact that Sam did not know that the claimant was disabled by this stage in the chronology suggests that, contrary to the claimant’s case, he was not visibly or obviously disabled and had not told all his colleagues of his physical difficulties. Otherwise, why would Sam be unaware of the disability

after the claimant had been working in a bakery for about a month?) In any event, the incident occurred as described at [159a]. It was Jo Northwood's day off and so she did not see the email until the next day, 20 March 2020.

24. At the beginning of the shift on 20 March Sam went to Jo Northwood and reported what had happened the day before. Sam told her that his comment about 'having a problem' was aimed at the speed of the task. He did not have any objection to the claimant or to him having a disability and he wanted to apologise to the claimant. We find that the very fact that Sam approached Jo Northwood of his own volition in order to discuss the incident indicates that he realised that his comments had been unacceptable (i.e. that he had done something for which he should apologise). However, contrary to the claimant's evidence, we accept that Sam did in fact go to the claimant and apologise in person and that the claimant was prepared to accept the apology as sufficient to deal with the issue. All parties considered the matter closed. We also find that Jo Northwood checked with the claimant that he was happy with this and that the matter had been dealt with. It is not credible to suggest that the claimant would have refrained from sending further emails or escalating the grievance further if he had not heard from Jo Northwood and had not received an apology from Sam. We do not accept that he would have let matters lie. If he had remained concerned he would have taken further action.

25. We also accept that Jo Northwood handled the issue in line with the respondent's "open door policy". She was not in breach of it. The document indicates that an informal grievance can be raised either verbally or in writing. Therefore, the mere fact that the claimant sent an email does not automatically mean that it should be considered as a formal grievance. Unless the claimant told Jo Northwood that he wanted to escalate it, it was realistic for her to react to the parties and see whether it had been resolved informally to everybody's satisfaction. If both the protagonists thought that the matter was at an end and had been resolved then there was nothing for Jo Northwood to escalate or deal with in a formal manner. We find that this is how the issue was resolved, in line with the respondent's written policies and in line with the parties' wishes.

26. Despite the claimant's history of back problems he had taken relatively little sick leave in the later years of his employment with the respondent. The first self-certification form in the hearing bundle relating to his back condition is the document at [156]. The claimant was off work 9 May 2019 to 14 May 2019 with back pain. He was certified as fully fit to return to work and there is nothing to indicate that adjustments were being made to his work duties upon his return. There was then a gap of several months until he was next off work with back problems between 11 and 13 November 2019. Again, the record does not mention ongoing problems, treatment or limitations on his work activities. The next record [158] records absence with back pain between 23 January 2020 and 25 January 2020 with no reference to ongoing problems, treatment or limitations on his work activities. The record after that is of the return-to-work meeting on 9 March 2020.

27. The overall picture painted by these sick notes is of relatively short periods of absence with relatively lengthy periods of full attendance at work in

between. Only on 9 March 2020 does it begin to change. This was the first time that the claimant mentioned an ongoing back problem at a return-to-work meeting and it was the first time that he indicated that he was under the care of a specialist with ongoing tests being carried out etc. Furthermore, the nature of the medication which is recorded makes it clear that this not a straightforward 'bad back' which many working adults will complain of on a periodic basis. This is consistent with the respondent's broad evidence on the point, which is that they knew that there had been a back problem which had been significant in the past but for which the claimant had had surgery. As far as the respondent knew the back problem had not been particularly problematic in recent years. It certainly had not interfered with his daily job tasks at work.

28. There was a significant development on 20 March 2020 when the claimant met Paul Alexander and Steve McDonald. At that meeting he told the managers that he was not enjoying it in the Bakery and that he was having issues carrying out tasks involving bending, twisting and stretching as they were aggravating his back. Although the claimant had previously complained of a bad back he had reported it to Mr Alexander as something which affected him only occasionally. He had told Mr Alexander that he used to be registered disabled but that he had had an operation which meant that this was no longer the case. Mr Alexander's understanding had been that the claimant still had 'flare ups' with back pain from time to time and there had been conversations about further surgery but he only took occasional sick days and absences were short lived. He had seen that the claimant always reported himself fully fit to continue normal duties on his return to work. The claimant did not present with any observable limitations and Mr Alexander was aware that the claimant's roles at work could be physical. The change was at the meeting on 20 March when the claimant made it clear that the work in the bakery was adversely affecting his health or vice versa. The claimant gave Mr Alexander the impression that it was specific tasks within the bakery department that were causing the back issue rather than the job as a whole.
29. The comments made by the claimant at the meeting on 20 March taken together with the contents of the return-to-work record of 9 March could have triggered the respondent to take further steps to investigate the severity of the claimant's symptoms and the degree of limitation he suffered. They could have sought an overall picture of his medical condition at this stage. They did not do this but relied on what the claimant had already told them. They could have asked for occupational health guidance at this stage to see what steps could and should be taken at work to accommodate the claimant's condition. They did not need to accept the claimant's account of his limitations unquestioningly. To some extent, matters were overtaken by events which took place over the next days and weeks.
30. At the meeting on 20 March the claimant basically reported that the problems with his back only arose in the context of the Bakery. Hence he wanted to return to work in the Deli. (He did not tell the respondent that when working in the Deli he would avoid tasks and delegate tasks to others in order to protect his back. If this is what was happening, the respondent was unaware of it. As far as they were aware he was fit to do all the tasks associated with the Supervisor role in the Deli.) The problems the claimant described were repetitive twisting turning and bending. Lifting itself was not



referred to as a particular problem at this stage. Viewed objectively this is a curious state of affairs. It is difficult to understand how the claimant had problems working in the Bakery but not when working in the Deli. In any event, the respondent gave the claimant what he was asking for. The outcome of the meeting was that the claimant could return to work as the Deli Supervisor from 23 March 2020.

31. On 20 March 2020 the Prime Minister ordered all cafes, restaurants and pubs to close. On 21 March 2020 the Environment Secretary advised individuals to stop panic buying.
32. The claimant returned to do his first 8-hour shift on the Service Deli on 23 March.
33. In the evening of 23 March 2020 the Prime Minister announced the first national lockdown during a TV briefing. Whilst this was not announced until the evening of 23 March, it did not occur in a vacuum. The lockdown had been widely predicted and discussed for at least a week previously. During this period there were daily TV Covid briefings. There had been increasing pressure on essential services, stockpiling, queues in shops and supermarkets, panic buying and shortages of key products. In the run up to the lockdown announcement the respondent's business was under increasing pressure. Due to the increased demand we accept that overall sales might increase just before lockdown [406]. However, this took place in the context of increased demand and the difficulties and restrictions placed on the respondent in organizing the business to cope with stock and staff shortages and the overall unprecedented levels of unpredictability. We accept that priorities within the business shifted as demand for different categories of product changed. Society had to get to grips with an entirely new way of living during this period and this undoubtedly impacted upon retail and wholesale consumption. Products which were linked or tied to normal work patterns would be in less demand. There was no call for platters of sandwiches for work meetings, for example. By contrast, demand for core products, staples and essentials rose sharply. Most people in the UK at that time were only too aware of the gaps on shop shelves for such products as toilet roll, for example. The respondent had to respond to those changes within its own business and the work environment. Hence the reference to 'business needs' would take on a special and exceptional relevance and meaning during this time.
34. We heard evidence and submissions about the sales data at [406]. We broadly accept Mr Boscott's characterization of the challenges and changes facing the respondent in the Deli when they made the decision on 23 March. However, we do not accept that the respondent's managers could have known about takings in the department reducing by £20,000 at that stage. We note that, as of the week of 16 March, the Deli's sales were up 44% compared to the same period in the previous year. However, importantly, the sales in the rest of the business were up by 84% during the same period. The week before that, Deli sales were up by 29% compared to 80% in the rest of the business. So, whatever else was going on, the respondent could see that the increase in demand was weighted towards the rest of the business rather than the Deli. Deli sales might have been up in the period leading to the start of lockdown but not by as much as other areas of the

business. The priority shifted to other areas of demand. Then, in the week commencing on 23 March, Deli sales were down 43% as compared to a reduction in the total warehouse of 16%. The comparative weakness of sales in the Deli (as compared to the whole of the warehouse) was maintained over a number of weeks. Whilst the Deli started to recover slowly during April, May and June, its sales were still weaker than those of the warehouse as a whole and its recovery was slower and less pronounced than the business as a whole.

35. A number of matters would reasonably have been within the respondent's knowledge and would entitle them to think that more flexibility was needed. They would have been well aware of the impact of panic buying and excessive queueing within the store. They would already be aware of the increased strain on workforce planning given the increased and unpredictable level of staff absence during the pandemic. Overall there was a reduction in predictability. We accept Mr Boscott's evidence that, although the warehouse was packed with members every day, members were panic buying staple foods and household items, not fresh Deli products. Demand for party and sandwich platters (previously strong sellers) dropped off completely when group gatherings were banned.
36. When Covid started, the pattern of production changed as the respondent did not know what sales in the Deli were going to look like. Instead of doing all the production first thing in the morning and risking wastage if products did not sell, the respondent changed to a reactive model. They responded to sales as they went along and prepared products in line with what was actually selling that day. They also had to react to schedules fluctuating at short notice due to staff absences and fluctuating demand. The bulk of the work moved away from being concentrated on the early shift. Hence, the need for Supervisor presence became more important later in the day and less important in the early mornings.
37. To be clear, we do not accept the claimant's assertion before the Tribunal that Covid was not adversely impacting the Deli. We have set out above the ways in which that impact was already known. The claimant suggested that the only real change at around this time was that he was moving back to work in the Deli. That is not correct and mischaracterizes what was a very fluid and fast changing business environment. Things were changing on a daily basis and this would be obvious to anyone present in the warehouse. The respondent was doing its best to react to those changes in real time and make adjustments as and when needed. When the claimant returned to work later on things had moved on again (see findings below). The Tribunal considers that it is important to look at the circumstances facing the parties as they actually were at the time each meeting was held and each decision was made rather than to look back on events with the benefit of hindsight and risk conflating developments which actually occurred over a period of time rather than all at once.
38. The claimant was called to a meeting with Paul Alexander and Neil Boscott on 23 March 2020. They told the claimant that because of changes to business needs they needed him to be more flexible in relation to shifts worked in the Deli. He was told that he could not expect to work exclusively on the early shift. He was told that his shift pattern would need to be more varied than previously because member shopping habits in the Service Deli

had changed. The demand for fresh pre-prepared products had dropped off so there was less activity in the Deli in the morning getting things ready for sale later in the day. Instead, the department was finding that it needed to react and get products ready as demand came through the day. The claimant was unhappy with this and said that he needed to work the early shift for childcare reasons. He made no mention of needing to work early shifts for reasons connected with his back condition (e.g. attendance at medical appointments etc). He did not make this link with disability. Although the claimant's preferences had been accommodated whenever possible it had not been agreed as a fixed or guaranteed arrangement. Mr Alexander told the claimant that he could work early shifts for the next four weeks and they would work with the claimant as much as possible to help with the transition to a more flexible schedule. Mr Alexander explained that if the claimant wanted a fixed shift pattern going beyond the next four weeks, he would need to make a flexible working application. Thus, the respondent was not imposing a complete change after 28 days. The respondent was trying to facilitate a transition rather than an abrupt change. On balance, we prefer the respondent's account of how this was explained to the claimant at the meeting. We find that up until this point the respondent had been accommodating the claimant's preference for early shifts. There was no contractual entitlement to early shifts. As business needs changed then the respondent's ability accommodate the claimant's preferences ended. At the meeting the respondent did not tell the claimant that they were taking away his earlies, rather that they needed more flexibility from him. So, for example, on days when other supervisors were off work he might have to work later shifts to accommodate that. Given the overall unpredictability regarding staff absences during this period there was a realistic expectation that the claimant might have to cover later shifts which were usually supervised by others.

39. On 20 April 2020 the Coronavirus Job Retention Scheme was launched.
40. The claimant was required to self-isolate from 24 March to 6 April [160-161] and from 7 April to 20 April. He was only back at work for one shift in the middle of these two periods. This mirrored what was happening across the workforce during this period and was part of the problem faced by the respondent in maintaining adequate and predictable staffing levels.
41. Absence levels were high and unpredictable due to employees either testing positive for Covid or being required to self-isolate or shield. This left the warehouse very stretched in places and those who were able to work had to move around shifts and departments at short notice. Although Mr Boscott still had a Relief Supervisor available, that worker was only covering when needed and most of the time the Deli was quiet enough for Mr Boscott to manage himself. At around this time "Front End" was by far the busiest in terms of demand. On a normal pre-Covid day there would have been a maximum of 6 out of the 16 tills open at any one time whereas during this first lockdown period all 16 tills were open from opening until closing time. Indeed, there were still queues at 9pm even though the warehouse would normally shut at 8pm. The overriding priority was to get customers served and to keep the queues moving through and out of the tills.
42. The respondent employed Cashiers on the Front End section and Supervisors oversaw the work on the tills/Front End. In pre Covid times the

Supervisors would spend most of their shifts working in a supervisory capacity and would spend only short periods working on the tills themselves in order to cover for Cashiers' break times etc. This situation changed dramatically with the onset of Covid 19. The respondent was so short of trained Cashiers that the Front End Supervisors were regularly required to spend their whole shifts working as cashiers and had to forego the supervisory elements of their roles. There was no slack in the system. Even managers from other, quieter departments were being asked to work on the tills in order to plug the staffing gaps.

43. Anyone who worked on the tills had to undergo specific training. In normal circumstances it would be possible to train up new Cashiers with a Supervisor overseeing their work on the till. However, the staffing shortages meant that there was nobody free to train staff on the tills in order to be able to use them on Front End. The respondent needed to deploy all ready-trained staff on the tills and did not have the time and resources to retrain other staff for redeployment. It is also important to note that there were other potential limitations on where staff could work. Under the respondent's rules, Supervisors could not supervise workers on the tills who were members of their own family. Hence, an employee called Lauren could not move to work on the tills even though she was already trained because it would have meant that she was being supervised by a close family relative. We also heard evidence, and accept, that it took at least month to recruit new cashiers into the business. So even if the respondent were able to do this, they would still need internal cover on the tills pending that recruitment.
44. On 20 April several of the managers in the quieter departments were told that employees would need to be temporarily moved to cover the tills. As the claimant was due to return to work the following day and already had experience of working on Front End and had not been working in the Service Deli for the previous few weeks, Mr Alexander told Mr Boscott that the claimant was one of the employees who was earmarked to move.
45. As Mr Boscott was due to be off work the next day he sent a text message to the claimant to let him know the plan. He confirmed that it was a temporary move and he would continue to be paid the supervisor rate [162] The text message said: *"Afternoon the duty managers, Assistants and Steve have just had a meeting and have decided that they are moving people around to cover where is needed. They have just told me that at 9am tomorrow you will need to go and cashier on front end and until lockdown ends and Deli returns to normal you will be a cashier on front end and lola will be doing your rota. We will need to transfer the hours each week as you are not being PDE'd over. Just wanted to let you know as I am off tomorrow. You will be in Deli from 6am to 9am tomorrow then to front end after. This is due to front end are struggling to get enough cashiers but you are still being paid supervisor rate."*
46. We heard evidence, and we accept, that the claimant was not the only person to be moved from another department to work as a cashier. In addition to the claimant twelve other members of staff moved from other departments to plug the staffing gaps on the tills.
47. Shortly afterwards the claimant phoned Mr Boscott. Mr Boscott explained the situation and the claimant said that he would be unable to work on the

tills because it would result in the same issues for his back that he had experienced in the Bakery. He said that operating the tills involved bending, twisting, turning, lifting and repetitive movements which he could not do. Mr Boscott was concerned by this as he had understood that the claimant's back issues in the Bakery were specific to the tasks in that department whereas what the claimant described during this phone call suggested that he was also having trouble with the physical demands which would also form part of his role on the Service Deli.

48. Mr Boscott then went to speak to Paul Alexander and Steve McDonald (the General Manager of the store at the time). Mr Alexander confirmed that he would speak to Dominic Flanagan (UK HR Training and Development Manager). The advice which came back from Mr Flanagan was that the respondent should ask the claimant if he was able to provide some medical information clarifying what duties he was/was not able to safely carry out so that the respondent could ensure that it was not exposing the claimant to any risk.
49. As a result of this advice Mr Boscott phoned the claimant back and made the request. The claimant said that he would speak to his GP.
50. The claimant remained off sick for the rest of that week but sent in medical letters to Steve McDonald [164-166] which confirmed that he had chronic leg and back pain due to problems with his spine and was awaiting surgery. It confirmed that the surgery (which had been delayed due to the pandemic) was looking to alleviate some of the symptoms but was not going to be curative. It then went on to say: *"Alan tells me that the work he is undertaking in the deli counter is something that he has coped with and can cope with. What he cannot do is repetitive twisting, turning and bending continuously. He can do some lifting, but only what he feels he is capable of, and not continuously for long periods of time."* The GP letter and associated medical letters did not provide any further or more detailed guidance about what types of task the claimant could or could not do at work. Mr Boscott gave evidence that the content of the medical letters did not make sense to him as the movements which the claimant was said to be unable to do were all movements which were required as part of the claimant's duties in the Deli. He was also concerned that the claimant's ability to lift was limited. Mr Boscott was worried about this as this was the sort of task which the claimant usually did. We accept that this was Mr Boscott's genuinely held view at this point in time. The evidence before the Tribunal indicated that the claimant, as a Supervisor, had a degree of autonomy in the Deli which meant that he was able to allocate tasks amongst the staff and arrange the work to suit his needs and preferences. This meant that he could make adjustments to his own work tasks without anyone else at a higher level in the management chain actually being aware of it at the time. He could do this either on an ad hoc basis or more regularly and managers would not necessarily be made aware of this. In effect, it would not be picked up on by the respondent and its managers unless the claimant specifically brought it to their attention. He had not brought it to their attention and so they were actually ignorant of the extent to which the claimant might or might not have been making adjustments to his own working practices. We have concluded that when working in the Deli the claimant had previously been able to choose what tasks he could and could not (or would not) do. To that extent the claimant had previously been

working with informal adjustments in that he was not doing the full task range as set out in his full job description. That does not mean, however, that the respondent knew or approved any such adjustments. For example, the claimant was fully trained to work on the rotisserie and as far as the respondent knew he worked on the rotisserie as part of his Supervisor role. However, in practice, the claimant delegated that task to other employees so that he did not need to do it himself. The availability of other staff and the claimant's supervisory powers meant that any adjustments were effectively masked from the respondent's managers' view.

51. On 24 April 2020 the claimant sent an email to Steve Macdonald which stated *"Can you clarify my current employment situation as I've had nothing in writing. All I've been told is not to come into work until I give medical evidence about my back because nothing has been copied from what I have taken to work in the past. So I don't know if I'm being paid for this time off or if I'm suspended as I'm not being allowed to work, please could I have clarification of what my employment is at present. Please find attached medical evidence from my Doctor."*
52. By 27 April the claimant was due to return to work. The return-to-work form which was signed by the claimant and Mr Boscott confirmed that he had been on a 2 week isolation for possible contact with Covid 19 and then awaiting medical advice of restrictions to duties he was able to perform in the warehouse. The comment section noted: *"Alan now has medical advice noting certain duties unable to perform see attached notes."* On the morning of 27 April there was a meeting between the claimant and Mr Boscott. Sue Wilson attended as a note taker. The notes were produced to us at [169]. This was a return-to-work meeting. There was no entitlement for employees to have a companion or to be accompanied at this sort of meeting under the respondent's processes and procedures. There was no expectation or usual practice that employees would be accompanied at this sort of meeting. We find that this was understandable and not an unusual position for an employer to take. Such meetings would often involve the discussion of confidential information, such as medical evidence, where it could not be assumed that an employee would want to share this information with colleagues. Furthermore, the purpose of such a meeting is not such as would usually attract the need for representation or accompaniment. It would not be expected that an employer would be taking significant decisions at such a meeting unlike, for example, at a disciplinary or grievance meeting. Furthermore, a return-to-work meeting would be required each time an employee returned to work from sick leave. By definition, there would be a quite a high number of such meetings and they would often need to take place at relatively short notice. It would not be reasonably feasible to arrange representation as of right at all such meetings, particularly if the respondent needed to free up the companion/representative from their own work duties in order for them to attend the meeting. All of these factors go some way towards explaining why employees were not routinely offered a companion at such return-to-work meetings.
53. Contrary to the claimant's assertion we do not accept that he specifically asked to have a witness at this meeting. There is no mention of it in the notes, which we find to be a broadly accurate summary of what was said at the meeting. The purpose of the meeting was to clarify what the claimant

could or could not do at work going forwards in light of the medical evidence he had produced. It was not a disciplinary hearing and did not have that 'flavour'. In those circumstances we cannot see why the claimant would have any reason to ask for a witness or companion at the meeting.

54. At the meeting the respondent asked the claimant to explain, in his own way, what he could and could not do due to his back problem. This was a perfectly reasonable question for them to ask given the relatively limited information that had been received from the claimant's doctors. The claimant was asked whether he was able to perform all the tasks which were required within the department. He answered that he could, but not repetitive tasks. He demonstrated the movements which he considered repetitive. The claimant stated that moving in this fashion in the Bakery and at Front End exacerbated the problems with his back. Mr Boscott went through the list of jobs which the claimant might be required to perform within the department and the claimant confirmed his ability to perform these tasks with two exceptions namely: the loading and unloading of the ovens in the rotisserie; and the production of spicy products (e.g. jalfrezi, katsu curry etc). We can see that it was the claimant who raised the specific tasks which he would struggle with together with the more general observations about repetitive twisting. We accept that the respondent asked for more detailed information and sought to explore the practicalities. They went through the tasks which form part of the claimant's job description in order to get the claimant's response. This was the first step to understanding the claimant's limitations at work. We find that there was nothing wrong with the respondent asking the claimant how often he could do tasks and whether he would be able to cover all the relevant tasks if working on his own. This was all part of the process of the respondent establishing the limits of what the claimant could do before making a decision about his work based on advice and the available evidence.
55. We find that the notes of both meetings which took place are accurate, although not verbatim.
56. During the course of the meeting the claimant discussed the nature of his problems with working with spice. He informed the respondent that exposure to spice affected his breathing and he confirmed that when working with the product he felt unable to take a full breath. He went on to explain that he even experienced breathing difficulties when working in the vicinity of a colleague making the product. He confirmed that he was affected by working with at least five spice products. The claimant was asked to confirm whether he would be able to make these products if required and the claimant confirmed that he would try wearing a mask. The claimant gave an example of a day when he wore a mask and sealed goggles whilst making the product and did not suffer any effects. When asked again whether he would be able to make the spiced products as needed the claimant confirmed that he was able to make the spiced products as needed.
57. In oral evidence and in the claimant's closing submissions, the claimant tried to row back on the extent of the problems he suffered as a result of working with/in the vicinity of spice. However, it is notable that in writing his witness statement for the Employment Tribunal the claimant still maintained that exposure to spice caused his eyes and throat to burn and made it

difficult for him to breathe. This suggests that the record of what he said to the respondent on 27 April is accurate.

58. Although the difficulty with spicy foods is not the disability for the purposes of this Tribunal claim, it is still a relevant part of the factual matrix and was very relevant to the respondent in managing the situation. Whether the claimant was disabled by some sort of spice allergy or not, the respondent had a duty of care to ensure the safety of the claimant at work. They therefore had to think of the consequences of this. It was particularly relevant at the time in question given that the country was in the early stages of the Covid 19 pandemic. Covid 19 was known to be a primarily respiratory disease at that point in time and so anything which contributed to breathing difficulties in the workplace could be seen as particularly problematic. The consequences of a respiratory attack could be serious, particularly given the delays and difficulties in getting prompt or emergency medical attention at that stage of the pandemic. The claimant had effectively put the respondent on notice that he was at risk of a respiratory attack as a result of his working practices. If the respondent then ignored that information and continued to knowingly put the claimant in harm's way it would leave itself open to a personal injury claim should the claimant have a significant adverse reaction. The Tribunal cannot know, based on the available evidence, how likely it was that such an event would occur but the respondent was having to actively manage risk in the workplace and was entitled to deploy a cautious approach in the prevailing circumstances. The risk of ill health was arguably increased by the fact that the claimant could not even work in the vicinity of a colleague who was preparing spicy food without being at risk of respiratory problems. This indicates quite a high level of sensitivity to spice on the claimant's part. The Tribunal notes the claimant's suggestion that he could use a mask and goggles to produce the dishes. However, this does not account for the fact that he had an adverse reaction even when others were working with spice. In those circumstances it is difficult to see how a mask and goggles would give adequate protection unless he wore them all through the shift when people were working with spicy food in the vicinity. We conclude that, just taking the issue with spicy food in isolation, the respondent had legitimate concerns about the claimant's ability to work in the Deli.

59. The claimant was also questioned about the possibility of him working on the rotisserie. Mr Boscott put forward a scenario where the claimant was the only person in the department and the rotisserie needed attending. He asked the claimant whether he would be able to take over the role. The claimant said that he would do as much as he was physically able to do. He confirmed that he had not really done it before and so he would have to try it. He described it as an "unknown lifting quantity" and he could not say whether his back would stand it. He would do what he could. Mr Boscott asked the claimant whether he would be comfortable saying whether he would be able to keep the rotisserie open in such a situation. The claimant's response was to confirm that he was unable to say that he would be able to keep the rotisserie open because of the unknown nature of the lifting. He said that it would be unwise for him to do it with his back problem. He gave the example of when he loaded approximately 128 chickens and unloaded approximately 50% of them. At the end of the unloading he needed a break and took some medication. He avoided heavy lifting for the rest of the day. When questioned whether there was heavy lifting that he avoided the



claimant confirmed that, although that day there was no heavy lifting required, if there had been he would have been unable to perform it.

60. The upshot of the meetings was that the claimant was not able to give a guarantee that he could do the loading/unloading of the rotisserie on his own. This could be a time critical task depending on when the food finished cooking. Although the claimant was not indicating that he could not do it at all, he was indicating that if he tried it, it could well result in a flare-up of his symptoms with knock-on effects. He himself confirmed that it would be unwise for him to do the task with his back condition [169]. This put the respondent on notice of the risks with regard to its duty of care to the claimant.
61. At the end of the meeting the claimant was asked if there was any other situation or problem that he had. The claimant confirmed that he could not do the rib boxes when they were delivered. He was asked what he would do if he was the only person in the department at that point. He said that he would leave them for someone else to do.
62. The evidence to the Tribunal indicated that dealing with ribs was not a daily task. There were two deliveries of ribs per week totaling eleven boxes. These needed to be moved to the Deli chiller from another chiller. We find that the claimant told the respondent that he could not do that, although he tried to downplay that aspect during the Tribunal hearing.
63. The Tribunal heard evidence about the changes in product demand in the Deli during the Covid pandemic. We were told that, not only did production shift from first thing in the morning to production throughout the day, but that the types of products which were in demand also changed. There was a move away from sandwich platters for work events. There was an increased demand for spicy food. This was partially because the restaurants and take-aways were closed so could not supply this sort of food to consumers, and partly because of the increase in home working. The Tribunal accepts what the respondent says about this. We find that this would exacerbate the problem with working with spice from the claimant's point of view. The amount of time he was exposed to spices would increase. It would also reduce the room for manoeuvre from the respondent's point of view as it was harder to limit the times of day that the claimant would be exposed to spice. Furthermore, it would be harder to get adequate cover in terms of other staff who could do these tasks instead of the claimant. All of these were relevant considerations for the respondent at the time and the respondent acted entirely properly in exploring these issues with the claimant.
64. The morning meeting on 27 April provided the respondent's managers with much food for thought. Mr Boscott sought further HR advice from Dominic Flanagan. He emailed Mr Flanagan a copy of the notes and asked for his advice [171]. Mr Flanagan's position was that he would be uncomfortable with the claimant working in the Deli given the medical information and what the claimant had said in the meeting that morning.
65. As a result of this HR advice Mr Boscott asked the claimant to attend a further meeting that afternoon. Once again, notes were taken by Sue Wilson [172]. At the outset of the afternoon meeting Mr Boscott conveyed the HR

advice that he was not deemed fit to work in the Deli. Instead of just sending the claimant home from work Mr Boscott asked the claimant to say where in the warehouse he thought he would be able to work given his limitations. The claimant named a number of departments including Member Services. He noted that he was not sure how he would cope with sitting for long periods of time. Mr Boscott confirmed that, at that time, there were no vacancies in any of those departments but if something came up they might be able to offer it to the claimant.

66. During the Tribunal hearing we heard evidence about the role in Member Services and what it entailed. The role involved three tasks on rotation. At that point in time the main task to be undertaken was to act as gatekeeper at the front door because the warehouse was managing and restricting the number of customers able to enter at any given time (as part of Covid 19 restrictions). The second task was to walk the floor in order to identify stock losses and the third task was to check customer receipts. The job involved a degree of autonomy as the incumbent could decide which tasks to do at what time. It was not a desk job and would not involve the long periods of sitting which might be associated with an administrative job. It was not a job sitting at a customer services desk. From what we heard it was a job role which would accommodate the claimant's back related restrictions quite well.
67. At the conclusion of the meeting the claimant asked if he was free to go home at this point and Mr Boscott confirmed that if he did not have anything else he needed to discuss he was free to leave. We do not accept the claimant's assertion that the respondent sent him home and told he him he had to go home without pay. It was the claimant who asked whether he could go home (understandably as they had not identified anywhere for him to work in the immediate future). Neither side mentioned the issue of pay. The claimant had no reason to think that he was being sent home unpaid. It was quite understandable for the claimant to ask if he could go home as no alternative work had been identified for him at that point. We consider that any search for alternative job opportunities would probably have been done by a manager higher up in the management structure than Mr Boscott. It was really for Mr Alexander or Mr Macdonald to find a solution to the problem.
68. The claimant was off work on sick leave following the 27 April. We find that this was sickness absence partly because that is consistent with the respondent's records [153]. We were told that the code 'S1' would be automatically entered on the system by the administration if an employee called in to notify them that they were off work. Furthermore, at [154] there is reference to sick notes. This would not be relevant if the claimant had not said that he was on sick leave at some prior point.
69. Lockdown started to ease 10 May 2020.
70. It is apparent that a job became available for the claimant in early June [174-175]. By 8 June the claimant was being offered a job as a full time Member Services Supervisor. It was thought to be in line with the claimant's medical needs and in line with the claimant's description of where he felt he could work.

71. The claimant sent in a sick note on 8 June for three weeks. The claimant was unfit for work due to anxiety and depression. On receipt of the sick note Mr Alexander replied by email and gave the claimant details of the respondent's employee assistance programme so that he could get access to any necessary support.
72. The claimant did not respond to this message or to the job offer. The claimant's next act was to send in a grievance. He submitted this via email to Andrew Westwood and Sue Knowles on 1 July 2020 [181]. The grievance complained of disability discrimination. He asserted that as a result of his back condition reasonable adjustments had always been made to enable him to carry out his responsibilities within various departments including the Café and the Deli. He indicated he could not undertake any roles which required frequent heavy lifting of items of approximately 15kg or bending or twisting or rotating of the spine. He asserted that colleagues had always assisted him with the lifting of heavy items but said that there were no reasonable adjustments that could be made that would enable him to carry out roles involving frequent bending or twisting.
73. The grievance included allegations of disability discrimination covering the period from 22 March 2020 onwards when the claimant asserted that he was told his shift pattern would be changed so that he could no longer work early shifts. He also complained that he had been told to return to work on the tills. He further alleged that he had asked for a representative at the return-to-work meetings but that this had been refused. He alleged that the respondent had breached its duty to make reasonable adjustments. With regards to the offer of the post on Member Services, the claimant stated that the respondent had moved the Member Services Supervisor to a job on Front End (which the claimant knew he could do) in order to offer him a role on Member Services which he may not be able to do. He said that he would have preferred to work on the Deli department or the Café where flexible working hours were available as this would enable him to continue to collect his son from school [190]. He reasserted that he wanted to return to work in the Deli and asserted that he was so traumatized by the conduct of the respondent's management team that his GP had now confirmed that he was suffering from anxiety and depression. He indicated that he was prepared to move to another warehouse in Hampshire in order to avoid working with the managers who he asserted had discriminated against him and harassed him.
74. The claimant's grievance did not make any reference to the alleged act of discrimination involving Sam which forms the first allegation of discrimination (chronologically) in these Tribunal proceedings.
75. We were referred to an email by Mr Alexander on 1 July [192] which stated (amongst other things) that "*When Alan returned to work we spoke to him about temporarily moving him as we didn't need him to work in the deli due to payroll costs and it didn't seem fair to move someone else, Alan also had experience of Front End.*" The claimant asserted that this was a reference to the fact that it would cost more to move someone else and let him return to the Deli. We do not accept that this is correct. The reference to payroll costs was not a reference to Jan (the Relief Supervisor) costing more to move than the claimant. The reality is that Jan could not be moved to cover

Front End as she was not till trained. There was another member of staff in the Deli "Lauren". She could not be moved either as she would be supervising or being supervised by a close family member, in breach of the respondent's rules. The reality is that the respondent could, and did, move other staff to Front End. The claimant not the only one.

76. Upon receipt of the grievance Sue Knowles asked some questions in clarification in order to assist her in carrying out her investigation (email 3 July 2020 [196]). The claimant replied on 8 July [198] providing answers to the questions and referring back to the content of the original grievance where he felt that he had already provided the information requested. The last paragraph of his letter read: *"I am mindful that I need to contact ACAS as soon as possible to ensure that I am not out of a [sic] time for submitting a claim for disability discrimination in the Employment Tribunals, although I believe I am still being subjected to disability discrimination. To date no attempts have been made to enable me to return to work in a safe environment and I am unwell and continuing to suffer financial loss as a result."* In concluding the letter with that paragraph the claimant was signaling a clear intention to take the matter forward in Tribunal litigation. He was also complaining about the perceived slowness of the respondent's response to the grievance albeit the grievance had only been submitted the week before.
77. The claimant's letter prompted a response from Sue Knowles the same day [202]. In the opening paragraph she stated *"Thank you again for your response which I will go through in conjunction with your previous grievance information. I would however ask that you reduce the level of aggression in your responses, your email was the first time I became involved, I was unaware of any issues prior to that. I responded immediately acknowledging your grievance. I reviewed the documents and asked for further clarification, well within the realms of a reasonable request."* Ms Knowles evidently felt stung by the tone of the claimant's correspondence. In evidence she clarified that the claimant's final paragraph (as set out at paragraph 75 above) was the part of the letter which she found aggressive. She saw the reference to time limits for litigation as unnecessary in circumstance where she had responded to the grievance within three days. She did not see that she had caused any delay and she felt that the reference to ACAS and time limits was unnecessary in the circumstances. It effectively escalated matters prematurely. Of course, she recognised that the claimant was entitled to seek legal redress and that he would have to act within time limits to do so, however, it was not necessary for the claimant to openly refer to this when responding to the respondent's request for clarification. She felt that this was unnecessarily aggressive. The claimant did not need to refer to litigation in the course of answering her questions and it gave the exchange an unnecessarily combative flavour.
78. Ms Knowles used the rest of her email to invite the claimant to a face-to-face meeting to determine his grievance. She asked which dates, times and locations would be convenient for the claimant. She indicated that Andrew Westwood would also be in attendance as he was the Regional Operations Director with responsibility for Reading and Southampton Warehouses. The claimant was notified of his right to be accompanied at the meeting.

79. The claimant responded on 10 July that the proposal to meet had exacerbated his anxiety condition. He maintained that the proposal, together with the assertion that he should reduce the level of aggression in his responses, had caused him 'grave concern'. He stated that he had hoped Ms Knowles would investigate the grievance in a fair and objective manner but the accusation of aggression had only caused him to fear that attending any internal meeting would result in subjecting himself to further hostility and harassment, similar to the meetings of 27 April. He indicated that his GP agreed that he was not well enough to attend an in-person meeting with Ms Knowles and Mr Westwood and that such a meeting would exacerbate his mental health condition. He indicated that he would respond to any further questions about the grievance in writing and that the grievance should be resolved on paper. He asked for copies of any witness statements provided by other staff so that he could comment on their contents. A letter from the claimant's GP dated 10 July was attached to the claimant's email. It stated: *"Alan continues to suffer from marked anxiety. Accordingly, I do not think that he would manage, nor would it be productive, for him to attend a face to face meeting regarding his workplace situation. If any such questions were needed to be asked of him, alternative routes (such as email) would appear to be more appropriate."*
80. In the background to this correspondence, the claimant had contacted ACAS for the purposes of Early Conciliation on 9 July 2020.
81. On 16 July Ms Knowles informed the claimant by email that the respondent wanted him to attend a full capacity review with occupational health so that they could understand his limitations and reasonable adjustments that the respondent could put in place. She made the reasonable point that she and the other managers at the respondent are not medical experts and so it would be best to get the information from an independent occupational health company. She also confirmed that she was continuing her investigation into the grievance and would send the claimant any additional documentation to review so that he would be fully aware of the information that she had available to her in order to make a decision.
82. The claimant's next response was to write to Ms Knowles on 5 August essentially complaining about the time it was taking to provide an outcome to his grievance. He felt that his complaint about harassment and direct discrimination could not be affected by the outcome of an occupational health consultation. He concluded: *"Delay is exacerbating stress and anxiety. You will understand that as a result of the conduct complained about in my grievance letter that I am now suffering from stress and anxiety, which is exacerbated by delay. I was further alarmed to read that my employment could be affected if I did not respond to WPA's email within 48 hours. The email was allegedly sent on 30<sup>th</sup> July 2020 but was only received by me yesterday. Because of my anxiety condition I would prefer not to receive any further threats to my continued employment with Costco. I look forward to receiving the outcome of my grievance as soon as possible please."*
83. Ms Knowles responded to the email on 6 August with her answers inserted into the body of the claimant's original message. She confirmed that she felt that it was important to have an occupational health report before making a decision on the grievance. She felt that the information in the report would

feed into the respondent's conclusions on harassment and direct discrimination. However, if the claimant now wanted an outcome to the grievance without waiting for the occupational health report, Ms Knowles was prepared to go along with that approach. She asked for confirmation from the claimant that he wanted her to produce a grievance outcome based on the investigations so far without the medical information. She maintained that the claimant had indicated in his return-to-work interview that his condition had changed. Therefore, she felt that any reasonable adjustments needed to be reviewed. Hence the reason for the occupational health referral. She also noted that some of the adjustments put in place had not been recorded in the claimant's file. Ms Knowles denied harassment. She maintained that a return-to-work interview and a decision to send the claimant to occupational health did not constitute harassment. Rather, she asserted that it showed a duty of care. She said, *"As discussed previously your medical report is essential to ensure that we do not, now having been made aware of increased restrictions with your back and lifting, put you into a position that could potentially cause you harm. You are currently on full paid medical leave to ensure that you do not suffer any detriment as a result of us requesting further information."* She also confirmed that the claimant could receive a copy of the respondent's request to occupational health and would receive a copy of the report itself at the same time that Costco received a copy. She confirmed that under no circumstances would the respondent withhold the information. She expressed disappointment that he thought that they would. She further went on to say, *"Alan I understand that they [occupational health] have struggled to get into contact with you to arrange the appointment and they will have sent out a standard letter as their procedure. Given that I have never indicated that your employment would be affected, we have continued to pay you, I have continued to respond to your emails, I have agreed to complete an investigation, I am again disappointed at your comments."* She reiterated that: the grievance had been taken very seriously at the highest level; that the claimant was on paid medical leave so there would be no financial detriment to him; he was not currently fit for work (as he had submitted a further medical certificate); an occupational health assessment had been arranged to ensure that the respondent understood the restrictions with regard to his work and could ensure appropriate adjustments on a return to work; the respondent was not forcing a return to work until the matter was resolved; and the respondent was not forcing the claimant to attend a medical- the claimant had, in fact, agreed to do this.

84. The ACAS Early Conciliation certificate was issued on 9 August 2020.
85. The grievance outcome letter was produced and sent to the claimant dated 10 August [219]. In that letter Ms Knowles:
- a. Confirmed that she had considered the grievance on the assumption that the claimant was in fact disabled because she had been asked to conclude the grievance without awaiting the occupational health report.
  - b. Concluded that, based on the available information, the management in the warehouse would not have been aware of any potential issues regarding the claimant's physical capabilities prior to the conversations from March 2020 onwards.
  - c. The conversations which took place around the claimant's move back from the Bakery and the request to work on Front End (March

2020) taken with the GP letter of 5 March and the return-to-work interview on 9 March appear to be the first indication from the claimant that there was any issue in respect of his physical capabilities in the warehouse.

- d. The request made for the claimant to transfer to an alternative department was reasonable and appropriate on the basis of the information that the company held at that time. At the point where the claimant raised issues regarding his physical capabilities the request for the claimant to move was not progressed and the company decided to seek further information from the GP rather than simply return the claimant to the Deli. As the physical demands in the Bakery and Front End are broadly similar to those of the Deli, Ms Knowles considered that this was a reasonable step to ensure that the company was meeting its duty of care. The information from the GP reported restrictions in the claimant's ability to twist, turn, bend and lift.
- e. In the return-to-work meeting on 27 April the claimant had confirmed those restrictions and had also raised issues around a spice allergy. As both issues would impact on the claimant's day to day ability to perform duties in the Deli, the company did not feel comfortable returning the claimant to the Deli without further consideration and discussion around the claimant's role and potential adjustments. Ms Knowles concluded that this was a reasonable conclusion to reach to ensure that the company was not placing the claimant at any risk. She confirmed that the intention was for there to be further discussions with the claimant regarding his role and adjustments following receipt of the occupational health information.
- f. There was no evidence on file or in the recollections of management to confirm that the claimant had an agreed or guaranteed permanent early shift pattern. Early shifts were the claimant's expressed preference which was accommodated where possible but there was no particular shift pattern specified as part of the claimant's terms and conditions of employment.
- g. Given the respondent's flexible shift pattern and the needs of the business, Ms Knowles considered that the management team acted appropriately when discussing changes to the claimant's schedule, explaining the reasons and giving the claimant reasonable notice of the changes.
- h. If the claimant would like to make a request for flexible working to accommodate a particular shift pattern then the respondent would be happy to consider this in line with usual procedures but there was no guarantee that any particular shift pattern could be accommodated for any given role or department.
- i. The process of ensuring that the claimant's pay was covered pending the occupational health review should have taken place more quickly. However, it was confirmed that the claimant had received back pay and would be covered up to and including the time when the occupational health report was received.
- j. Upon receipt of the occupational health report the respondent would make arrangements for a meeting to discuss it with the claimant and to discuss any recommended adjustments to his role as Department Supervisor.

86. In light of the above Ms Knowles confirmed that she did not consider that there was any evidence to support the allegations of disability discrimination and she denied that any discrimination had taken place. She notified the claimant of his right to appeal the grievance decision to Andrew Westwood.
87. On review of all the available information and the evidence provided to the Tribunal we consider that Ms Knowles reached a reasonably permissible conclusion based on the evidence that the respondent had at the time and the way in which the claimant had asked them to deal with his grievance (i.e. without a meeting and without waiting for the occupational health report). We do not consider that there was any undue delay in giving the grievance outcome in all the circumstances. Grievance investigations do sometimes take time. A period from 1 July to 10 August (just less than 6 weeks) is not unreasonable. The real difficulty with the grievance outcome was that the claimant did not agree with it. It was not the outcome he was looking for.
88. Following the outcome from the grievance there was further correspondence between the parties about the terms of the instructions to occupational health. The claimant's solicitors put forward an amended referral including information added by the claimant. The respondent's HR department agreed to send this to occupational health but highlighted the portions added by the claimant so that they could be discussed with the author of the report.
89. The claimant appealed the grievance outcome on 25 August 2020. The appeal letter was drafted by the claimant's solicitor. The grounds of appeal were sent to the respondent on 28 August.
90. In summary, the letter [259] reasserted that the claimant had been subject to discriminatory conduct and that the discrimination was continuing as a result of the management's failure to fairly investigate the claimant's grievances of direct disability discrimination and harassment. It confirmed that the claimant had been disabled since August 2018 and that his physical limitations were well known by all his colleagues. It asserted that since August 2018 adjustments had always been made to ensure that any activities he could not carry out were assigned to able-bodied colleagues. It maintained that at no time did this prevent the claimant from carrying out his responsibilities. The letter also asserted that in around August 2018 the claimant's contract was modified to place him on permanent early shifts. This was so he could collect his son from school and spend more time with him. The letter asserted that the day before the claimant was due to return to working in the Deli, he was notified that his contractual hours were changing and he would have to revert to flexible shift patterns. As he did not consent to the change it was alleged that he was given 28 days' notice of the change. After two periods of self-isolation the claimant was due to return to work on 21 April. He was then notified that he would have to return to work as a Cashier. Because of the nature of this work, the claimant knew that he was unable to do it. It was asserted that his proposed solution of covering an able-bodied Supervisor's role so that they could work on the tills in his stead was not acceptable. It was asserted in the appeal grounds that in deciding that it was appropriate to ask a disabled Supervisor to carry out work that they would not ask an able-bodied Supervisor to do, they



unlawfully discriminated against the claimant. It was asserted that he was subjected to less favourable treatment than a non-disabled employee. When the claimant returned to work on 27 April the grounds of appeal allege that he was subjected to further direct discrimination and harassment. It was alleged that he was called into the meeting and not permitted representation. It was alleged that he was told that he could no longer work in the Deli because he could not lift 19.5 Kg boxes of ribs or guarantee that he could work repeatedly in the rotisserie. His inability to work with spice was also raised as a reason to send him home although, it was alleged, others with food allergies had always been accommodated. It was asserted that no alternative work had ever been proposed for the claimant. It described the claimant as having been interrogated about the tasks that he could and could not do by his line manager who was, it was alleged, fully aware of his limitations. It was submitted that he was subjected to repeated harassment including being shouted at in the afternoon meeting. The appeal alleged that the grievance outcome indicated that Ms Knowles had not fully read or understood the grievance and associated documents. It was asserted that she did not carry out a reasonably detailed investigation and that various aspects of the medical evidence had been ignored. It was asserted that she should have asked for further documents from the claimant. It was maintained that there was enough medical evidence for Ms Knowles to come to a conclusion herself that the claimant met the definition of disability. The appeal asserted that personnel records had not been correctly maintained or updated. It was maintained that if occupational health evidence was required it should have been requested by the respondent back in August 2018. The claimant had interpreted the grievance outcome as containing an implied criticism of him for failing to take disability related absence. It was asserted that the claimant's condition was already known to his managers and was not variable so that he could have continued working in the Deli providing the previous adjustments were in place. The claimant did not accept that the respondent was unaware of his disability. The appeal also asserted that an investigation of the claimant's working pattern over the past two years would have demonstrated the permanent change to early shifts. It was asserted that Ms Knowles failed to investigate this. The fact that it is not recorded does not, in the claimant's view, mean that it was not a contractual change. The appeal raised the matter of pay and indicated that the respondent's actions had caused stress and financial hardship. Although underpayments had since been repaid, it was asserted that the initial discrimination was never acknowledged. Finally, it was asserted that the grievance outcome had actually perpetuated disability discrimination.

91. The grievance appeal was sent to Andrew Westwood and he dealt with it. The claimant never indicated that he felt that Mr Westwood should not hear the appeal. He was aware that Mr Westwood knew about the original grievance because when the original grievance was sent, the claimant copied it to Mr Westwood. He was also aware that the intention had been for Mr Westwood to attend the proposed grievance meeting (which did not take place in the end). It was only once the claimant asked for his first stage grievance to be dealt with on the papers that Mr Westwood removed himself from the grievance stage. Given this background, if the claimant genuinely felt that there was a risk of bias or that Mr Westwood was not the appropriate person to deal with the appeal, he could and should have raised it at the

time. Indeed, he had instructed solicitors who could have done this on his behalf too.

92. On 1 September Mr Westwood emailed the claimant's solicitor to ask if the claimant would be comfortable with face-to face meetings to conduct the appeal or whether he wanted to do it in writing. The solicitors' reply indicated that the claimant's anxiety had been exacerbated further by the grievance outcome such that a meeting would be unwise. On that basis Mr Westwood proceeded to investigate the appeal based on the written information that the claimant had provided, the information held on his employee file and the information gathered during the grievance process.
93. Mr Westwood also spoke to Ms Knowles and visited the warehouse in order to speak to other members of staff regarding the points of appeal that he considered to be relevant to them. He asked those members of staff to send him a summary of what was discussed so that he could add a written record to his appeal pack. A couple of the employees were not available on the day that Mr Westwood attended the warehouse and so Jo Finn (the new General Manager) conducted the discussions with them.
94. In the course of the investigations Mr Westwood discovered that the claimant had sent a copy of his blue badge to Steve Macdonald on 27 April 2020. However, the area of dispute appeared to be what management/colleagues had known about the claimant's condition at an earlier stage. Mr Westwood asked Mr Boscott, Mr Alexander, Uves Chilli (Assistant General Manager), Ms Northwood and Ms Ivanoa (Café Manager) to clarify their experiences of working with the claimant.
95. Mr Boscott's evidence was that he was made aware when the claimant joined the Deli that he had a bad back but the claimant said it would not impact on his ability to work in the Service Deli. He maintained that the claimant opted to complete deliveries each day which is where most of the heavy lifting was required. He was not aware of the claimant needing any assistance with lifting or experiencing difficulties and said that no adjustments had been discussed or agreed in respect of this. Whilst Mr Boscott was aware that the claimant did not like spice and used to avoid making spicy products, at no point did he say he was allergic and they had not discussed or agreed any permission to not make spicy products.
96. Mr Alexander's account was that the claimant had told him he had a bad back before he joined the respondent and had been classed as disabled but that this was no longer the case. The claimant had not asked him for special accommodation due to his back and did not make him aware of issues regarding working with spice. Mr Alexander confirmed the reasons why the claimant had been flagged to move to Front End to cover the tills along with several other employees from quieter departments. He said that before lockdown began and they started to restrict the number of members entering the building, the sales in all cost departments, except meat, dropped. Due to this, the respondent had to move lots of employees out of cost departments to Front End and merchandising to help with the demand in those areas. They needed to open every till from opening until closing.

To achieve this they moved everyone from the Optical Department to Front End along with anyone who had previously worked on Front End from all departments including Tyre Bay, Bakery, Café and Deli. He confirmed that, as of 4 September 2020, some of these employees were still working on Front-End.

97. Mr Chilli told Mr Westwood that the claimant had had a discussion with him about how he had previously been classified as disabled but that was no longer the case and his back no longer affected him in any form at work. He reported that the claimant had always asked to move around departments regularly and did not want to work on Front End.
98. Ms Northwood told the appeals manager that no allowances were made for the claimant in the Bakery in respect of heavy lifting and that he lifted bags as heavy as 25 kg whilst in the Department. She reported that the issues the claimant experienced in the Bakery had related to repetitive movements and not to lifting.
99. Elena Ivanoa confirmed that during the claimant's time as a Supervisor in the Café he did not say that he was allergic to spice and there were no arrangements made to accommodate his back.
100. Mr Westwood received a copy of some WhatsApp messages between the claimant and colleagues to consider as part of his investigations. They dated from 2018 and 2019. Mr Westwood's view was that these did not indicate a day-to-day knowledge of any issues over and above what the individuals had reported during the grievance process (i.e. they knew the claimant had a back issue but not a day-to-day impact on his activities or physical conduct capabilities in his role). There was no record of any agreed adjustments or any mention of the issues concerning spice in the messages.
101. Mr Westwood also reviewed copies of the job descriptions and risk assessments from each of the Bakery, Front End and Service Deli departments. Based on these, together with his own knowledge of operations at the respondent, he was comfortable that the physical demands of each department and manual handling requirements were broadly similar. He considered that, in view of the issues the claimant had raised regarding his capabilities, the medical information submitted on 24 April 2020, and the information provided in the return-to-work meeting, it was reasonable for the warehouse to have sought advice based on a duty of care towards the claimant. Steps had then been taken to find the claimant a new Supervisor role on Member Services which would be less physically demanding and would not involve exposing himself to potential breathing difficulties. Mr Westwood did not see any credible reason why multiple members of the warehouse team would try to hide their level of knowledge and then present this as "new" information with a view to penalizing the claimant or taking away something that had previously been agreed, as the claimant had alleged.
102. In relation to the return to work meeting itself Jo Finn spoke to Sue Wilson (Marketing Manager) to clarify her experience of the meeting. Ms Wilson told her that the meeting was conducted in a professional manner and there was no shouting.

103. Mr Westwood reviewed information around the claimant's working practices and pay and cross-referenced these with the respondent's online attendance system and payroll. Based on this review he could not find any evidence of errors or mismanagement of information. He felt that, based on Covid 19 impact on the warehouse at that time it was reasonable for management to rely on inherent flexibility across shifts, departments, and positions and these were not circumstances which were specific to the claimant. He was comfortable that the claimant knew of the parameters of the flexibility and that there were no agreements in place with him regarding set positions or shift patterns. The claimant had also been told that it was open to him to make flexible working request if he needed set shifts to be in place contractually. He had not done so.
104. Mr Westwood's conclusion was that Ms Knowles' grievance investigation and decision was reasonable and thorough and took account of all the available relevant information. He did not accept that Ms Knowles had sought to deny or ignore any of the information the claimant had provided regarding disability but had thought it better to gain as much information as possible including the more tailored occupational health report. In any event, Ms Knowles had responded to the grievance from the claimant's perspective (i.e. she had assumed that he met the definition of disability even in the absence of the occupational health report). She had also acknowledged that the referral and pay process should have been handled better.
105. On 11 September Mr Westwood emailed the claimant's solicitor to confirm the full list of evidence that he was going to consider when reviewing the claimant's appeal. He included a placeholder for the final piece of information (the awaited occupational health reports). He did not receive any reply from the solicitor to indicate that there was further evidence or information which should form part of his review. As he had heard nothing from the claimant or his representative, he went ahead and sent out the grievance appeal outcome. He did not realise that he had not enclosed a copy of the documents when he sent the list. He was not alerted to this by the claimant or his solicitor. The upshot of this is that the claimant's solicitors say that they were not sent the copy documents before they received the outcome of the grievance. However, we are unclear how many, if any, of the documents were not already in the claimant's possession. We would have thought that, in checking whether there was something extra to send to the respondent, the solicitors would have worked through the list and checked what was in their possession. In any event, we are not sure that it had any particular bearing on the fairness of the appeal overall. It is clear from what we have read, seen and heard, that Mr Westwood had done a lot of investigation and looked at a lot of documents in coming to his conclusion. He had intended to enclose a full copy of the document pack that he had used for the purposes of his decision and noted the relevant appendices throughout the letter. Unfortunately, due to an oversight, he omitted to include the enclosures when he sent the letter. He did not receive any contact from the solicitor or the claimant flagging this up and so did not become aware of his mistake until later.

106. The occupational health report was received shortly afterwards [330]. The report set out a history of the claimant's medical position. It noted that he had a partial discectomy in approximately 2007 and underwent a further discectomy or partial disc removal and spinal fusion in 2009. He did extremely well post operatively and did not experience any major problems until 2018, when he was on holiday in Poland and leaning over the bonnet of a car when he started to develop low back pain which had persisted since. At the time of the occupational health consultation the claimant was complaining of low back pain radiating to the right-hand side but not below the right knee. He had undergone facet joint injections in the past (most recently earlier in the year) but without significant benefits. Further surgical treatment had been recommended but had been delayed due to the coronavirus pandemic. He had been prescribed strong pain-relieving medication by his GP which he took occasionally as well as muscle relaxants which he also took infrequently and he did not report any side effects. The claimant reported that he could manage up to a weight of 15 kg with his arms close to his chest.
107. The consultant's opinion was that the claimant would remain at risk of low back pain for the foreseeable future. Any future surgical procedure was unlikely to be curative although it might alleviate some of his symptoms. The consultant's opinion was that the claimant has a physical impairment as a result of the long history of low back pain which has significantly impacted on his normal day-to-day activities when it is flaring up. It has a significant adverse effect on his ability to carry out normal day-to-day activities particularly requiring bending, twisting and lifting, although the back pain is currently controlled with pain-relieving medication sufficiently for the claimant to undertake most of his day-to-day activities. The consultant felt that the claimant would struggle to undertake heavy and repetitive manual handling. For example requiring repetitive bending, twisting and lifting of loads in excess of 15 kg. The claimant did indicate to the consultant that he found some tasks exacerbated his symptoms for example, manual handling the 20kg rib packs and rotisserie as well as bending, twisting and lifting the baking trays. The consultant's recommendations included that a suitable and sufficient manual handling risk assessment be undertaken at work to ensure that manual handling tasks were reduced as far as reasonably practicable. The consultant thought that the claimant had managed in his role as Deli Supervisor role for some time. He felt that the claimant would struggle in a role which required sustained and repetitive bending, twisting and lifting and would benefit from working in a role which allowed him to change posture from time to time in order to avoid postural fatigue.
108. The consultant's opinion was that the claimant "would be fit to perform his role as a supervisor in the service deli" and that "the current adjustments would be sufficient"-namely delegating tasks he could not safely do to other employees within the department (including bending, twisting, repetitive lifting and lifting 11 boxes of ribs due to their size and weight). However, Mr Westwood understandably took the view that these were the adjustments which were those which the claimant had reported as something he was already doing and this went back to the conflicting account from management. Mr Westwood consulted Ms Knowles about this and they decided that the best course of action would be to instruct a full risk assessment specific to the recommendations in the report, followed by a

meeting between Jo Finn and the claimant to discuss and agree what the specific adjustments would look like in the Service Deli. The report also noted that there were some “perceived work-related issues” to resolve, which they considered Jo Finn would be best placed to take forward given that she was completely new to the warehouse.

109. Mr Westwood sent the appeal decision to the claimant on 22 September, including a summary of his findings and conclusions. He set out each of the points of appeal and explained his findings in relation to them. He confirmed that he did not uphold any of the points of appeal and did not agree with the claimant’s allegations of disability discrimination or unlawful conduct. He was not satisfied that either the management team or the respondent were aware of any disability until 24 April when the claimant emailed his yellow badge to the General Manager. This was elaborated on in the return-to-work meeting on 27 April when the claimant first noted that he was unable to return to normal duties, specifically that he was unable to load or unload the ovens in the rotisserie and was unable to produce spicy products. He accepted that the claimant had suffered from periodic back pain and has had some surgery which necessitated some absence from work and that the management team were aware of this. However, he was satisfied that the management team was unaware that the back issue was a disability and that no amendment to his normal duties was requested, recognised, authorised or practised. He felt that he had no reason to doubt the information relayed by the management team, given that as soon as they became aware of issues regarding the claimant’s physical capabilities, they immediately sought advice from HR to protect the claimant’s health and safety.

110. Mr Westwood concluded that there was no contractual agreement between the claimant and the respondent around set working hours, specifically permanent early shifts. In relation to the incidents around 23 March and 20 April, Mr Westwood concluded that since neither the respondent nor the management team in Farnborough were aware of his disability until 24 April and that up until 27/4/20 the claimant confirmed on return to work that he was able to carry out normal duties, there was no direct disability discrimination in asking the claimant to work in another area of the business. He considered that the management team was simply not aware of any physical limitations that would prevent the claimant from doing so. Immediately upon the claimant raising an issue, the proposed move to Front End did not proceed. Mr Westwood went on to point out that he had found no evidence to support the claimant’s allegations of harassment or disability discrimination in relation to the return-to-work meeting. Nor did he conclude that the meeting was conducted in any way inappropriately. Mr Westwood was satisfied that the grievance investigation that was carried out was reasonable in the circumstances. He considered that all the claimant’s complaints had been investigated and responded to appropriately although he appreciated that the claimant might not agree with the conclusions. He did not accept that Ms Knowles’ grievance response denied the existence of a disability. Rather, it stated that the further information being sought from occupational health would be required for the respondent to properly assess the position. Given that the occupational health referral information was imminent and there was conflicting information regarding the claimant’s physical capabilities/limitation and knowledge of these, Mr Westwood did not consider this to be unreasonable.

In any case, Ms Knowles had explained that she had considered and responded to the claimant's grievance from the claimant's own perspective of being disabled (in other words she had taken the claimant's case at its highest and assumed that he could satisfy the definition of disability).

111. Following his review of the claimant's absence records Mr Westwood did not accept that they had been incorrectly maintained. He explained that he had reviewed the job descriptions for Service Deli Supervisor, Bakery Supervisor and Front End Supervisor and could say that they were broadly similar in terms of physical demands. On this basis he did not consider it to be unreasonable for the management team or HR to conclude that further investigation was necessary in order to protect the claimant's health and safety. He had reviewed the risk assessments for the three roles and could say that the manual handling risk assessment for all three was identical.
112. Mr Westwood's overall conclusion was that none of the action taken by the company amounted to disability discrimination and he therefore upheld the decision reached by Ms Knowles. He confirmed that no further appeal was permitted. He also confirmed that the goal now was to find a way forward to resolve the current situation and facilitate the claimant's return to work with appropriate agreed and recorded adjustments in place. As he now had the occupational health report he had instructed the risk management department to conduct a new risk assessment for the service deli and the claimant's role in light of the recommendations. He confirmed that he had asked the new General Manager in Farnborough, Jo Finn, to make contact with the claimant to arrange a meeting to discuss the return to work. He concluded by stating "we look forward to welcoming you back to work."
113. On 22 September Jo Finn sent a letter to the claimant in order to introduce herself as the new manager and to outline the intended next steps. She confirmed that she had received a copy of the occupational health report and that the risk management team had completed a full risk assessment of his role so that they could understand how best to implement the recommendations of the report. She was writing to invite the claimant to meet with her so that they could discuss the report, the risk assessment and agree/record the reasonable adjustments that will be put into place. They could also discuss his current absence, how he was feeling and how best to facilitate a return to work. She stated, *"as I have just moved to the warehouse with no prior knowledge of your situation or involvement in your current grievance, I trust you will feel comfortable to meet with me."* She had arranged a provisional time for the meeting on 5 October at 2:30pm. She confirmed that at that stage she believed that they were able to facilitate a return to work in the Supervisor role with reasonable adjustments. It was confirmed that his full pay would continue until 11 October to allow the parties a reasonable opportunity to meet and agree a suitable plan for the return. If the claimant felt unable to return and remained off sick after this date his absence would be paid at statutory sick pay level in line with the usual position in the Employee Agreement.
114. The Tribunal finds that this was a good and constructive letter from Ms Finn which was designed to reassure the claimant and actively encourage him back to work. There was nothing in it which could be characterised as likely to persuade him to resign or to make matters any worse. We note the

positive and constructive tone and we also note that it came from a person with whom the claimant had had no previous dealings. He had no reason to doubt the constructive and positive intent behind the letter.

115. On 28 September Mr Westwood received an email from the claimant's solicitor attaching a resignation letter on behalf of the claimant. He forwarded this to Sue Knowles and it was at this point, due to the contents of the letter, that he realised that he had not sent the document appendices as he had intended.

116. The lengthy resignation letter, drafted by the claimant's solicitor, asserted that the response to the grievance appeal had destroyed all trust and confidence in the integrity of the respondent's management team. It stated that the claimant was offended by the assertion that the management team had not been kept fully informed and did not know that the physical impairment amounted to disability. It asserted that Mr Westwood's reference to an historic disability was irrelevant and disingenuous. The letter confirmed that the return-to-work meeting notes of 27 April were inaccurate and had never been signed by the claimant to confirm that they were an accurate representation of the conversations that day. It was asserted that the claimant's managers had always known that it was not necessary to send the claimant home on 27 April and that this had subsequently been confirmed by the Occupational Health Consultant's report. It asserted that the denial of knowledge of disability amounted to dishonest conduct and a repeated failure to act in good faith. The letter suggests that Mr Westwood had not relied on an objectively fair analysis of the relevant documentation. It observed that the manager's denial of all knowledge of disability was dishonest and had caused deep offence. The letter maintained that it was not possible for the claimant to return to work for the same management team. It asserted that the manager had not reviewed all of the relevant timesheets in order to get an accurate impression of the claimant's working patterns and the suggestion that he moved to permanent early shifts. It asserted that if Mr Westwood wanted to verify the working pattern he would have looked at the shift patterns between the relevant dates. The solicitor maintained that the claimant was never asked to make a formal request for flexible working. It was another informal arrangement that resulted in a permanent change to his working practices and reference to the timesheets and rotas in the relevant period would have shown that working arrangement. The letter asserted that Covid 19 business demands could not justify less favourable treatment of the claimant. The claimant maintained that other employees in the Deli department could have been redeployed to work as cashiers and the claimant could have been permitted to return to the Deli department to work that he could do and had done for the previous 10 months before being redeployed to the Bakery. The letter suggested that a non-disabled supervisor working in Front End could have worked as a Cashier and his work could have been covered by the claimant. The claimant maintained his assertion that he was denied representation at the meetings on 27 April.

117. Following receipt of the resignation letter Ms Knowles emailed the claimant's solicitor on 29 September acknowledging the letter and expressing regret that the claimant had made the decision to resign. She reiterated the respondent's position that there was still an opportunity to



move on from the grievance process and facilitate a successful return to work. She pointed out that Joanne Finn (the new General Manager at Farnborough) had no previous involvement with the claimant's employment, she had already offered to meet the claimant and remained keen to do so. Ms Knowles therefore offered the claimant the opportunity to reconsider his resignation and meet with Joanne Finn as intended. Ms Knowles indicated that the respondent was happy to reschedule the meeting currently planned for 5 October to allow the claimant further time to consider his position. In addition, from reading the resignation letter, the respondent had become aware that the claimant had not received the documents from the grievance appeal. The respondent expressed disappointment that this was not raised earlier as they were not aware of this. The letter reiterated that the respondent had no issue with the claimant reviewing the documents and they were attached to Ms Knowles' email. She expressed a wish to allow the claimant to the opportunity to digest these prior to confirming his position regarding his resignation. She invited the claimant's solicitor to discuss this with the claimant and confirm his intentions by 11 October. She confirmed that if the claimant did not wish to accept the offer, or they did not hear from the claimant by the end of the day on 11 October, the respondent would process the resignation with a termination date of 28 September 2020. The Tribunal's view is that this was a genuine email and the respondent was not just paying lip service to the claimant. They genuinely wanted him to reconsider his decision to resign.

118. The claimant's solicitor responded to this letter by email dated 8 October 2020. The body of that letter indicated the writer's opinion that it was now self-evident that their comments would have made no material difference to the grievance outcome. It confirmed that any deceit in an employment relationship would amount to a fundamental breach of the contract of employment and confirmed that the claimant could not return to work for managers who had fundamentally broken the implied term of mutual trust and confidence. The letter stated that the claimant's loss of trust extended to the highest levels of management in the respondent. Even though the respondent had appointed a new General Manager the letter pointed out that the claimant would still have been required to work within the same warehouse as Mr Bostock and Mr Alexander and that his position had been made completely untenable. The claimant's decision to resign was therefore confirmed.

119. The Tribunal claim form and grounds of complaint were submitted to the Employment Tribunal on 21 August 2020.

## **The Law**

### **Unfair dismissal**

120. Section 94 of the Employment Rights Act 1996 ("ERA") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. Section 95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct ("a constructive dismissal").

121. If there is a constructive dismissal s98(1) ERA indicates that it is for the employer to show that it was for one of the permissible reasons in s98(2) ERA or “some other substantial reason.” If it was, then s98(4) requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
122. To establish a constructive dismissal the employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract. He must leave in response to the repudiatory breach and he must not delay unduly in doing so otherwise he may be found to have waived the breach and affirmed the contract (see Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, W.E Cox Toner (International) Ltd. v Crook [1981] IRLR 443).
123. The repudiatory breach may be a breach of an express or implied term of the contract. The claimant in this case relies upon the implied term of mutual trust and confidence which is a fundamental term of the contract. Any breach of the term of mutual trust and confidence will be considered a fundamental or repudiatory breach of contract (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347) The implied term is that the respondent shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (Malik v Bank of Credit and Commerce International SA [1997] ICR 606).
124. Whether the conduct is likely to destroy or seriously damage the relationship of trust and confidence is considered objectively and the employer’s subjective intention is irrelevant (Leeds Dental Team Ltd v Rose [2014] IRLR 8, Nottinghamshire County Council v Meikle [2004] IRLR 703).
125. Guidance can be gleaned in relation to a cumulative breach of the implied term of mutual trust and confidence from the case of London Borough of Waltham Forest v Omilaju [2005] IRLR 35. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. The breach of the implied term may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. The last straw itself need not be a breach of contract. It may be relatively insignificant but it must not be utterly trivial. It must contribute something to the breach although what it adds may be relatively insignificant. The last straw need not be unreasonable or blameworthy but it must contribute, however slightly, to the breach of the implied term of trust and confidence. (See also Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833).
126. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is ‘reasonable and proper cause’ for it.

### Section 13 direct discrimination

127. Section 13 Equality Act 2010 states:

- (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.

128. Section 23 of the Equality Act 2010 provides:

- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case...

129. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL; *Stockton on Tees Borough Council v Aylott*)

130. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport* 1999 ICR 877, HL Lord Nicholls stated: "a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds... had a significant influence on the outcome, discrimination is made out." The protected characteristic need not be the sole or even the main cause for the difference in treatment so long as it has significantly influenced the treatment (*Nagarajan v London Regional Transport* [1999] IRLR 572).

131. The judgment in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

132. Establishing less favourable treatment will not be sufficient: for the claim of direct discrimination to be made out, the conduct complained of must be on the prohibited grounds. The bare facts of a difference in status and a difference in treatment only indicate the possibility of discrimination. They are not, without

more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (Madarassy v Nomura International plc [2007] IRLR 246).

133. Less favourable treatment can include anything which a reasonable person would regard as less favourable or detrimental.

Section 15 discrimination arising from disability

134. Section 15 Equality Act 2010 states:

*(1) A person (A) discriminates against a disabled person (B) if-*

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

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

135. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

- (i) There must be unfavourable treatment. No comparison is required.
- (ii) There must be something that arises 'in consequence of the claimant's disability'. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
- (iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
- (iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

136. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

137. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).
138. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:
- (a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
  - (b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
  - (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant
  - (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
  - (g) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
  - (i) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."
139. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

140. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317.)
141. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)
142. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934.)
143. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.
144. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM.) It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

145. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)
146. In A v Z [2019] IRLR 952 the authorities in relation to knowledge under s15 were summarised (paragraph 23). There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment. The respondent need not have constructive knowledge of the claimant's diagnosis. However, employers should consider whether a worker had a disability even where one has not been formally disclosed. An employer must do all that they can reasonably be expected to do to find out if a worker has a disability. What is reasonable depends on the circumstances and this is an objective assessment. It is not incumbent on an employer to make every enquiry where there is little or no basis for doing so. Reasonableness for the purposes of section 15(2) must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee.

Section 20/21 Reasonable adjustments

147. Section 20 (so far as relevant) states:

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

...

148. Section 21 states:

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
  - (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
  - (3) ...
149. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:
- (a) Identify the PCP applied by or on behalf of the employer,
  - (b) Identify comparators (if necessary),
  - (c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.
150. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.
151. A 'substantial disadvantage' is one which is 'more than minor or trivial'.
152. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] E1 1075).
153. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503). It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'
154. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be



placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

155. In relation to a PCP the protective nature of the legislation means that a liberal rather than an overly technical approach should be adopted (Carrera v United First Partners Research UKEAT/0266/15)
156. When assessing reasonableness it is proper to examine the question not only from the perspective of a claimant but also the wider implications including the operational objectives of the employer (Lincolnshire Police v Weaver [2008] All ER (D) 291).

### Section 26 Harassment

157. Section 26 states:

- (1) A person (A) harasses another (B) if-
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) The conduct has the purpose or effect of-
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
- ....
- (4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

158. 'Unwanted' conduct is essentially the same as 'unwelcome' or 'uninvited' conduct.

159. Harassment will be unlawful pursuant to section 26 if the unwanted conduct related to a relevant protected characteristic had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

160. The harassment has to be "related to" a particular protected characteristic. The tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In Unite v Naillard [2017] ICR 121 the EAT indicated that section 26 requires the tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the tribunal focuses on the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. As stated in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, "there must still ... be some feature or

features of the factual matrix identified by the tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found have led to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.”

161. The test as to the effect of the unwanted conduct has both subjective and objective elements to it. The subjective element involves looking at the effect of the conduct on the particular complainant. The objective part requires the tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect. Whilst the ultimate judgement as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant’s subjective perception of the conduct in question must also be considered. So, whilst the victim must have felt or perceived her dignity to have been violated or an adverse environment to have been created, it is only if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment. Much depends on context. See the guidance Richmond Pharmacology v Dhaliwal [2009] ICR 724 revisited in Pemberton v Inwood [2018] IRLR where Underhill LJ stated:

“In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant’s dignity or creating an adverse environment for him or her, then it should not be found to have done so.”

The context of the conduct and whether it was intended to produce the proscribed consequences are material to the tribunal’s decision as to whether it was reasonable for the conduct to have the effect relied upon. Chawla v Hewlett Packard Ltd [2015] IRLR 356.)

162. As stated in Dhaliwal:

‘If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the

meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

163. Unwanted conduct will encapsulate the same sorts of matters falling within the concept of unfavourable treatment or a detriment but is more focused on the victim's subjective feelings as to what is "unwanted"
164. Dhaliwal also states: "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that an offence was unintended. While it is very important that employers, and tribunal, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase." And "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."
165. In Weeks v Newham College of Further Education EAT 0630/11 the factors which a tribunal might take into account to determine whether there was an 'offensive environment' for the purposes of s26(1)(b) of the Equality Act were considered: "It must be remembered that the word is "environment". An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff room concerned. We cannot say that the frequency of use of such words is irrelevant. For example, if the conclusion of the tribunal here had been that the words were used all the time, in effect, in regular conversation, one would have expected the ultimate conclusion to be very different and to have required the Respondent as employer of the other staff concerned to have given some explanation as to its action or inaction about it.

### Section 27 victimisation

166. Section 27 of the Equality Act provides that (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.
167. A protected act is defined as:
- a. Bringing proceedings under this Act (EA2010)
  - 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.

168. An act can properly be said to be done “by reference to the Act” if it was done by reference to the legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act (Aziz v Trinity Street Taxis Ltd [1988] IRLR 204.)
169. The claimant needs to show that the respondent was motivated by the fact that the claimant had done a protected act or that the respondent had a belief that the claimant had done, or may do, a protected act. The claimant also needs to demonstrate that he was in fact subjected to a detriment as a result of the protected act.
170. The protected act need not be the only or even the principal reason for the unlawful treatment but it must have had a “significant influence” and/or have been an “important” causative factor (Nagarajan)
171. Detriments must be because of the protected act and where there is more than one motive in play, all that is needed is that the discriminatory reason should be “of sufficient weight” (O’Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615)
172. A detriment must also be capable of being objectively regarded as such and an unjustified sense of grievance cannot amount to detriment (see Shamoon).

#### Burden of proof

173. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof “shifts” to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.
174. The wording of section 136 of the act should remain the touchstone. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.
175. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then “shifts” to the respondent to prove (on the balance of probabilities) that the treatment in question was “in no sense whatsoever” on the protected ground.
176. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

- a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
- b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
- c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
- d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
- e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
- f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

177. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only plays a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

178. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion

applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

179. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.
180. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).
181. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.
182. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.
183. In a case of harassment under section 26 of the Equality Act the shifting burden of proof in section 136 will still be of use in establishing that the unwanted conduct in question was "related to a relevant protected

characteristic” for the purposes of section 26(1)(a). Where the conduct complained of is clearly related to protected characteristic then the employment tribunal will not need to revert to the shifting burden of proof rules at all. Where the conduct complained of is ostensibly indiscriminate the shifting burden of proof may be applicable to establish whether or not the reason for the treatment was the protected characteristic. Before the burden can shift to the respondent the claimant will need to establish on the balance of probabilities that he was subjected to the unwanted conduct which had the relevant purpose or effect of violating dignity, creating an intimidating etc environment for him. The claimant may also need to adduce some evidence to suggest that the conduct could be related to the protected characteristic, although he clearly does not need to prove that the conduct *is* related to the protected characteristic as that would be no different to the normal burden of proof.

184. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that “something” arose as a consequence of his or her disability and that there are facts from which it could be inferred that this “something” was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the “something” alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.
185. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

### **Conclusions in this case**

186. In arriving at its conclusions in this case the Tribunal has addressed the factual allegations that the claimant made in chronological order and has grouped its conclusions in relation to complaints of s13, s15, s26 discrimination in turn alongside each factual allegation. We have then addressed the claims of the breach of the duty to make reasonable adjustments and victimisation before setting out our conclusions in relation to the claim of constructive unfair dismissal. Finally we have made our observations about jurisdictional issues.

187. At the conclusion of the hearing claimant's counsel confirmed that the holiday pay claim was withdrawn. We have therefore dismissed it upon withdrawal and do not address it further here.

19<sup>th</sup> March incident with Sam

188. In our findings of fact we have set out the comments which we accept Sam made towards the claimant. We accept that those comments were unwanted and would constitute unwanted conduct within the meaning of section 26 of the Equality Act. The claimant was upset and offended by the comments.
189. The comments in question fell into two parts. At the beginning of the exchange Sam was unaware of the claimant's disability. However, part way through the exchange the claimant confirmed that he was disabled and asserted that there was a link between that and his work abilities. Even once Sam had been informed of the disability he continued with his comments. It is evident to us, not least because Sam felt the need to raise the issue the next day and to apologise to the claimant, that by the end of the exchange he was aware that he had said something that he should not have done and that there was at least a strong possibility that he had offended the claimant. In the context we also accept that the comment was related to disability as a matter of fact and that by the second half of the exchange Sam would have known that his comments were related to disability as a result of what the claimant had said in response.
190. Given that the comment was initially directed at the slowness of the claimant's work rather than the disability per se it might have been possible to argue that the conduct did not have the *purpose* of violating the claimant's dignity or creating the proscribed environment within the meaning of section 26 of the Act. That is to say, Sam may not have intended to cause offence and therefore may not have intended or had the purpose of violating the claimant's dignity or creating the proscribed environment. However, section 26 of the Act directs us to examine the *effect* of Sam's comments and not just their purpose. We accept, in all the circumstances of this case, that the comments made by Sam had the proscribed effect vis-à-vis the claimant. Whilst this may have been a one-off event of limited duration and without the element of offensive intent, we have concluded that it does pass the threshold for harassment as described in section 26. It may not be the most serious or prolonged example which comes before the Tribunals from time to time but it nevertheless constitutes section 26 harassment as it created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We cannot say that the claimant reacted in a hypersensitive way such that it was not reasonable for the comments to have the proscribed effect on him (section 26(4)(c)). The effect on the claimant was sufficiently serious and marked and not trivial or transitory. Nor are there other circumstances in the case which mean that the comments did not have the proscribed effect (section 26(4)(b)).
191. The position is different in relation to section 13 direct discrimination. We have concluded that a hypothetical comparator without the claimant's disability would have received the same treatment in the same circumstances. There was no less favourable treatment than the



hypothetical comparator. Someone with a similar inability to work quickly on the task in question would also have been on the receiving end of the same comments. The comparator suggested by the claimant [99] is not the correct comparator. It asks the Tribunal to compare the claimant with a non-disabled person who *could* rapidly lift, bend, twist and turn without incurring significant pain. Section 23 Equality Act dictates that there should be no material differences between the circumstances relating to each case other than the difference in the protected characteristic (i.e. the presence/absence of the disability). The correct comparator is therefore someone who has the same limitations on their ability to perform the task quickly and efficiently but who is not disabled. The slowness could be due to lack of practice/inexperience or due to physical symptoms which did not amount to a disability. We find that Sam would have made the same comments to the appropriate, non-disabled hypothetical comparator. Sam made the comments that he did because of the claimant's slowness in making the rolls not because that slowness was caused by disability. The 'problem' that Sam had with the claimant was to do with his speed in completing the task, not because there was an underlying disability. We find that he would have confirmed that he 'had a problem with that' even with a non-disabled person- 'that' being the slowness, not the disability. Someone inexperienced (and therefore slow) or someone with physical limitations due to a short-term injury (rather than a disability) would have been criticised in the same way.

192. The claimant also suggested that an 'actual' comparator could be used for this part of the case [99]. Sam and Sada are named, although we heard no evidence about Sada during the course of the hearing. Reliance on these named comparators was not really pursued by claimant's counsel in closing submissions. Even on the claimant's pleaded case, the two named comparators had no difficulties in repeatedly lifting, bending, twisting and turning. They are not, therefore, appropriate comparators within the meaning of section 23. It is apparent that there were material differences between the claimant and the named comparators (aside from the absence of the disability).
193. In those circumstances the elements of the section 13 claim are not made out in relation to this incident and this part of the section 13 claim must be dismissed.
194. The claimant also alleged that this incident constituted section 15 discrimination because of something arising from disability. The "something arising in consequence of disability" which was relied upon by the claimant in the list of issues (for all the allegations of section 15 discrimination in this case) was that "*the claimant was unable to carry out every duty that working in the deli required.*" Given that the incident with Sam took place outside the context of the Deli it is hard to understand how the pleaded "something arising" was the reason for the comments made by Sam which are said to constitute the act of unfavourable treatment. We find that Sam did not make those comments because the claimant could not carry out 'every duty that working in the Deli required'. The claimant's limitations in the Deli were wholly irrelevant to this aspect of the case. Sam was commenting on the claimant's slowness in completing a particular task in the Bakery.

195. In order for a section 15 claim to work conceptually in relation to this incident the claimant would have had to amend the basis of his claim and plead an alternative “something arising”. He did not do so. Even then, though, the claimant did not advance any evidence to show that his slowness in making rolls was actually caused by the limitations presented by his back condition. The pleaded impact of the disability on the claimant was not slowness, it was inability to twist, turn and bend repetitively. The claimant asserted that he could not work faster because of his back but there was no evidence of this. This was his assertion. It is not a self-proving link. In any event, no amendment to the pleaded claim was sought at any point during the hearing. We note that the claimant has been legally advised throughout. This Tribunal cannot amend his pleaded case for him in the absence of such an application to amend. Furthermore, it would be wrong for the Tribunal to move the metaphorical goalposts in the case after closing submissions have been completed. We must determine the case which has been pleaded and presented to us, not some alternative or potential version of the case.
196. We also note claimant’s counsel’s attempt to make the linkage between the disability, the ‘something arising’, and the unfavourable treatment work as pleaded. He asserted that the ‘something arising’ is the inability to carry out every task in the Deli and that when working in the bakery the claimant’s slow speed has a causal link to the same reason he is unable to carry out every duty that working in the Deli required (paragraph 45 of claimant’s written submissions). When worked through logically we cannot accept this line of reasoning. We accept that, in accordance with the case law, there can be more than one ‘link in the chain’ between disability and unfavourable treatment. However, for there to be a linear chain in this case, the inability to do the tasks in the Bakery would have to arise out of the inability to do the tasks in the Deli which, in turn arose in consequence of the disability. That is not the way that the chain of causation actually works in the circumstances of this case. The claimant *could* have asserted that he was unfavourably treated because he was unable to work quickly and complete all the tasks the in the bakery and that the ‘inability to work quickly and complete all the tasks the in the bakery’ was the relevant ‘something arising’ in consequence of disability. This chain would have worked as a matter of causation but was not the one relied on by the claimant. Instead the claimant has relied on a ‘something arising’ relevant to the work tasks in the Deli in complaining about his treatment in the Bakery. Mixing aspects of these two different departments in the same section 15 claim means that the chain of causation does not function as required in order for the claim to be made out.

23<sup>rd</sup> March- The claimant was told that his permanent early shift patterns would revert to flexible shifts

197. We refer to our earlier findings of fact. The claimant did not have an entitlement to permanent early shifts and was not told that he would have to revert to working flexible shifts. As previously set out, the situation was more nuanced. He did not have an entitlement to permanent early shifts but up to that point in time he had been accommodated on early shifts

where possible and consistent with the needs of the business. He had no guarantee of early shifts. Furthermore, the respondent merely asked the claimant to provide greater flexibility regarding shift patterns. There were likely to be more occasions on which he could not do an early shift but he was not removed from early shifts entirely. He might well be able to work early shifts relatively frequently but he would be asked to cover later shifts more often than had previously been necessary. It was a relatively limited change in circumstances and by no means as dramatic as the claimant sought to suggest. Furthermore, the request for shift flexibility was not because of, or related to the claimant's disability but arose out of the workforce changes necessitated by the Covid 19 pandemic.

198. In any event, we have applied the relevant sections of the Equality Act to the facts as found. In relation to section 26, requesting that the claimant work more flexible shifts was evidently 'unwanted conduct' from the claimant's perspective. He would have been happier had the request not been made. However we do not accept that such unwanted conduct was related to disability. On the claimant's own case, the reason he had requested regular early shifts was because of his childcare responsibilities. It was nothing whatsoever to do with his disability. It was not unwanted conduct 'related to disability'. Nor did the respondent change shifts because of the claimant's disability but rather because of the impact of the pandemic on staffing needs and arrangements. The only other way it could potentially be suggested that the conduct was 'related to disability' is if it could be said that the respondent had used the proposed change in shifts as a form of vindictive act or punishment of the claimant because of/related to his disability or the difficulties his back condition presented. There was no evidence of this presented to the Tribunal. We do not accept that the respondent's actions were in any way tainted by this reasoning or motivation. There was nothing at all about this conversation which indicated that the respondent had decided they wanted to get rid of the early shifts because the claimant was disabled or to make life more difficult or less comfortable because of the claimant's disability. There was quite simply no evidence available to us that the respondent had decided to punish the claimant because of his disability or from which we could draw such an inference.
199. Furthermore, we were not convinced that the requested shift changes would create the necessary proscribed effect within the meaning of section 26(1)(b).
200. The claimant's section 26 harassment claim based on this incident therefore fails and is dismissed.
201. The claimant alleges, in the alternative, that this was an act of direct discrimination contrary to section 13 of the Act. However, we find that the appropriate hypothetical, non-disabled comparator would also have been asked to be flexible regarding shifts. There was no less favourable treatment. Furthermore, the reason why the respondent asked for this greater flexibility regarding shifts was nothing whatsoever to do with disability. Rather, it was based on the needs of the business during the Covid 19 pandemic. As already outlined, by this stage in the chronology there had been significant changes in both demand within the warehouse and the availability of appropriate staff to meet that demand. The

respondent was facing greater unpredictability in staff availability due to short notice sick leave or the need to self-isolate. It quite simply could not plan work rotas and shift patterns in the same way as it had hitherto. This problem may well have got worse during the lockdown which was announced on 23 March but it was already a well-established feature of the working environment at this point in the chronology. It was that need to ensure that adequate staffing was in place throughout the working day in circumstances where staff availability was reduced and unpredictable that was the reason for the respondent's request for greater flexibility in the claimant's shift patterns. We do not accept the claimant's argument that the respondent's Covid justifications are retrospective.

202. The claimant also contended, in the alternative, that this was an incident of section 15 discrimination. Once again, the 'something arising' in consequence of disability relied upon was "the claimant was unable to carry out every duty that working in the deli required." This "something arising" has no causal relevance to the unfavourable treatment in question. The request to work more flexibly is about *when* the claimant did the job in the Deli not *what* job or *what* tasks he could do. Even if the claimant were able to carry out all the tasks in the Deli without restriction and without any adjustment, the respondent would still be asking him to work shifts other than the early shift in order to cover staff shortages etc. In any event, had we been called upon to determine the respondent's "legitimate aim" defence we would have found that the respondent's actions were a proportionate means of achieving a legitimate aim. The respondent was doing no more than was necessary to manage staffing resources appropriately given the pandemic. The respondent did not tell him that he could *never* work early shifts but rather that they would need him to be more flexible on occasions when there was no other cover. That is the essence of proportionality: it asks for the minimum change in order to achieve the desired outcome.

20<sup>th</sup> April – the claimant was asked to work as a cashier on Front End, which required him to continually bend, lift, twist and turn

203. In our findings of fact (above) we have found that the claimant was asked to work temporarily as a Cashier during lockdown. This was done because of the needs of the business and the difficulties of staffing all the tills to meet increased demand.
204. The claimant alleges that this was an act of direct discrimination contrary to section 13. We disagree. A non-disabled person who was till trained would still have been asked to move to work as a Cashier. In fact, the claimant was one of 13 people who were asked to move. The other 12 employees did make the move. Consequently, we do not accept that there was less favourable treatment of the claimant than of the appropriate comparator.
205. Once again we have reviewed the list of comparators provided by the claimant [99]. The list refers to "Rose, Adrian, and Jamie". They are said to be non-disabled supervisors working on Front End who could have worked as a cashier as they could all repeatedly bend, twist and turn. However, we were provided with no evidence about these named comparators and so we cannot make any findings of fact about them. Nor

can we draw any legal conclusions about how they would have been treated and whether this is grounds for a finding of direct discrimination in this case. In any event, we note that they are described as able to repeatedly bend, lift, twist and turn. They therefore would not constitute appropriate comparators within the meaning of section 23 of the Equality Act. We also saw reference to the Relief Supervisor called Jan. She acted as Relief Supervisor within the Deli. However, she was not till trained and therefore would not have been an appropriate comparator in this case as the claimant was, in fact, till trained. We also saw reference to an employee called Lauren. She too was not a suitable comparator because she could not go onto the till and work as a Cashier because of her family relationship with one of the supervisors. This would have been a conflict of interest within the respondent's own employment policies. Whichever way we attempt to construct the comparator for this allegation we arrive at the same result, namely that the section 13 claim fails and is dismissed.

206. We also do not accept that the reason for the request was the disability-it was the business need during the pandemic. So, for that reason too, the section 13 claim must fail. Furthermore, the claimant was asked to work on the tills but was not actually made to do so. There is therefore legitimate doubt as to whether he was subjected to a detriment for the purposes of the section 13 claim.
207. The claimant also alleges that this was an act of section 26 harassment. We accept that the request from the respondent that the claimant go onto the tills as a cashier was unwanted from the claimant's perspective. It was unwanted conduct. However, it did not have the proscribed effect within the meaning of section 26(1)(b). In no way could such a request reasonably be considered humiliating or degrading or offensive or to have created a hostile environment for the claimant. Quite simply, it does not fall within the ambit of section 26. It is not the sort of treatment which that part of the legislation is designed to cover. One of the reasons for this is that the respondent made a request of the claimant. They asked him to move onto the tills. They did not demand it and when he said that he could not make the move it was not forced upon him. Furthermore, as unwanted as the request was, it was not related to disability. They did not ask the question of the claimant because he was disabled. They did not ask the question for any reason which could be construed as relating to his disability. (We recognise the looser causal relationship implied by the wording of section 26 than compared to section 13). It is also notable that they asked many employees to move not just the disabled employee. For all these reasons this harassment allegation must fail.
208. In the alternative, the claimant alleges that this was section 15 discrimination. Even if it is accepted that the request to move to be a Cashier is unfavourable treatment it does not have the requisite causal connection to "something arising from disability." The request was not made because there were limitations on the claimant's ability to carry out work in the deli. The request was made because of the impact of Covid 19 on staffing levels and customer demand. They did not single out the claimant. The respondent looked for all till trained staff that they could move to the Front End as Cashiers at short notice. The claimant's inability to carry out every duty that working in the Deli required was irrelevant. The demand for Cashiers was brought about by the pandemic. This was

the effective cause of the request as clearly explained by the respondent's witnesses. In any event, we would still have found that the employer's defence was made out. The request was a proportionate means of achieving the legitimate aim of managing the respondent's staffing resources appropriately given the pandemic. The respondent did not enforce the change on the claimant once he raised concerns. The section 15 claim fails.

20<sup>th</sup> April -the claimant was told that he would have to provide medical evidence before he is allowed to return to work

209. In the list of issues to be determined by the Tribunal this was erroneously recorded as having occurred on 23 March. This allegation must relate to 20 April. The allegation is that the claimant was told that he would have to provide medical evidence before he was allowed to return to work.
210. We have considered whether this was an act of section 26 disability related harassment. This incident occurred in the context of the respondent's duty of care to the claimant regarding the appropriate standards of health and safety at work. From the claimant's perspective it was unwanted conduct because the claimant wanted to return to work without delays and without waiting for medical evidence. However we do not accept that the respondent's actions had the necessary proscribed effect (section 26(1)(b)). It is a standard HR practice to request information from a medical practitioner in order to understand an employee's condition and situation properly so that the employer can make decisions which appropriately protect the employee whilst still meeting the needs of its business. It is an information gathering exercise and nothing more. It is instructive to consider the alternative proposition. What if the respondent did not require medical evidence before the claimant returned to work and something went amiss at work which caused the claimant injury or exacerbated symptoms of pain etc? In such circumstances the respondent would quite rightly be criticised for their failure to obtain the necessary information and take appropriate steps to safeguard the employee whilst at work. From the claimant employee's point of view there is nothing humiliating in being asked for such medical evidence. It cannot reasonably be concluded that by asking for the medical information the respondent was denying the existence of a medical problem. The respondent was not suggesting that the claimant was lying or exaggerating or in any way acting inappropriately in saying that there were limitations on what he could do at work. They were merely trying to understand the situation properly. The claimant in this case made a great deal of the fact that he felt that his back condition had not deteriorated. He gave evidence that his condition was stable and that there had been no change. However, even if this was correct, it did not mean that the respondent could only ask for medical evidence if the claimant's medical condition had changed or got worse. The relevant change in this scenario is the change in the respondent's knowledge. The respondent was made aware that the claimant asserted that his medical condition impacted on his ability to do his job. This is something the respondent was not previously aware of. Even if the severity of the claimant's symptoms had not changed, the respondent's knowledge and understanding of the position had changed. Once the respondent was put on notice that a medical condition potentially impacted upon the claimant's

ability to do his work duties it was surely entitled follow that up in order to discover the true state of affairs. This was necessary in order to protect both parties to the employment contract. The respondent was asking for objective medical evidence.

211. We have concluded that whilst this was conduct which was linked to the disability and was unwanted from the claimant's perspective, it did not have the proscribed purpose or effect (section 26(1)(b)) and therefore does not meet the definition of section 26 harassment.
212. The claimant maintains that this was, alternatively, an act of direct discrimination. The correct hypothetical comparator for section 13 purposes would be someone who was not disabled. However, the relevant comparator might well have back pain symptoms and limitations on their ability to do all their tasks at work. Such a comparator would not necessarily meet the definition of disability (e.g. the symptoms might not be sufficiently long term within the meaning of section 6) but their condition would still have a functional impact on their ability to do all work tasks. We find that such a comparator would have been subjected to the same treatment as the claimant in this regard. The respondent would still, with good reason, wish to obtain accurate and up-to-date medical information to ensure that the comparator was safe to return to work and the interests of both employer and employee were adequately protected. Consequently, this Tribunal is not satisfied that there was less favourable treatment of the claimant than of the correct hypothetical comparator. We note that named comparators were identified by the claimant [101]: Matt and Jamie. However, the claimant led no evidence in relation to the comparators and so we are unable to find that they were appropriate named comparators for the purposes of this part of the case. Furthermore we do not accept that being asked for medical evidence is itself a detriment within the meaning of section 13. Indeed, the claimant himself accepted that if he had suffered an injury at work in circumstances where medical evidence had not been obtained beforehand, he would have complained about it. This in itself suggests that he recognised the benefit and utility of medical evidence rather than considering it to be detrimental or "less favourable treatment."
213. The claimant also put this forward as a claim of section 15 discrimination. The respondent's request for medical evidence was triggered by the claimant's expressed difficulties in moving to work on the tills and, to some extent, the difficulties he said he had experienced in working in the Bakery. At this stage, the respondent had not been made aware that the medical condition impacted upon his work in the Deli. The alleged 'unfavourable treatment' was not because of the identified "something arising in consequence of disability". The necessary causal link for a section 15 claim is therefore not made out. We also query whether it could constitute unfavourable treatment. Surely it is as much to the claimant's benefit as to the respondent's? In any event, we consider that it would be a proportionate means of achieving the respondent's legitimate aim of ensuring a safe working environment for the claimant and ensuring that he was not put at risk of further injury or harm to his health. The respondent must be permitted to discharge its duty of care to the claimant regarding health and safety in circumstances where the claimant has flagged up limitations on his work capabilities. The tribunal cannot identify

any other, less intrusive way for the respondent to achieve that. It opted for the least objectionable route to protect the claimant's health and safety in all the circumstances of the case.

27 April- the claimant was instructed that he could not work in the deli department.

214. The claimant asserts that this was an act of section 26 disability related harassment. We accept that this was unwanted conduct and it clearly related to his disability. However, taking into consideration the factors in section 26(4) the conduct did not have the effect proscribed by section 26(1)(b). Section 26(4) requires us to take into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct have that effect.
215. At the relevant time the respondent was experiencing significant staffing pressures. There was no spare capacity in the system. They had considerably fewer employees than usual to cover all the business needs. The respondent had taken its cue from what the claimant told them about the limitations on his ability to do his work. The respondent initially thought that the claimant's limitations were just in relation to bending, twisting et cetera. However, the claimant added the issue of his difficulties working with spices. He referred to the breathing problems experienced when he was working in the vicinity of spices. That had to be taken into consideration. He also indicated that there were limitations on his ability to lift certain items in the Deli. The respondent could not ignore that information (which came from the claimant himself).
216. The respondent's exploration of the claimant's position could not in any sense be described as cursory. During the relevant meetings the respondent engaged in detailed questioning in order to try and look after the health and safety of the claimant in the exceptional circumstances presented by the pandemic. The real problem in this case is that the claimant fundamentally disagrees with the respondent's assessment of the risks. However, we consider that the respondent was best placed to know what staff support was actually available at the relevant time. The respondent could assess whether there were "spare employees" available to assist the claimant with those tasks which he could not carry out himself without risk of exacerbating his back pain. By this stage the claimant had not actually been in the workplace for some time and so could not see for himself whether the respondent would realistically have sufficient staff to cover the tasks that he could not complete. He based his assessment on the situation as it had been prior to the pandemic. However, much had changed since then. We cannot accept, based on the evidence presented to us, that the decision to prevent the claimant from working in the Deli violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him. To the extent that that was his subjective experience we have concluded that his perception was not reasonable, particularly given the other circumstances of the case.
217. The claimant says, in the alternative, that this was an act of direct discrimination. We have to construct an appropriate hypothetical comparator. That comparator would be someone with a back problem which fell short of disability or who had the same functional limitations on his abilities at work and who also could not work with spices. That



comparator would have limitations on his ability to carry out certain tasks in the Deli although disability would not be the reasons for them. In those circumstances we considered that the comparator would have been treated in the same manner by the respondent. In particular, the difficulties in working with spices would apply to both the claimant and the comparator and would, in themselves, be a reason why the employee would not be entitled to return to the Deli. There was a need for the claimant to work with (and in the vicinity of) spices and he could not do this safely and without significant respiratory problems. The non-disabled comparator would have been in the same situation and would have been treated in the same way. Even if the spice issue was removed from the relevant circumstances of the claimant and the comparator, the respondent would still prevent the claimant and comparator employee from working in the Deli given the back problems because of the circumstances of the pandemic. The pandemic meant that the respondent would not be able to guarantee that another employee would be around to help complete the tasks. Even on the claimant's own case, his ability to do the Deli role since August 2018 had been dependent upon his ability to delegate tasks to others at will. In the changed circumstances of the pandemic the ability to delegate was significantly curtailed and would sometimes be wholly absent. We consider that the respondent would be entitled to conclude that an employee who could not manage all of the relevant tasks on his should not be working in the delicatessen. They could not guarantee the necessary help and therefore they were entitled to ensure that the person doing the job could do all of the job without assistance. They were entitled to place the claimant somewhere where his disability would not pose the same difficulties. The hypothetical comparator would also have faced restrictions on his/her ability to delegate tasks to other employees and so the same decision would have been made in relation to that comparator. The claimant has therefore failed to establish that he was subject to less favourable treatment than the comparator and we are not satisfied that the treatment was because of disability. The section 13 claim therefore fails.

218. Once again, the claimant asserts that this should be characterised as section 15 discrimination. We accept it is unfavourable treatment and that it is because of the pleaded "something arising from disability". Even in the absence of the complication added by spices, the claimant would still have been restricted in his ability to carry out all the tasks in the Deli because of his disability. The disability materially contributed to the restrictions on his ability to work in the delicatessen. However, we also accept that the unfavourable treatment was a proportionate means of achieving the respondent's legitimate aim. The respondent had a legitimate aim of ensuring a safe working environment for the claimant and ensuring that he was not put at risk of further injury or harm to his health. It also, legitimately, aimed to manage its staffing resources appropriately. We accept that moving the claimant away from the Deli was a proportionate means of achieving those aims. There were no less discriminatory alternatives available in the prevailing circumstances of the pandemic and the staffing challenges facing the store, particularly as the respondent was attempting to find an alternative role that the claimant could do without such risks to his health and safety. We also do not accept that there was a workable solution which could be used to allow the claimant to work safely in the vicinity of spices given the respiratory risks

and the fact that the problem even arose when others in his vicinity were working with spices. The idea that the claimant could wear a mask and goggles throughout the shift was not reasonably practicable, particularly as production of spicy foods was no longer concentrated in a particular part of the shift and given that the overall demand for spicy food had risen during the pandemic. Further, the claimant could not assume that he would be able to call on help with lifting tasks as and when required. Some of those tasks were time sensitive (e.g. unloading the rotisserie) so leaving the task until later or until somebody else was available would not be an answer to the problem.

27 April -the claimant was sent home and told that he was to be unpaid and subsequently was only paid SSP and further subsequently only being paid his proper salary after raising a grievance.

219. We have found as a fact (above) that the claimant was *not* sent home and told that he would not be paid. He asked if he could go home. He was only paid statutory sick pay at the time and then received back pay to cover the relevant period. His sick pay entitlement was statutory sick pay and he was off work on sick leave. Contractually he got more than he was entitled to when the respondent gave him full backpay as a gesture of goodwill.
220. The claimant alleges that his was an act of section 26 harassment. Insofar as the claimant has proved the relevant facts (i.e. that he went home and was paid SSP and subsequently backdated full pay), we accept that this was unwanted conduct which was related to disability. He would have preferred to stay at work on full pay. However we do not accept that it had the proscribed purpose or effect. Putting someone on sick pay ( which is their entitlement) cannot reasonably, in all the circumstances of the case, be considered to be harassment. Were it otherwise, every time an employer legitimately paid an employee sick pay pursuant to the contract of employment they would be accused of disability related harassment. Harassment as a concept is directed at conduct over and above the normal course of legitimate and appropriate conduct within the employment relationship. Giving someone their contractual entitlement cannot reasonably be said to produce the proscribed effect within section 26(1)(b) taking into account the factors in section 26(4).
221. Nor do we accept that the claim of direct discrimination in relation to this should succeed. A non-disabled comparator would have been treated in exactly the same way as the claimant. In the absence of less favourable treatment the section 13 claim cannot succeed.
222. We also do not accept that the section 15 claim should succeed. Whilst the respondent's actions could be characterised as unfavourable treatment because of something in consequence of the claimant's disability, they were not a disproportionate means of achieving the respondent's legitimate aims. The respondent had a legitimate aim of ensuring a safe working environment for the claimant, ensuring that he was not put at risk of further injury or harm to his health, and in managing its staffing resources appropriately. Allowing the claimant to go home in the absence of appropriately safe work for him to carry out while still being paid his contractual entitlement and then back paying over and above the

contractual entitlement must surely be a proportionate means of achieving those aims.

27 April 2020- denying the claimant the opportunity to be accompanied by a witness at the two meetings.

223. As a matter of fact we do not accept that the claimant actually asked for a witness at these meetings. The issue therefore does not arise on the facts as proven. Even if he had asked for a witness, the nature of the meetings meant that there was no need for a witness. It was essentially a return-to-work meeting rather than a meeting under one of the formal procedures (such as disciplinary or grievance procedures.) It is not the sort of meeting to which the right to a witness or to be accompanied attaches. Furthermore, the meetings would entail discussions about the claimant's health which in themselves would pose confidentiality issues. Thus, even if established, we do not accept that this would have constituted harassment within the meaning of section 26. Even if unwanted conduct it was not related to disability. When viewed holistically it would not have the proscribed purpose of effect in section 26(1)(b).
224. Likewise the direct discrimination claim fails. The non-disabled comparator invited to such meetings would have been treated in the same way. There was no less favourable treatment. Furthermore we accept the respondent's evidence that if the claimant had asked for a witness at these meetings it would not actually have been a problem. The failure to provide or to offer a witness was nothing to do with the claimant's disability. It was to do with his failure to request one and the fact that it was not a disciplinary or grievance meeting which would normally attract the right to be accompanied.
225. The section 15 claim in this regard must also fail. The unfavourable treatment complained of was not because of the "something arising from disability" relied upon by the claimant. It had nothing to do with his ability to carry out all the tasks in the Deli. It was because of the respondent's normal procedures and the fact that the claimant did not request a witness for the meetings. In any event, we have already outlined the practical difficulties in enabling employees to have witnesses at these sorts of meetings. This rather indicates that the respondent's approach in not offering witnesses as of right was a proportionate means of achieving its legitimate aims.

The respondent failed to carry out a reasonably fair, objective and independent investigation into the claimant's complaints set out in the grievance.

226. We have set out above the steps which the respondent took to investigate the claimant's grievance and provide him with an outcome in a timely manner. The claimant, in closing submissions, noted that Ms Knowles had asked the claimant a series of questions which the claimant responded to. Ms Knowles then asked the claimant in correspondence to "reduce the level of aggression in his responses". Ms Knowles confirmed in evidence to the Tribunal that she was referring to the claimant's reference in his email to needing to contact ACAS as soon as possible to ensure that he

was not out of time to submit a claim of disability discrimination. This accusation of aggression is said to have contributed to the claimant having grave concerns and fearing that attending any internal meeting would result in subjecting himself to further hostility and harassment similar to the meetings of 27 April. The claimant submitted that in those circumstances the conduct and outcome of the grievance were unwanted conduct related to his disability which had the effect of creating the proscribed environment within the meaning of section 26(1)(b).

227. The comment relating to the claimant's aggression was perhaps an unwise comment for someone in Ms Knowles' position to make in all the circumstances. The tone of the claimant's correspondence had indeed been somewhat combative at times and it was certainly true that there was no need for the claimant to refer to his intention to bring Tribunal proceedings. However, there was equally no need for Ms Knowles to react to it. It was a somewhat thin-skinned response. However, it was only one unwise comment made in the context of a much bigger grievance investigation. It should be viewed in its proper context. For the reasons that we have already stated, we do not accept that the previous internal meetings that the claimant had attended had been hostile. We also do not consider that Ms Knowles' subsequent correspondence was hostile. She tried to smooth things over. In those circumstances, viewed in its proper context, we do not accept that the comment had the proscribed effect set out in section 26(1)(b). Essentially, the claimant was reacting in an overly sensitive manner to the comment and giving it much more prominence and significance than it merited when looked at in context. We therefore do not accept that this aspect of the grievance process was harassment within the meaning of section 26.
228. We conclude that there was no evidence to suggest that Ms Knowles acted improperly in speaking to Mr Flanagan about the claimant. He made contact due to the fact that there was a possibility that an occupational health referral would be made which might incur a cost for the respondent. As a courtesy he alerted Ms Knowles to this given her position within the company. There is no evidence to suggest that Ms Knowles was substantively involved in the claimant's grievance before it came to her attention on 1 July 2020. We also accept that Ms Knowles was entitled to conclude that the evidence about the claimant having breathing difficulties around spice was new information which suggested a change in his condition.
229. We do not accept that the overall investigation and grievance outcome would constitute harassment within the meaning of the Equality Act. Clearly, the claimant did not get the outcome that he was hoping for. However, an employer is entitled to carry out a thorough investigation and reach reasonable conclusions based on the evidence which do not coincide with the employee's view of events without this resulting in a finding that the employer has committed disability related harassment. This is what Ms Knowles in fact did. She carried out a full investigation within the parameters set by the claimant given that he was not prepared to attend a face-to-face meeting. She took into account relevant evidence and left out of account irrelevant evidence. She came to a reasoned conclusion. It was not the conclusion the claimant hoped for but we do not consider that the grievance investigation and outcome, viewed overall

meets the threshold set by section 26. It did not have the proscribed effect. In order to make it hostile, humiliating or degrading (etc) it is necessary to misinterpret the Ms Knowles' observations and conclusions and to take them out of their proper context. For example, the claimant seemed inclined to believe that Ms Knowles did not accept that he was disabled. That was not what her grievance outcome actually said. What it said was that she had been asked to conclude the grievance prior to receipt of the relevant medical evidence. She was, therefore, not in a position to draw her own conclusions as to whether the claimant had a disability as a matter of fact. In those circumstances she erred on the side of caution and took the claimant's assertion at face value and determined the grievance on the basis that the claimant was in fact disabled. She took his case at its highest.

230. A reasonable reading of her grievance outcome would not have led to the claimant being offended or distressed. It was also not unreasonable of Ms Knowles to maintain that the respondent did not have knowledge of the claimant's disability just because she was accepting, for the purposes of the grievance, that the claimant was disabled as a matter of fact. There was no inconsistency in this and she was not obliged to concede that the respondent had prior knowledge of the disability just because she proceeded on the assumption that the claimant had a disability within the meaning of the Act. Furthermore, the claimant maintained that his immediate superiors and colleagues were aware of the adjustments that he made for himself during his time working in the Deli. However, on a reasonable reading of the grievance outcome he would have realised that it was reasonably open to Ms Knowles to come to a different view based on the evidence she had seen. Just because she did not agree with him did not mean that she was acting unreasonably or unfairly such that the claimant could be offended or caused unnecessary distress. An employee who submits a grievance to their employer has to be prepared for the fact that they may not agree wholeheartedly with the employer's conclusions. They have to be pragmatic and phlegmatic. They cannot be hypersensitive. A fully reasoned and evidence-based finding against them cannot reasonably be expected to cause offence or distress such as to convert the grievance into an act of harassment without something more. There is no such additional factor in this case. The requirements of section 26(1)(b) are not met and for those reasons the section 26 claim fails.
231. The claimant alleges that there was also an act of direct discrimination contrary to section 13 in relation to the grievance. It is difficult for this Tribunal to see how a non-disabled comparator would have been treated any differently during the grievance process or in the grievance outcome. We cannot see that a non-disabled comparator would have been treated more favourably than the claimant. If there was no less favourable treatment there can have been no direct discrimination. Furthermore, we do not accept that the claimant's disability was a significant influence on the actions of the grievance officer. It did not have the necessary causal influence on the respondent's actions. The fact that he had a disability was not a material factor in the way that the grievance was handled and was not a significant influence on any detrimental treatment the claimant may seek to point to.

232. The claimant also asserted that the grievance and the outcome were section 15 discrimination. We do not accept this. The claimant relied upon the same “something arising from disability” in relation to this aspect of his claim as relied upon in all other aspects of the section 15 claim. We have therefore examined whether the alleged unfavourable treatment was because of the alleged “something arising from disability”. We do not accept that it was.
233. We do not accept that the respondent failed to carry out a reasonably fair, objective and reasonable investigation into the claimant’s grievance or that the outcome was unreasonable in the circumstances. We do not accept that the comment made by Ms Knowles about the claimant being aggressive arose because of the ‘something arising in consequence of disability’. It had nothing to do with the limitations on his work in the Deli and everything to do with the way he had expressed himself in response to her genuine questions during the grievance process. To the extent that the claimant sought to criticise Ms Knowles’ contact with Mr Flanagan, we accept that this contact was due to the fact that there was the possibility of an occupational health referral with cost implications. As a courtesy Mr Flanagan alerted Ms Knowles to this. There was no evidence anywhere to suggest that Ms Knowles was substantively involved in the claimant’s grievance before it came to her attention on 1 July 2020. In any event it is hard to see how this was because of the “something arising in consequence of disability” relied upon in the claimant’s pleaded case. The claimant was unhappy that Ms Knowles concluded that there had been a change in his medical condition. As set out above, the relevant change was in the degree of knowledge possessed by the respondent of the claimant’s physical limitations. Ms Knowles explained that the issue concerning spice and the claimant’s breathing was new and had never been raised before (the issue of the claimant having difficulty breathing as opposed to merely disliking spice) and accordingly she was of the view that the claimant’s condition had changed. This was a reasonable view for her to come to. It was not unfavourable treatment because of something arising in consequence of disability.
234. We accept that the respondent carried out a thorough, fair, objective, independent and reasonable grievance process as detailed in Ms Knowles evidence, witness statement and the outcome letter. The fact that she did not find in favour of the claimant did not indicate unfavourable treatment because of something arising in consequence of disability. The decision was based on the evidence available which she considered in an appropriate way. It was also a proportionate means of achieving the respondent’s legitimate aim.

The respondent failed to carry out a reasonably fair, objective and independent investigation into the claimant’s complaints in the grievance appeal./In the grievance appeal the respondent failed to take account of the occupational health report.

235. Based on our findings of fact we have concluded that the respondent did carry out a fair and reasonable appeal process and came to conclusions which it was legitimately entitled to reach. We do not accept that the respondent failed to take account of the occupational health report. It is clearly referred to in the appeal outcome. Rather, Mr Westwood took the

practical approach of using the occupational health report as the basis for discussions as to how the claimant could come back to work. To that extent he passed it to Ms Finn so that she could meet the claimant and make arrangements for a suitable return to work. He did not leave the report out of account or fail to consider it.

236. Mr Westwood has been criticised for failing to send copies of the documents he would be considering to the claimant's solicitors prior to sending the grievance appeal outcome. We have already outlined the reasons behind this failure in our findings of fact. It was an oversight rather than a deliberate action on Mr Westwood's part. We are not satisfied that it made any substantive difference to the fairness of his process. He had explained to the solicitor which documents he would be considering in coming to his conclusion and had given them the opportunity to comment and to explain if there were additional documents which should be considered or documents which should be left out of account as part of the appeal. He got no response to that correspondence. The claimant and his representatives did not need the copies of the documents in order to make those submissions. Indeed, the claimant did not assert to this Tribunal that, had he been sent those documents earlier, he would have made different representations to Mr Westwood as part of the appeal. It made no practical difference to the outcome of the appeal. The claimant's representatives could have pointed out the omission at an earlier stage. They could have queried why they documents had not been sent. They did not do so.
237. We also do not accept that the claimant's criticisms of the review of his rotas is justified. He says that the respondent should have looked at all of the rotas rather than the sample and that if this had been done it would have been clear that there was a distinct change from flexible working to early shifts only. Even if Mr Westwood had looked at all of the rotas and had noticed a distinct change from flexible shifts to early shifts and then back to flexible shifts again this would not have told him about the legal basis for the working pattern. It would not have proved or disproved that the claimant had a contractual variation *guaranteeing* him early shifts on an exclusive basis. It would be just as consistent with the respondent's case, which was that his early shift preferences were accommodated for as long as it was reasonably practicable to do so given the needs of the business at the time. Although the criticism can be levelled at Mr Westwood that he looked at an inadequate sample of rotas this, either alone or in combination with other factors, does not mean that the appeal was unreasonable or inadequate and or that it was an unfair way to carry out a grievance appeal investigation. The provision of the other rotas would not have proved the 'knockout blow' for which the claimant contends. The respondent could have looked at a bigger sample. This may well have shown that there were consistent early shifts after 2018 but it would not have helped the claimant to show a contractual entitlement where he could not show a written agreement varying his contract or some other evidence of a variation to the contract. This is particularly so in circumstances where the respondent required a request under the flexible working policy to effect a permanent change. So the absence of other rotas and the criticisms of the sample are of limited relevance. Furthermore they are not unfavourable treatment because the respondent has accepted that the claimant's description of his working practices is

accurate. It just disputes the *reason* for the change in working patterns and the *entitlement* to guaranteed early shifts. Furthermore the examination of the rotas was unrelated to disability because the claimant never said that he needed early shifts because of his disability. There is also no evidence to suggest that Mr Westwood deliberately 'cherry picked' the rotas in order to undermine the claimant's case. This conduct did not have the relevant proscribed effect.

238. Nor is it fair to say that Mr Westwood's conclusion that the first the respondent was aware of the disability was 24 April is demonstrably false. It was a conclusion which was open to him on the evidence available. It is just not a conclusion with which the claimant agrees. The evidence before the respondent was that managers knew the claimant had had a back problem but did not appreciate the extent of it. Some respondents might have reached a different conclusion but this does not make it a *false* assertion on the respondent's part. We do not accept that it had the relevant proscribed effect. It was not dismissive and did not indicate that the respondent had ignored the available evidence. It was merely coming to a conclusion which differed to the claimant's case.
239. The claimant also complains that Mr Westwood was not sufficiently independent as he had been aware of the grievance investigation at the first stage of the grievance (which was decided by Ms Knowles). Mr Westwood was originally due to attend the meeting with the claimant but he did not do so and thereafter Ms Knowles proceeded with the grievance on her own. The claimant was well aware of Mr Westwood's involvement at the earliest stage and did not complain about it. He did not assert that Mr Westwood was an inappropriate person to hear the grievance appeal. Indeed, he sent his grievance appeal to Mr Westwood. We accept, based on all the evidence before us, that Mr Westwood was sufficiently independent of the grievance decision maker to be able to carry out a fair appeal. Although he was aware of the nature of the grievance he was not intimately involved in the investigation and did not have a hand in the grievance outcome. We think that the claimant and his lawyers would have raised any lack of impartiality during the process if they had genuinely thought it was a problem. Furthermore, this had nothing to do with the claimant's disability and we do not accept that it had the proscribed effect within the meaning of section 26.
240. In light of our observations above we do not accept that the grievance appeal was handled unreasonably or that the grievance appeal outcome was unreasonable. We do not accept that the respondent's actions in this regard constituted harassment within the meaning of section 26. Much of the way the grievance appeal was handled was unrelated to disability and, looked at overall, we do not accept that it met the threshold for the proscribed effect set out in section 26(1)(b).
241. We have also considered whether the handling of the grievance appeal constituted direct discrimination. We do not accept that a non-disabled hypothetical comparator would have been treated in any different or more favourable way. The respondent's conclusions were based on the evidence available. They were not because the claimant was disabled. There was no less favourable treatment and the necessary causation was absent.



242. We do not accept, in the context of the section 15 claim, that the handling of the appeal grievance was because of the pleaded “something arising in consequence of disability”. Nor do we accept that it can be legitimately characterised as unfavourable treatment. The causation is absent. In any event we accept that in handling the grievance and appeal as it did, the respondent was adopting a proportionate means of achieving its legitimate aims.

Victimisation: s27

243. The claimant relied on two protected acts for the purposes of his victimisation claim. The first protected act was his complaint about discrimination in the Bakery department on 19 March. This was the complaint he raised about the conduct of Sam. We accept that this was a protected act within the meaning of section 27 Equality Act 2010. However, we do not accept that any of the detriments relied upon by the claimant in the list of issues was caused in any way by this protected act. The complaint about the incident involving Sam was not causative of anything which happened subsequently. It was a one-off isolated incident which was dealt with at the time and probably forgotten about by everybody concerned except the claimant. Without the necessary causation this part of the section 27 victimisation claim must fail.
244. The second protected act relied upon by the claimant was when he told the respondent that he was unable to continue working in the Bakery because of his disability. The claimant’s evidence in relation to this was set out at paragraph 24 of his witness statement. He said that on 20 March he told Mr Alexander and Mr McDonald that he was very sorry but he was unable to continue working in the Bakery. He explained that it was the repetitive twisting turning and bending that was causing excessive pain.
245. The claimant’s evidence does not disclose a protected act within the meaning of section 27. He does not say in terms that he is disabled but more importantly he makes no reference to discrimination. He makes no criticism of the respondent at this point and does not do any of the acts by reference to the Equality Act as described in section 27(2)(a)-(d). We do not accept that there was a second protected act. That element of the victimisation claim must also fail. In any event we do not accept that the alleged second protected act was causative of any of the detriments pleaded. His comments about his inability to work in the Bakery and the pain he suffered did not lead to the changing shift patterns, the request for medical evidence, the request for the claimant to work as a Cashier, the confirmation that he could not work in the Deli department, the fact that the claimant went home on 27 April, how the claimant received sick pay or the way that the respondent carried out its grievance and grievance appeal processes. It was causally irrelevant to the alleged detriments.

Reasonable adjustments

246. The claimant’s reasonable adjustments claim is founded on the PCP that: “On 27 April the claimant was required to carry out full duties required in the Deli department including lifting heavy weights over 16 kg, repeated bending, twisting and lifting and working with spice.” First of all we are not

satisfied that the PCP as drafted in the list of issues was actually applied to the claimant. It is not factually correct. He was *not* actually required to go and work in the Deli on 27 April. The claimant was not required to work in the Deli at all on 27 April given what he had told Mr Boscott at his return-to-work meeting. In fact he was allowed to go home rather than work in the Deli. In fact it is arguable that the PCP actually applied to the claimant was a requirement *not* to work in the Deli given his issue in working with spice. The claimant cannot establish that the PCP, as specifically drafted, was applied to him.

247. If the PCP had not referred to 27 April it could be said to have been applied to the claimant over a different period of time. It could be argued that the PCP was actually to require the claimant to attend the Deli and carry out the full range of tasks himself and that it was because of the substantial disadvantage he was at in trying to do this (as compared to someone without his disability) that he was sent home. It would be possible to modify the PCP so that it was actually applied to the claimant. In those circumstances we would accept that the respondent knew that the claimant was disabled and that they would know that the claimant suffered a substantial disadvantage as a result of the application of such a PCP. (That said, any disadvantage caused by working with spice is not disability related as it is unrelated to his back condition and so there is no obligation to make reasonable adjustments to alleviate any disadvantage arising from the aversion to spice. There would be no comparative disadvantage between the claimant and a non-disabled person in relation to the spices issue)

248. The real question for us is what the reasonable adjustment(s) would be in such circumstances (i.e. if an appropriate PCP were identified). The claimant contends that the respondent should have allowed him to continue to work with the adjustments that had been in place since June 2018. This was elaborated upon in the claimant's closing submissions (paragraph 71). The claimant contends that the following adjustments would have enabled him to remain working in the delicatessen:

- a. Delegating the lifting of 11 boxes of ribs per week;
- b. Delegating the preparation spicy products;
- c. Preparing spicy products by wearing a mask; and
- d. Training any untrained staff to staff the rotisseries.

The claimant asserts that these steps would have been effective in preventing a substantial disadvantage because they were practical and the cost and disruption of making the adjustments is likely to have been minimal in the context of a large multinational employer with financial and other resources, such as the respondent.

249. Given our findings of fact of, we do not accept that the respondent was in a position to put that package of adjustments in place in the prevailing circumstances in the workplace. The claimant would have needed all of these adjustments in place in order to be able to carry on in the Deli. One adjustment alone would not have been sufficient.

250. As noted above any substantial disadvantage caused by the requirement to work with spice was not related to the disability and so, arguably did

not trigger a duty to make reasonable adjustments. However, even if it did, we were not satisfied that the adjustments contended for were reasonable and practicable. From the onset of the pandemic there was a need for continuous production of spicy products within the delicatessen. Production could not be ring fenced to one particular time of day so that the claimant could avoid being in the vicinity of spicy food. His problem was not restricted to producing the food himself. He also suffered difficulties when he was in the vicinity of spice. Given the significance of the breathing difficulties he indicated that he was suffering it was not reasonable to expect the respondent to allow him to work in the vicinity of spicy products. Given the staffing problems the respondent could not guarantee that there would always be somebody else available to produce the spicy food instead of the claimant. Even if that were possible, the claimant would still suffer the ill effects by working in the vicinity of it. In order to adequately protect the claimant he would therefore have needed to work in a mask and goggles all day long. This would not have been comfortable or practicable and it would not have been a reasonable requirement for the respondent place on the claimant.

251. Even if the respondent were able to solve the claimant's predicament with spicy food it would not have been able to guarantee the availability of other staff to carry out tasks that the claimant could not do in circumstances where staffing levels were significantly lower and more unpredictable than pre-pandemic. Furthermore, it is not realistic given the staffing pressures that the respondent was facing at the time (see the evidence regarding the need for trained till staff) for the respondent to be expected to take time out to train staff to work on the rotisserie if the claimant were unable to complete that task. That would have required taking at least two people away from their normal work (i.e. the person being trained and the person training them). It is unrealistic to expect that the respondent would be able to carry out this training and, even if it did, it would need to train significant numbers of employees to cover the claimant to ensure that spare staff were available to do this task should the claimant need them. It is also relevant to note that this particular task could be time sensitive (i.e. when the food is cooked it needs to be unloaded without too much delay). Therefore, the respondent would have to train spare staff and then ensure that they were on duty and kept available at the specific times the claimant needed assistance. This adds further complexity and pressure to an already difficult staffing situation. The context of the pandemic meant that the sorts of adjustments that might have been practical in normal times were just not available during the relevant time. The respondent was short staffed and staff attendance was unpredictable at a time when demands on the staff were at their highest. It really was 'all hands to the pump'. The claimant's ability to delegate tasks to other members of staff was no longer sustainable.
252. In an ideal world it may have been possible to put some of these adjustments in place for the claimant but not all of them. Furthermore, the respondent was very far from operating in an "ideal world," during the pandemic. The claimant's suggested adjustments are a counsel of perfection. They were not reasonably practicable in the prevailing circumstances and they would not have provided the requisite level of reassurance that the claimant could return to work with all the tasks in the Deli still being carried out as and when required. The crux of the matter is

that there were fewer people available for the claimant to delegate to during the pandemic.

253. Furthermore, as of 27 April the respondent did not have all the necessary and relevant information. This was the first time that the claimant had told them the full extent of the problems he faced. It would be unrealistic to expect the respondent to have a ready-made solution available then and there at a point in time when they had not received the occupational health report and so could take no occupational health guidance. It was entirely appropriate, we find, for them to refer the issue higher up the chain of command. On 27 April the respondent was essentially 'stuck'. The matter did not become resolvable until there was a change in the availability of alternative roles.
254. The claimant underestimated the impact of Covid 19 upon the working practicalities at the warehouse because he had not been in the workplace. The claimant was effectively asking to be made supernumerary within the Deli department. The respondent did not have the guaranteed staff available to achieve this. There was also the risk of a personal injury claim if the claimant was put in a situation that caused him harm. The respondent had to balance the competing risks. We do not accept that its actions in the circumstances were a breach of the duty to make reasonable adjustments. The respondent was evidently entitled to obtain more information before choosing what adjustments would be appropriate and practicable. The adjustments the claimant now suggests just did not work practically in the prevailing Covid circumstances. The better adjustment to meet the substantial disadvantage was to arrange for the claimant to move department so that he could do a full job role without significant difficulty. That option only became possible later. The respondent did all it could reasonably be expected to do on 27 April when faced with the circumstances as the claimant described them.
255. It is also important to consider what the respondent did try to do in terms of reasonable adjustments to enable the claimant to return to work. They looked for alternative roles for him. They got him to identify the jobs that he felt that he could do. At that point in time the roles were not available to be filled and the respondent hadn't yet seen the occupational health report. As time passed one of the jobs did become available (the Supervisor role on Member Services) it was offered to the claimant. This was a role that the claimant had himself identified as a possibility but by the time it was offered to him he did not want to try it out.
256. For the above reasons we do not accept that the respondent was in breach of a duty to make reasonable adjustments in the circumstances of this case.

#### Constructive dismissal

257. At the outset of the hearing claimant's counsel provided us with a list of the issues to be considered in relation to the constructive dismissal claim. It set out the particular matters which were said to amount to a breach of the implied term of mutual trust and confidence. The paragraphs ran from (a) to (k). We were told that the last straw in this case was at paragraph

(j): "In the grievance appeal failing to take account of the occupational health report."

258. In line with our findings of fact, the claimant has failed to prove the last straw on which he relies. For the reasons set out above we do not accept that the respondent failed to take account of the occupational health report in the grievance appeal. The appeal did take account of the occupational health report to the extent that was reasonable in all the circumstances. We address the remaining paragraphs highlighted as part of the constructive dismissal claim below.
259. At paragraph (a) the claimant relies on the complaint by Sam on 19 March 2020 about the claimant being too slow when working in the Bakery. We have already set out our findings of fact in relation to this incident. Although Sam's comments were problematic they were dealt with appropriately by the relevant manager. We have found that the claimant raised a grievance about this and it was resolved to his satisfaction at that time. The claimant continued working for a considerable period of time thereafter and indeed moved away from the Bakery department.
260. Whilst Sam's comments were inappropriate we do not accept that they constituted a breach of the implied term of mutual trust and confidence. Sam apologized and the matter was dealt with in line with the claimant's wishes at the time. We also consider that by the time that the claimant resigned this incident was well and truly 'water under the bridge'. He had waived the breach and affirmed the contract such that this incident could not form part of the fundamental breach of contract which caused him to resign. In short, the matter was resolved and had no causative effect in relation to the resignation.
261. In relation to paragraph (b) we have found that the claimant did not have any contractual entitlement to permanent early shifts. He had not made a formal request for flexible working and this had not been agreed. His preferences had been accommodated so far as consistent with business need. We have also found that permanent early shifts were not removed from the claimant. Rather, he was asked to provide greater flexibility because of the change in business circumstances. This was a reasonable request in all the circumstances. He might still be able to work early shifts but probably not as many as previously. The respondent had reasonable and proper cause to act as it did. There was no breach of contract and no breach of the implied term of mutual trust and confidence.
262. For the reasons previously discussed we do not accept that asking for medical evidence should be considered as a breach of mutual trust and confidence in circumstances where issues have been raised about an individual's health and ability to carry out his job. As set out above, the respondent had reasonable and proper cause for the request it made and the way in which it went about it. There was no breach of mutual trust and confidence in this regard. Paragraph (c) of the particulars did not contribute to establishing the fundamental breach of contract.
263. At paragraph (d) the claimant refers to the fact that he was asked to work as a cashier which he said required him to continually bend, lift, twist and turn. He says that role was unsuitable given his physical condition.

However, once the claimant made his position clear the request was not pursued. He was never forced to go and do this work. Furthermore, the respondent had reasonable and proper cause for making the request given the circumstances of the pandemic. They did not force the matter. They asked the (reasonable) question and acted upon the answer which the claimant gave. The respondent must be able to make reasonable management requests without the making of the request itself becoming a breach of contract.

264. At paragraph (e) the claimant complains that on 27 April he was instructed that he could not work in the Deli department. We have already examined the respondent's duty of care to the claimant as its employee. The respondent had a duty of care to the claimant in terms of protecting his health and safety at work. It had been alerted to potential risks to health and safety from requiring the claimant to do his full role on the Deli and wanted to stop him taking these risks until the matter had been assessed and more suitable work obtained, if appropriate. The respondent therefore acted with reasonable and proper cause and was not in breach of contract. This was not a breach of the implied term of mutual trust and confidence.
265. At paragraph (f) the claimant asserts that he was sent home on 27 April and told that he would be unpaid. He asserts that he was subsequently paid only SSP and was only paid his full salary (backdated) after raising a grievance. We refer to our previous findings of fact. The claimant's assertion here is not factually correct. He was not told to go home and he was not told he would be unpaid. He went home on sick leave and got sick pay. He was paid what he was entitled to. In fact he actually asked if he could go home and nobody said anything about the issue of pay. He was subsequently off work on sick leave in line with the records. In the end he got full backpay which was actually more than he was contractually entitled to. It is inappropriate to characterise this as a breach of contract or a breach of mutual trust and confidence.
266. At paragraph (g) the claimant asserts that he was denied the opportunity to be accompanied by a witness at the two meetings on 27 April 2020. In our findings of fact we have not accepted this assertion. He was not denied the witness. He never requested a witness. We also accepted that the respondent would have allowed him to have a witness had he requested one. On that basis, this cannot constitute a breach of contract or contribute to a breach of mutual trust and confidence.
267. We do not accept the claimant's characterization of the grievance and grievance appeal process and outcomes as set out at paragraphs (h) and (i). The process and the outcomes were reasonable and fair in the Tribunal's view. The claimant did not get the outcome that he wanted but that does not mean that they contributed to a breach of mutual trust and confidence or were otherwise breaches of contract.
268. In relation to paragraph (k) we also do not accept that the respondent made a false assertion that the first time the management team knew the claimant was disabled was when Steve McDonald received a registered disabled badge on 24<sup>th</sup> April. The respondent was entitled to say that prior to this point it had had no direct notification that the claimant was disabled,

as legally defined. They had some knowledge of previous back problems but not sufficient to put them on notice of disability. In such circumstances it would be wrong to say that the assertion was false or that it was a breach of contract.

269. We have considered whether the respondent's actions (as pleaded) whether separately or taken cumulatively, amounted to a fundamental breach of contract. We do not accept that they did. There was no breach of the implied term of mutual trust and confidence either taking the allegations separately or collectively. There was no last straw. There was no constructive dismissal. In those circumstances the claimant's claim of constructive unfair dismissal fails must be dismissed.

### Time limits

270. In light of our conclusions the claimant has established only one act of discrimination in this case. The only assertion which we have found proved as an act of discrimination relates to the comments made by Sam on 19 March 2020. That is the only proven act of discrimination.
271. The three-month limitation period expired on 18<sup>th</sup> June. The EC certificate ran from 9 July to 9 August 2020. The claim form in this case was presented on 21 August 2020 and so the allegation was presented outside the three-month time limit. The EC certificate does not assist in extending time as it postdates the expiry of the primary limitation period. Nor are we able to link this incident to other discriminatory acts so as to establish an act extending over a period of time thereby bringing this complaint within the limitation period. The complaint relates to a discrete incident which is wholly unconnected with any of the other acts complained of. The other acts involve different people and different departments within the respondent etc. In any event, there are no other proven 'in time' acts of discrimination that we can link this incident to in order to bring it within the limitation period. We cannot therefore bring it within time pursuant to section 123 of the Equality Act
272. The only remaining question is whether it would be just and equitable to extend the primary limitation period so the claim can be upheld. We have considered all the available and relevant information in reaching a conclusion on this point. We note that the claimant did not complain about this incident as part of his internal grievance and grievance appeal with the respondent. Therefore there was no legitimate reason why he had to wait until the conclusion of the grievance process before he presented this claim to the Tribunal. This was not one of those cases where a claimant waited to see if the grievance resolved the issue without the need to resort to litigation. We also note that the claimant was legally represented during a considerable portion of the chronology. He had access to advice about the appropriate way to present it. We also find that time limits are there to be applied. There is no presumption in favour of establishing time on a just and equitable basis. It is for the claimant to establish that it would be just and equitable to extend time. The starting point, therefore, is to adhere to the time limit. We have considered whether there was anything which prevented the claimant from bringing the claim before he actually did. We have not been provided with any evidence of that. On balance we find that the only incident of discrimination was presented to the Tribunal

considerably out of time and that there is no evidential basis on which we can conclude that it would be just and equitable to extend time and uphold this aspect of the claimant's case. For that reason this aspect of the claim too must fail and be dismissed.

Knowledge of disability

273. For completeness we have considered the issue of knowledge of disability even though it would make no overall difference to our conclusions in this case. As can be seen from our reasons above we have not dismissed any of the claimant's claims on the basis that the respondent did not know and could not reasonably be expected to know of the disability at the relevant time. We have assumed that the respondent had the requisite knowledge and the claims have failed for other reasons.
274. Based on the evidence we have heard we accept that the respondent had actual knowledge of the claimant's disability by 24 April 2020. Furthermore we fix them with constructive knowledge of the disability in the return-to-work meeting of 9 March. It was at this point that the respondent became aware of the strong drugs which the claimant had been prescribed, the fact that he was possibly due to undergo surgery, the fact that he had had an MRI scan and was under the care of consultants. The claimant had a specialist treating him. This was more than a run-of-the-mill back condition treated by GPs. Someone within the respondent organisation should have picked up on this issue and asked questions about it [159]. Had they done so they might well have thought to make further medical enquiries which would undoubtedly have made clear the extent of the claimant's history of back problems and the extent of his ongoing symptoms and their duration. In those circumstances the respondent had constructive knowledge of the disability on 9 March 2020 but failed to take the necessary steps to gain actual knowledge of the nature and extent of the disability at that stage.

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Employment Judge Eeley

Date: 8 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12 August 2022

FOR EMPLOYMENT TRIBUNALS