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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms S Jakuszewska **v Department for Work and Pensions**

Heard at: London Central **On**: 3-7, 10 April 2017

Before: Employment Judge Glennie

Members: Mr G W Bishop
Ms J Collins

Representation:

Claimant: Mr C McDevitt, Counsel
Respondents: Ms G Wolfe, Counsel

JUDGMENT ON LIABILITY

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of unlawful deduction from wages is well founded in respect of 4 April 2016 only.**

2. **All of the complaints under the Equality Act 2010 and the complaint of breach of contract (notice pay) are unsuccessful and are dismissed.**

REASONS

1 By her claim to the Tribunal the Claimant, Ms Jakuszewska, made the following complaints:-

1.1 Direct discrimination because of disability (withdrawn at the hearing).

1.2 Discrimination because of something arising from disability.

1.3 Harassment related to disability.

1.4 Victimisation (withdrawn at the hearing).

1.5 Failure to make reasonable adjustments.

1.6 Unlawful deduction from wages including holiday pay.

1.7 Breach of contract (notice pay).

2 By its response the Respondent, the Department for Work and Pensions, resisted all of those complaints.

3 The Tribunal is unanimous in the reasons that follow.

The Issues

4 The issues were the subject of an agreed list, a copy of which is attached as an annex to these reasons.

5 This hearing was listed to consider the issues as to liability only. The Tribunal heard evidence and submissions for the first four days of the hearing and deliberated on day five and into day six. The parties attended on day six when the Tribunal informed them that it was reserving its judgment and reasons.

Evidence and Findings of Fact

6 The Claimant gave evidence on her own behalf. Evidence on behalf of the Respondent was given by the following witnesses:-

6.1 Ms Lisa Mullaly, an ICS Coach.

6.2 Ms Joy Arogundade, Senior Operations Leader.

6.3 Ms Andrea Barnatt, Senior Operations Leader.

6.4 Mr Alexander Aina, Senior Executive Officer.

6.5 Ms Trish Frawley, Higher Executive Officer in the HR Mediation and Investigation Service.

7 There was an agreed bundle of documents and page numbers that follow in these reasons refer to that bundle.

8 As demonstrated by her CV at pages 179 – 181, the Claimant has considerable experience in HR and related areas of work. For example, between 1998 and 2000, she worked for the Citizens Advice Bureau service as a Deputy Bureau Manager and Bureau Manager. The work that she did included giving general and specialist advice and representing clients in the Employment and Social Security Tribunals and in the County Court. She worked for Leicester City Council between 2001 and 2005 and as an HR Manager for the Cambridge District Citizens Advice Bureau between September 2005 and November 2008. She worked at the Hounslow CAB with HR responsibilities between 2009 and 2013 and subsequently as an HR Advisor for the St Giles Trust in 2014 and 2015 and as an HR Officer for the London School of Science and Technology from 2014 to 2015.

9 The Claimant has the condition of Macular Dystrophy, which impairs her vision such that she is unable to read ordinary sized print (the main point in the present case) but also has other effects such as difficulties with depth perception and distinguishing faces at a distance. When working on a computer she needs a large monitor, for example 26 inches, magnification equipment and a high visibility keyboard. It is common ground that as a result of this condition, the Claimant is a disabled person within the meaning of the Equality Act.

10 In January 2016, the Claimant was unemployed and in receipt of Jobseeker's Allowance. This had been the case since the previous October. Her work coach at the Job Centre identified a position as a work coach for the Respondent and advised her to apply for it. The job involved assisting claimants, as they are known, with their search for employment. In these reasons the Tribunal will refer to claimants as "clients" in order to avoid confusion with the Claimant.

11 The Claimant applied online on 6 January 2016 at pages 68-69. In the online application she declared her visual impairment and identified a need for large print material, magnified material on a PC, a high visibility keyboard and extra time for the online test for the position, which was granted.

12 On 4 February (all dates hereafter are in 2016) the Claimant was interviewed by Mr Aina and another. On 1 March she completed a health questionnaire in

which she again identified her condition and the necessary equipment, saying that she herself had this in her possession but that it needed updating.

13 On 23 March Ms Mullaly telephoned the Claimant and offered her a job as a work coach at the Hounslow Job Centre. The Claimant expressed a reservation about that in that she had previously worked at the Hounslow Citizens' Advice Bureau. Ms Mullaly's evidence was that she did not see why that should be a problem, but in the event at page 124 on 23 March, she emailed to the Claimant an offer of a job as a work coach at the Hammersmith office. That offer described a permanent appointment starting on Monday 4 April and said that a full employment letter and employment terms and conditions would be issued once the necessary employment checks had been successfully completed.

14 This was followed by an email on 26 March at pages 125-126. This repeated the start date of 4 April and said that the Claimant could start work before the relevant checks had been completed, but if those became an issue, the Respondent might not offer her an employment contract.

15 Ms Mullaly and the Claimant spoke by telephone on 31 March. Ms Mullaly's evidence, which the Tribunal accepted, was that the Claimant expressed concern about the need for adjustments as so far there had been no discussion about these or assessment of what she might need, and wondered whether she should attend on 4 April. Ms Mullaly sought to reassure her and advised her to attend along with the other inductees on Monday 4 April.

16 This conversation was followed by an email from the Claimant at pages 129-130. In this the Claimant set out a history of her application and offers to date and said that the necessary adjustments should have been put in place for the start date. She said that not doing so was putting her at a disadvantage and that she believed this to be discriminatory and stressful. She said that she had not been informed what was lacking in the pre-employment checks and so could not assist in getting that resolved. There followed a slightly confusing paragraph in the following terms:-

"I have been signing on for some months currently and am fully aware and able to start a role immediately, based on reasonable adjustments. At no point have JCP [Job Centre Plus] sent a letter in other than standard small print, despite requests, given me a form to complete in other than standard small print whilst telling me I will not be able to see it or told me to look at a screen knowing and telling me I cannot see what I am looking at. I am therefore extremely concerned about the ability of JCP to make reasonable adjustments speedily to enable me to succeed in this role and hence are immediately putting me at a disadvantage."

The Claimant then suggested that the start date should be delayed to enable the reasonable adjustments to be made.

17 The Tribunal comments that this email showed that the Claimant was aware of the significance of reasonable adjustments and that it was potentially discriminatory not to provide them. It also showed that she was able to assert her position to the Respondent as her employer. To the extent that the Claimant expressed doubt about the Respondent's ability to provide reasonable adjustments, the Tribunal finds that this was not justified at this stage, and that in setting out the chronology of her application, the Claimant omitted the fact that the job offer had been sent to her as recently as 23 March. The Respondent could not reasonably be expected to start work on adjustments before being certain that the Claimant would be taking up the role and could not reasonably be criticised for a failing to act speedily when, as at 31 March, only eight days had elapsed from the offer letter being sent out.

18 The Claimant attended an Occupational Health interview by telephone on 1 April. This resulted in a report of the same date at page 178, which stated that she was fit for work with adjustments, and recommended that she should not commence work until display screen equipment was in place. The report said that the Claimant needed large print and that in her previous employment she had had an Access to Work assessment in 2009 which recommended a number of particular adjustments, including a large screen with zoom text and other items. The report recommended consideration of a referral to Access to Work or the RNIB for a visual assessment to identify current visual aids. The writer therefore evidently believed that, in one way or another, the 2009 assessment might require updating. The report also recommended other assessments related to the Claimant's visual impairment and mobility issues.

19 On Friday 1 April the Claimant sent an email to Ms Mullaly at page 129 referring to her discussion with the Occupational Health Advisor and to the report. She said that the advice had been that she should not start work until a work based assessment had been completed. Ms Mullaly forwarded that email onto the relevant management team.

20 On Monday 4 April the Claimant attended the Hammersmith Job Centre where Ms Arogundade was to conduct the induction of the new work coaches. Ms Arogundade's evidence, which the Tribunal accepted, was that she knew that one of these inductees was the subject of an Occupational Health report, but that she did not know who this was or what the report was about. She was not certain whether that individual would arrive on the day or not. There was some obscurity about whether that meant there were nine inductees in all so that she was expecting eight or nine, or whether there were ten in all and she was expecting nine or ten, but nothing turns on that. In the event nine attended, including the Claimant.

21 The Claimant and Ms Arogundade were in agreement that some reference was made between them to it not being expected that the Claimant would attend on that Monday, although each said that it was the other than mentioned this point. The Tribunal found that nothing significant turned on that detail.

22 It was also common ground that Ms Arogundade said that Hammersmith was a flagship office for the Respondent. The Respondent agrees that this is the case, and that this would have been said by Ms Arogundade and others. Hammersmith was a flagship office, apart from any other matter, in the sense that it was at the forefront of the digital roll-out of services.

23 It is part of the Claimant's case that when Ms Arogundade said that Hammersmith was a flagship office, this carried with it the implication that the Claimant as a disabled person was not welcome there. The Tribunal found nothing in the evidence to suggest that such an implication should be understood in that statement. One would not naturally understand that as having any reference to issues as to disability. The evidence was that various individuals with disabilities, including visual impairments, work in the Job Centres around London. There would be no reason for the Respondent to wish to discourage disabled people working visibly in its Job Centres when one aspect of its work is assisting people with disabilities into employment.

24 Some aspects of the interactions between the Claimant and Ms Arogundade on the morning of 4 April were disputed. The Tribunal resolved these as follows:-

24.1 Although Ms Arogundade was inclined to believe that she was not aware of the Claimant's visual impairment on the day, the Tribunal found as a matter of probability that the Claimant did inform her that she had such an impairment. There was no reason why she should not have done so, and on the contrary this was a matter that was at the forefront of the Claimant's mind. There was, however, no suggestion that the Claimant had gone into details about the effects of that impairment.

24.2 There came a point when the inductees were invited to observe an interview between a job coach and a client, in the course of which the job coach would be making use of a computer monitor. The Tribunal found as a matter of probability that Ms Arogundade did not say anything to the effect that the Claimant should not participate in this because she would not be able to see anything on the screen. As we have already held, the Claimant had not given any details of the effects of her impairment and so Ms Arogundade would not have known how it affected her as regards use of a computer screen; but in any event this would have been an insensitive observation to make and we do not find it likely that Ms Arogundade would make it.

24.3 The Claimant's evidence was that at one point Ms Arogundade said that she was looking at her strangely. Ms Arogundade denied saying that, but said that she did recall a moment in the course of discussions when she asked the Claimant whether she was all right because the latter did not appear to be following what she was saying, and the Claimant said that she was. The Tribunal considered that in an exchange of this nature, the Claimant might have added something to the effect of, why do you ask, and that if she did (and even if she did not) Ms Arogundade might have added something to the effect of, you were just looking at me a bit strangely. The Tribunal found it probable that Ms Arogundade did say something like that, but also found that this was a harmless remark of no real significance.

25 There was then evidence about how the Claimant's participation in the induction process ended. By the time of the Tribunal hearing it was common ground that Ms Arogundade had not asked the Claimant to leave or to go home. What occurred was that the Claimant approached Ms Arogundade and said that she had cancelled a job interview with another organisation for that afternoon, and was now wondering whether she could try to reinstate it and attend it. Ms Arogundade was surprised by this, but agreed that the Claimant could leave the Job Centre and attend the interview. There was a dispute about whether or not the Claimant made a phone call while at the Hammersmith office in respect of that interview, but this was not material to anything that the Tribunal had to decide. The upshot was that the Claimant left the office shortly after midday. She sent an email to the third party at 12.36pm at page 134 and attended the interview that afternoon.

26 In paragraph 12 of her witness statement the Claimant said that Ms Arogundade's response to her request was to ask why she would go to an interview as she had a job, but then said yes as there was nothing that she could do at the Hammersmith office. For the reasons already given above, the Tribunal found it unlikely that Ms Arogundade would have made that last comment, and found on balance of probabilities that she did not.

27 The Claimant's evidence in paragraph 12 of her statement continued that, as she left the building, Ms Arogundade said that she would inform HR for payroll purposes, which the Claimant understood to mean that the Respondent would continue to pay her while they sought to make the reasonable adjustments that she had requested and were confirmed by the OH Report of 1 April. It seemed to the Tribunal that if something like this was said then, although it could bear the meaning contended for by the Claimant, it could equally mean the opposite, i.e. that Ms Arogundade would be informing HR for payroll purposes that the Claimant was leaving and therefore should not be paid.

28 Further to this, in paragraph 13 of her witness statement, the Claimant said that she had difficulties with engaging in any work in the course of the induction on 4 April as she was unable to see the screen and then said this:

"I then asked Ms Arogundade if I should still be signing on given the difficulties, but she asked why I would need to do that given that she [presumably I] had a job with the Respondent. In any event, I informed her that I had had a job interview to attend that afternoon, as I felt unsure of my position with the Respondent".

29 Ms Arogundade had left the Claimant with her telephone numbers and at about 5.39pm the Claimant phoned her on her landline. In paragraph 14 of her witness statement, the Claimant said that she "again enquired what was happening" and that Ms Arogundade "was telling me that she did not know". The reference to "again" asking what was happening seemed to refer back to paragraph 12 where the Claimant said that when she asked what was happening during the morning of 4 April, Ms Arogundade said that she did not know and was trying to find the Occupational Health Report. The Claimant continued in paragraph 14 "as I have a mortgage and was getting financial reassurance, I said that I would sign on the following day, this was not disputed and Ms Arogundade said that she would be in touch. Ms Arogundade did not mention when I was to return to work, nor at any stage that the Respondent would need any further assessments or would undertake any adjustments …"

30 In paragraph 12 of her witness statement Ms Arogundade referred to this telephone conversation and said that the Claimant informed her that she would continue to sign on at her local Job Centre. She said that she thought that this was strange, but then remembered that the Claimant had stated before she left that the work coach job was not for her. Later in these reasons the Tribunal will explain why it has found that the Claimant did not in fact want that job; that being so, we also found it probable that she told Ms Arogundade that it was not for her. Ms Arogundade continued: "I thought that the Claimant was making it clear she did not want the work coach job and she made it clear during our telephone conversation that she wanted to return to claiming Job Seeker's Allowance."

31 When the Claimant was cross-examined about this conversation, her account of what she said to Ms Arogundade and which led to the answer that the latter "did not know", was slightly different from that in her witness statement, in that she said "I was asking Joy what was going to happen and she said I don't know, I said I would sign on the following day." The Claimant explained that her question was asking about what she would be doing. When Ms Arogundade was asked about this conversation, it was put to her that the Claimant asked, "what is going to happen tomorrow", which was slightly different from either of the pieces of evidence given by the Claimant, in that the word "tomorrow" had been introduced. Ms Arogundade said that she did not remember the Claimant asking this. She said that she would not have said that she did not know, because she knew that she would be continuing with the induction process and she knew what this would involve. Her account of what the Claimant said about signing on was that she said that she would continue signing on. So far as that is concerned, the Claimant agreed in cross-examination that she in fact continued signing on, but said

that she did not on this occasion use the word continue, she simply said that she would sign on, Tuesday 5 April being the next day on which she was due to do so.

32 The differences in these versions of what was said in the telephone conversation are relatively small but, in the Tribunal's judgment, relatively significant. The Tribunal accepted that Ms Arogundade would not have said that she did not know what was going to happen on the next day if she understood that to be a reference to what was going to happen in relation to the induction process. If the Claimant's question was more open, perhaps in terms of "what is happening", Ms Arogundade might have replied that she did not know because she did not know what the Claimant had in mind, a point that she made in her evidence in a different context. Whether the Claimant said that she "would sign on" or "would continue signing on" is perhaps less significant.

33 The Tribunal concluded as a matter of probability that in this conversation the Claimant asked Ms Arogundade what was happening and the latter replied that she did not know, meaning not that she did not know what was happening with regard to the induction process, but that she did not know what was happening with regard to the Claimant. The Claimant said that she would be signing on, in other words that she would be continuing to collect Job Seeker's allowance, by signing on at her local Job Centre.

34 Ms Arogundade's evidence was that as at the evening of 4 April she was not sure what would happen regarding the Claimant on the next day. When she did not turn up on 5 April, Ms Arogundade assumed that she would not be returning and so, she said, by 6 April she did not anticipate seeing the Claimant again. That seemed to the Tribunal to be a reasonable understanding of the situation, putting together the Claimant's statement that the job of work coach did not seem to be for her; her early departure from the induction on 4 April to attend a job interview elsewhere; her statement that she would be signing on at the Job Centre on 5 April; and her failure to reappear at the Hammersmith Office on 5 April. These all indicated that she was not intending to return to work in the role of a job coach at Hammersmith. It is perhaps unfortunate that at this point Ms Arogundade did not send an email to the Claimant to the effect that she understood that she would not be taking up the job of a work coach at Hammersmith. Had she done so, her position in the matter would have been clear and the Claimant would have had an opportunity to challenge it, if she wished to maintain that the situation was otherwise.

35 That said, the Tribunal had greater difficulty understanding the position from the Claimant's point of view. As we have related, her case was that as she left on 4 April she understood that the position was that she was going to be paid as an employee. If that was so, it was difficult to understand why she felt it was necessary or even permissible to continue signing on and receiving Job Seeker's Allowance. Her explanation to the Tribunal's question on this point, to the effect that the question of her employment status was

separate from that of her entitlement to benefits, and that she was concerned about the difficulties that could arise if she stopped claiming benefits and then had to restart her claim, seemed to be side-stepping the issue, given her stated belief that she could expect to be paid by the Respondent while they sought to make reasonable adjustments.

36 The same was true of the Claimant's evidence that she mentioned signing on to Ms Arogundade on the morning of 4 April, and the latter had replied asking why she would need to do that given that she had a job with the Respondent. It would generally be understood that having a job and signing on for Job Seeker's Allowance are mutually exclusive, and if that needed confirmation, then on the Claimant's account, Ms Arogundade gave that. There seemed to the Tribunal to be no reason why the Claimant should say to Ms Arogundade that she would be signing on for Job Seeker's Allowance if she believed that she continued to be employed by the Respondent, albeit not intending to attend work on the following day. To the extent that the Tribunal has observed that Ms Arogundade did not clarify the position from her point of view, the same is true of the Claimant, who did not say that she nonetheless considered herself to be employed by the Respondent, or even that she was in a state of doubt as to whether she was employed or not.

37 Ms Arogundade had not by this point read the Occupational Health Report, although she had received it by email during the day on 4 April. She read it on 6 April and on that day sent an email to the Claimant at page 165 saying that she had telephoned that morning in order to say that she had received the report but had received no answer. The Claimant replied by email on 7 April at page 164 which she said "I am sorry I have been out at interviews and will also be at interviews tomorrow, please could you email with your comments to the report." When cross-examined about this, the Claimant said that she was continuing to look for work at this time, but that she would have continued to do so even if she had been attending work as a work coach.

38 Ms Arogundade did not reply to the Claimant's email and the latter sent a further email on 14 April asking "please could you let me know what is happening". Ms Arogundade's explanation for not replying was that she was unwell at this time and although still at work (she went off sick on 16 April) she was not keeping up with her job, including her emails.

39 Ms Barnatt became involved on 20 April, when she sent an email at page 163 to the Claimant. She apologised for Ms Arogundade not replying, but said "I am available to meet with you to discuss your Occupational Health Report and agree the way forward". Ms Barnatt's evidence was that she sent this email on the advice of the HR Department who said that she should offer to meet the Claimant. This evidence was supported by an email to Ms Barnatt from Mr Whelan of HR on 20 April at page 717, asking for a chat, and an earlier email from another member of HR to Mr Whelan referring to the Claimant and an understanding that she had not at that point commenced employment. Ms Barnatt was very clear in her oral evidence

that, having been informed of what had happened on 4th and 5th April, according to Ms Arogundade, she did not regard the Claimant as an employee at this stage, but as a job seeker.

40 The Claimant and Ms Barnatt met on 22 April and spent something like three to four hours together. The Claimant had some brief notes of the meeting that were disclosed after she had commenced her evidence and which became pages 793 - 795 of the bundle. Ms Barnatt relied on an email of 4 May 2016, to Ms Hoare and others, which included a summary of their discussion and updates from 29 April and 4 May, to which further reference will be made. Ms Barnatt also sent an email on 26 April to the Claimant at pages 189 – 190.

41 There was some, although not total, agreement between the Claimant and Ms Barnatt in their evidence about what was said at this meeting about the work coach role. It was common ground that they agreed that this role was not suitable for the Claimant. In her email of 26 April Ms Barnatt said "we came to the conclusion that the work coach role that you were successful in is not at all practicable for you, DWP and our claimants [clients]." In a similar way in her email to Ms Hoare of 4 May, she said "We talked through the work coach job role as attached and it became obvious that she would not be able to carry out this role even with reasonable adjustments". Ms Barnatt continued that the main point was that the Claimant could not touch type and would need to record interviews with clients and that this was not practicable. (The Claimant herself disputes this and says that she can touch type). Secondly, Ms Barnatt said that there would be a difficulty about reading the clients' own digital devices such as IPads or Smartphones as the font would not be big enough for the Claimant to be able to read them. The Claimant's account was that it was indeed mutually agreed that the work coach role was not suitable, but she said that Ms Barnatt steered her towards this (something that Ms Barnatt denied) and that the real problem was the need for reasonable adjustments.

42 In her oral evidence Ms Barnatt stated repeatedly and emphatically that it was clear that the Claimant did not want the job as a work coach. She said that the Claimant had not stated this expressly but that it was absolutely clear from the content of their conversation. This was reflected in her email of 4 May to Ms Hoare, in which she said of the Claimant "she was very realistic and voiced that the practicality of her being able to carry out this job role is unrealistic and she was concerned about not being set up to fail". Elsewhere the Claimant had referred to the "digital inferences" involved in the job as a work coach, referring to the digital element of that job, which was particularly prominent in the Hammersmith Office as this was at the forefront of the roll-out of the digital processing of claims.

43 The Tribunal reached the following conclusions about the discussions of the work coach role on 22 April:-

43.1 For whatever reason, the Claimant did not want that job. If she had wanted it she would have said so, would have attended work on 5 April and thereafter and would have been more proactive in indicating that she was ready and willing to start work subject to the making of the reasonable adjustments.

43.2 The Claimant would not have allowed herself to be talked out of a job that she wanted against her will. She is an intelligent and experienced person and, the Tribunal finds, not someone who could be manipulated into a position that she did not really wish to take.

43.3 Referring to Issue D, the offer of a position as work coach at Hammersmith was not retracted. It was mutually agreed between the Claimant and Ms Barnatt that she would not take up that role.

44 Also in the meeting on 22 April, Ms Barnatt suggested that the Claimant could consider a role as an Assisted Service Manager (ASM). In her email of 4 May, Ms Barnatt said this about that role:-

"We talked about her passion and this was working in HR … I could not offer her an HR role but in conversation I picked up that she had managerial skills, so we spoke about the vacant [ASM] at Hammersmith that I am looking to fill from the recruitment exercise. She said she would be interested and requested a copy of the job spec, I asked her to have a look at it and let me know whether she wanted me to consider her for this role."

45 In her email of 26 April, Ms Barnatt asked the Claimant whether she wanted to accept the ASM role saying "did you look at the team leader assisted service manager role … what do you think? Do you wish to take up this alternative job offer? Please let me know ASAP." As explained in her email of 4 May, under the heading "update 29/04/16", on that date Ms Barnatt telephoned the Claimant and learned that she had been unwell and had not been checking her emails. She had not therefore read the job description for the ASM role.

46 The Claimant then sent Ms Barnatt an email on 3 May at page 198. She referred to her period of ill health and to a job application she had made elsewhere, saying she was waiting to hear from that organisation as she had been unable to attend the interview. She said that HR was her passion and then went on to say this about the ASM position:-

"I have looked at the assisted service manager role, it is very interesting and I would like to take it up although I have a concern about the digital inferences in both assisted service roles, e.g. enabling customers to use JCP Computers. Once all customers moved to UC will this be a continuing role?"

47 The Claimant's position was that this email was intended to be an acceptance of the ASM role and that she was primarily saying that she would take up the role, but had a concern about it. Ms Barnatt's evidence was that she read this as a non-acceptance and as meaning that, although the Claimant would like to take up the role, she was not doing so pending resolution of the concerns that she had expressed. On this point the Tribunal concluded that whatever the Claimant meant, Ms Barnatt reasonably thought that what she said fell short of an acceptance of the ASM position. The Claimant's reservation about "digital inferences" echoed the reason identified on 22 April for not pursuing the work coach role, and the Tribunal therefore accepted Ms Barnatt's oral evidence that she took it that the Claimant did not want the ASM role in the same way and for similar reasons to those for not wanting to take up the work coach role.

48 All of this led Ms Barnatt to send an email to the Claimant on 6 May at page 197 saying that she had made a valid point about the ASM role and having to engage with the clients digitally. She added "having considered the fact that the department (Hammersmith JCP in particular in June) is rapidly moving towards a digital environment, this role realistically too is questionable for you."

49 Miss Barnatt then said "I have though one more offer", this being a position as an advisor in access to work which was office based and involved talking to customers on the phone about their suitability for access to work grants. She said that the nearest office was in Harrow. Pausing there, the Tribunal considered that it was clear that at this point Ms Barnatt was not intending to pursue the ASM role further and that in the absence of further discussion this proposal would not be taken forward.

50 On the same date, Ms Barnatt completed the CSWAT form at pages 213-217 in relation to reasonable adjustments. In her update of 4 May 2016 in her email of that date at page 188, she said that the ASM role appeared to be unsuitable, but she referred more hopefully to the Access to Work role.

51 Then on 9 May at page 245 the Claimant sent an email to Ms Barnatt in which she said that she had been mulling over the job description (this being a reference to the Access to Work position) and was wondering if she could call to discuss it. She referred to Ms Arogundade's health in her email, but she did not make any reference to the ASM role or to any belief that she had accepted that. The Tribunal found that the Claimant's explanation for this omission in her oral evidence, namely that she thought that reasonable adjustments were being pursued in respect of the ASM role, does not stand as an explanation for not mentioning it in the light of Ms Barnatt's email of 6 May stating that the suitability of this role was questionable and that she had one further offer to make, i.e. the Access to Work position.

52 The Claimant followed up the Access to Work position again on 16 May in an email at pages 251-252. She said that she had not received the full job description for it and asked Ms Barnatt to send that through again.

53 On 19 May, at page 251, the Claimant sent a further email to Ms Barnatt saying that she had not heard from her, that she had not received the full job description for the Access to Work role, but "I have been through the assisted services manager job description again and with a team of staff and adjustments I think that this role could be workable. As per my email of 3 May I would like to take up this role, pending adjustments being made, I wondered if I could observe the team and how the office works? What do you think?"

54 Ms Barnatt's evidence, which the Tribunal accepted, was that by now the position as an ASM at Hammersmith had been filled. She replied to the Claimant on 19 May and in that email did not respond directly to what the Claimant said about the ASM role, but instead said "we have been exploring the different avenues with HR and Access to Work and wanted to come back to you only if I had clearly made progress with the discussions." Pausing there, the Tribunal comments that again there was a failure to make the Respondent's position clear. It seemed to us that it would have been more helpful if Ms Barnatt had responded directly and had said that she had not understood the Claimant to have accepted the offer of the ASM role for the reasons that she expressed, and that she had therefore gone on to recruit someone else.

55 Then on 20 May the Claimant received an automated email offering her the original position as a work coach, which she accepted online. She spoke to Ms Barnatt about this and the latter said that it had been a mistake that this had been sent to her. Although the Claimant said in her oral evidence that when she accepted this, she considered that she was accepting the terms and conditions of employment and not the particular role concerned, the Tribunal found that this was not a realistic interpretation of what happened at this point. In the event, however, it seems to have been understood that the sending of this automatically generated email to the Claimant had been a mistake, and the Tribunal found that her purported acceptance of it was of no contractual significance.

56 Also on 20 May Ms Barnatt and the Claimant had a conversation in which the latter said that, regarding the Access to Work job that had been proposed, the journey from her home to Harrow would be "fraught". The Claimant's evidence in paragraph 34 of her witness statement was that also in the course of this conversation on 20 May Ms Barnatt offered her the role of an ASM at the Acton Office and that she accepted this. She said that they had an extensive conversation about that role and how the reasonable adjustments required for it would take five days. The Claimant continued in paragraph 37 of her witness statement that Ms Barnatt originally stated that Monday 23 May would be the start date but they then agreed she would

need to finalise the role with Acton and the Claimant would start on Tuesday 24th.

57 When cross-examined about these matters, the Claimant said that she did not recall Ms Barnatt saying that she needed to speak to Mr Aina, the manager at Acton, and that "she spoke of the ASM role as if it were a done deal, I had it if I wanted it". The Claimant continued that Ms Barnatt needed to speak to someone in order to confirm matters, but that by that she meant confirm that the start date would be the 24th May.

58 Ms Barnatt's evidence in paragraph 47 of her witness statement was that in the conversation on 20 May she spoke about the possibility of an ASM role at Acton, but said that she needed to speak to Mr Aina to confirm that there was a vacancy. She said "I am 100% sure even at this late stage that I had not implied or confirmed that there was an ASM vacancy at Acton JCP. How could I? I would never know without asking [Mr Aina] directly which I did on Monday 23 May 2016."

59 When cross-examined about this, Ms Barnatt said that she could not possibly have said that the Claimant could turn up on the next working day, and that she needed to speak to Mr Aina to determine whether he had a job available in the ASM role. She said that it was right that she and the Claimant had spoken about going to observe the ASM role at Hammersmith or Shepherd's Bush, but this was to be so if there was a role available at Acton.

60 In an email of 23 May (which was a Monday) at page 297, Ms Barnatt said to the Claimant that following their conversation on the Friday, she had ceased exploring the possibilities of an Access to Work role in Harrow because of what the Claimant had said about the journey. She said that she had spoken at the earliest opportunity to Mr Aina about the ASC (meaning ASM) role which the Claimant now considered to be viable. She said that unfortunately the ASM role was not vacant at Acton and the only vacant role Mr Aina had was that of a work coach, that is the original role for which the Claimant had applied. She said that Mr Aina was willing to consider whether with reasonable adjustments the Claimant could be deployed effectively in the work coach role.

61 The Claimant replied on 24 May in an email at pages 296-297. She said "I am bitterly disappointed that the ASM role at Acton is not available as this seemed very suitable. I also note that you said that Access to Work would be frustrating within a couple of weeks and hence I would be set up to failure. As the digital change in JCPs started in 2012 I am very surprised that the issue of adaptions for visual impairment has not cropped up in the last six years, I would be grateful if you would investigate this again as the ASM role in Hammersmith as originally offered would be great".

62 The Tribunal noted that in her email the Claimant did not say, as she maintained in her evidence, that Ms Barnatt had offered her the ASM role at

Acton and that she had accepted it and was due to start work on 24 May, the day of her email. The Tribunal considered that had that been agreed on the previous Friday, the Claimant would have said so in her email rather than simply expressing her (no doubt genuine) disappointment that the ASM role at Acton was not available. That is consistent with the conversation as described by Ms Barnatt in which she was going to find out whether that role was available. In the circumstances, therefore, the Tribunal preferred Ms Barnatt's evidence about what was said on Friday 20 May.

63 On the following day, 25 May, the Claimant sent a grievance to Mr Heavisides about the recruitment process to date. She referred to her application for the role of work coach and the events of 4 April at Hammersmith. She referred to the discussions with Ms Barnatt on 22 April and said that subsequently she had accepted the role of Assisted Service Manager at Hammersmith; that this offer was withdrawn and that a further offer, the same role at Acton, was made on 20 May. She said that she had been confused and unsettled with offers made, adjustments discussed and agreed and then withdrawn, and said that she did not believe that a sighted person would have been treated in this manner and that she had been discriminated against. She also said that there had been a failure to make reasonable adjustments. She said that the offer and acceptance of an ASM role with adjustments would be an appropriate resolution to the matter, and she concluded saying that she trusted that she would receive pay from 4 April 2016 as well as the full services offered to other civil service staff immediately.

64 The Tribunal pauses here to summarise its conclusions regarding the ASM roles, which are:-

64.1 Ms Barnatt offered the ASM role at Hammersmith to the Claimant but reasonably formed the opinion from her response that she was not accepting and said so. The Claimant did not challenge that and Ms Barnatt then proceeded to recruit another individual for that role.

64.2 There was no retraction of an offer of an ASM role at Acton because Ms Barnatt in fact never offered it. She said that she would investigate whether there was such a role available and then reported back that there was not.

65 On 26 May there was another telephone conversation, this time between the Claimant and Mr Aina. The latter's evidence, which was not disputed by the Claimant, was that he confirmed that there was no ASM role available at Acton, but that he was able to offer a post as a work coach (the original role for which the Claimant had successfully applied in respect of Hammersmith). As a result of what the Claimant said, Mr Aina asked her in plain terms whether she was turning down the job of work coach at Acton, and she said she was. In his oral evidence Mr Aina said the Claimant mentioned being

offered the ASM Manager role and that he thought that this was her reason for turning down the work coach position.

66 There was also on 26 May an exchange of emails between Mr Aina and the Claimant. Mr Aina wrote before they had spoken at page 271 that he would try to call the Claimant, but he needed to find out what the adjustments were and how long it would take for them to be in place. After their conversation, the Claimant replied on the same page saying that she was very confused, upset and stressed, and stating that she had been offered the post of ASM at Hammersmith and had twice accepted this. She said that there had been a contract formed and this should be honoured, that this was the role she expected to start, and that failure to do so was direct discrimination. She also complained about a breach of the Data Protection Act if the OH Report had been passed to anyone other than Ms Barnatt.

67 Mr Aina then sent a further email later on 26 May at page 286, in which he said "Following on from our conversation this morning, as you have already been informed, the assisted service manager role is no longer available. I would however like to give you the opportunity to reconsider the work coach role in Acton Job Centre which is the position you applied for and were successful in the first instance. You will need to confirm to me in writing your acceptance or rejection of the offer by 5pm Thursday 2nd June 2016."

68 The Claimant replied on 2 June saying that she was not able to respond to the offer of a work coach post in the Acton Office. She said that Ms Barnatt had decided that the work coach role was not suitable and in summary that she wanted to know why the role was deemed unsuitable with reasonable adjustments initially and why there had now been a change of stance. She said "I would also appreciate details of the adjustments and how they will enable me to do the role. Lastly while this role cannot therefore be conducted in the Hammersmith Office as per the contract, once this information has been received, both parties can make a reasoned decision." She then referred again to the ASM role and to her grievance. She said that no decision should be made in relation to location or position pending the conclusion of the grievance.

69 Subsequently, on 21 June Mr Aina wrote an email to the Claimant as follows:-

"I refer my email to you dated 26 May 2016 in which I asked you to come back to me by 5pm on 2 June in relation to whether you accept the offer of work coach in the Acton Office. As you did not accept the offer I am writing to inform you that the offer has now been revoked by the date stipulated. I understand you have raised a complaint which is being considered and a manager from DWP will be in contact with you in due course, in view of this I will not be liaising any further with you so as not to undermine that due process."

70 Returning to the grievance process, on 26 May in his email of that date, Mr Aina had said that the grievance would be passed to Ms Sandra Dakin to hear. On 31 May at page 311, Ms Dakin sent an email to the Claimant proposing a meeting on 7 June.

71 On 1 June, in an email at page 310, the Claimant requested information to assist in the preparation for the grievance, including "all the terms and conditions of employment … and all the policies and procedures including staff handbook that are relevant to Civil Service employees." Ms Dakin replied on 3 June saying that given the points that had been raised, she had been advised to adjourn the grievance meeting pending the outcome of advice on them. Meanwhile, at page 334 the Claimant had also sent an email to Ms Alder of HR repeating the point about requests for information and asserting that she had been an employee since 4 June and had not been paid.

72 On 8 June, at page 338, there was an email to the Respondent on behalf of the Claimant's MP, setting out her complaints about the matter. Meanwhile, the Claimant was continuing to make job applications elsewhere. On 10 June, she received a conditional offer of employment with the Childrens' Society as HR Officer under a fixed term contract. Following this, on 1 July, the Claimant closed her claim for Job Seeker's Allowance, and she started work with the Childrens' Society on 4 July.

73 Meanwhile, on 3 July at page 417, the Claimant sent an email to Ms Alder saying that she had still not received the information she had requested and that her grievance had not been progressed in a timely manner. She said "this has led to a breach of mutual trust and confidence and I am therefore resigning with immediate effect." She went on to allege that there had been a failure to make reasonable adjustments, direct discrimination, indirect discrimination, a failure to deal with her grievance and a lack of pay and pensions and other benefits.

74 On 3 August, the Claimant notified her proposed claims to ACAS and the conciliation period followed.

75 On 15 August, at pages 461-462, Ms Frawley sent an email to the Claimant saying that she had been assigned to investigate the complaint and that she wished to speak to her. The Claimant replied on the following day, asking for clarification as to whether this referred to the grievance or the difficulties with freedom of information and Ms Frawley replied on 17 August that this referred to the grievance. The Claimant responded on the same day with an email posing a series of questions about the grievance process, including asking for an explanation of Ms Frawley's role and why that had not been made clear in the first email; points of detail, such as why Ms Dakin had not rescheduled a meeting; and more general questions such as "why has the DWP not adhered to its own policies and what is your objective in contacting me."

76 Ms Frawley replied on 30 August apologising for the delay and saying that she had been out of the office and needed to make further enquiries. She apologised for the oversight of the failure to inform the Claimant that HRMIS would be investigating her grievance. She sent a letter setting out her understanding of the matter and asking whether any further information needed to be provided or whether the Claimant needed to be interviewed. The Claimant suggested an exchange of questions and answers by email, alternatively a meeting on 9 September when she had a day off from her job.

77 The grievance process was suspended between 5 September and 10 October, while without prejudice discussions took place between the parties' legal advisers.

78 On 19 October, Ms Frawley sent an email to the Claimant saying that the investigation could now proceed. She enclosed a summary statement on behalf of the Claimant asking for her agreement and/or the addition of anything extra that she wanted included in her evidence.

79 Thereafter Ms Frawley wrote on 30 November, at page 473, and on 10 January 2017 at page 474, saying that the investigation was continuing. She sent the outcome at page 475 on 6 February 2017. At page 478 under "overall conclusions", Ms Frawley said that she concluded that no discrimination had occurred, although she commented that, while there was no detriment to the Claimant, since she had made the decision to continue signing as unemployed and managers had acted reasonably and gone far beyond the usual procedures to try to accommodate her, "the efforts to assist her may actually have contributed to the confusion".

The Applicable Law and Conclusions

80 The Tribunal first considered the issue as to whether or not the Claimant was at any stage of the matter employed by the Respondent under a contract of employment.

81 To constitute a contract, there must be an offer and an acceptance. An offer can be expressly accepted or accepted by conduct. If there was a contract formed between the parties, there was no suggestion that it was anything over than a contract of employment.

82 The Tribunal concluded that in the first instance at least, the analysis put forward by Mr McDevitt on behalf of the Claimant was correct, except in one particular. The latter was that the Tribunal did not consider that the Claimant had accepted any offer on 13 March 2016 as suggested by the contents of the online application at page 62. Although a provisional offer was sent on 26 February at page 98 and the Claimant forwarded the necessary information, it seemed to us unlikely that the Claimant registered her acceptance on 13 March, in other words before Ms Mullaly sent the offer of 23 March at page 124, since it was only then that the question of the office at which the

Claimant would be working was clarified. That was of importance to her as illustrated by her reservations about the initial offer of a post at Hounslow and her later refusal of a post at Harrow.

83 This point, however, is of little significance because the Tribunal was satisfied that in any event the Claimant accepted the offer of employment as a work coach at Hammersmith, at the latest, by attending for work on 4 April. This is so whether or not the Claimant had provided her bank details, something that was the subject of dispute. The Tribunal agreed with Mr McDevitt's submission that there was at this point mutuality of obligation, reflecting the fact that the Claimant had been instructed to attend work and did so. The Tribunal did not agree with Ms Wolfe's submission that there was no consideration passing between the parties. There does not need to be physical payment or the means of payment for consideration to be established. One promise may be consideration for another and here, as we have said, the parties undertook the mutual obligations of employer and employee.

84 It was therefore correct in the Tribunal's judgment to say, as Mr McDevitt did, that having started work for the Respondent, the Claimant remained employed until the employment contract was brought to an end. We differed, however, from Mr McDevitt's submission about when this was, and accepted Ms Wolfe's submission that if, as we have found, the Claimant was employed in the first instance, that employment was brought to an end by her conduct on 4 April. We have already set out our findings about the events of that day. In summary, the following matters meant that, although not expressly stating that she was doing so, the Claimant's conduct over 4 and 5 April in the following respects amounted to a resignation of her employment communicated to the Respondent:-

84.1 On 4 April, the Claimant left work at her own request shortly after midday in order to attend an interview for employment elsewhere.

84.2 Before doing so, the Claimant said to Ms Arogundade words to the effect that the job of work coach was not for her.

84.3 In the conversation later that evening, the Claimant said that she would be signing on, in other words she would be continuing to claim Job Seeker's Allowance. The Tribunal considered that this would signal to any employer that the employee concerned was not intending to continue in employment, since claiming Job Seeker's allowance would be inconsistent with that. That is all the more so in the context of this particular job and employer, since the role in which the Claimant had been employed was directly concerned with job seekers, most of whom would be claiming Job Seeker's Allowance. When the Claimant stated that she would be signing on for Job Seeker's Allowance that could only mean, in the Tribunal's judgment, that she was asserting that as of the next day, when she was due to

sign on, she considered herself to be unemployed and therefore not employed by the Respondent. We also found that Ms Arogundade would have understood what the Claimant said in that way. Stating this implied that the Claimant was resigning.

84.4 The Claimant did not attend work on 5 April or subsequently.

84.5 The Claimant did not at this stage assert that, in spite of what had been said on 4 April, she considered herself still to be employed by the Respondent, or that she was awaiting instructions as to when she should attend work. Nor did she return to work, if she considered that her employment was still continuing. She did not in fact positively assert that she had been employed since 4 April until 25 May.

85 The Tribunal therefore concluded that, although the Claimant was employed by the Respondent, this employment lasted for only one day, namely 4 April 2016. The Claimant was not paid for that day and on the face of the matter, although submissions have not been made directly on the issues as to remedy, she would appear to be entitled to one day's pay.

86 No claim for holiday pay or notice pay would arise on those facts.

87 The Tribunal then turned to the complaints under the Equality Act. It was common ground that essentially the same issues arose for consideration whether the Claimant was correctly regarded as an employee or as an applicant for employment at the material times.

88 As stated earlier, the complaints of direct discrimination and victimisation were not relied upon and will be dismissed on withdrawal. The discriminatory acts listed as items A – L are relied on as allegations of harassment and/or discrimination because of something arising from disability and the Tribunal has considered them in those terms.

89 The Tribunal reminded itself of the provisions about the burden of proof in Section 136 of the Equality Act 2010 in the following terms:-

(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

90 In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246** the Court of Appeal identified a two stage test when the burden of proof provisions (then under the previous anti-discrimination legislation) were to be applied. At the first stage the Tribunal would make its findings of fact and

consider whether those facts were such that, in the absence of an explanation from the Respondent, it could properly conclude that discrimination had occurred. In **Madarassy** the Court of Appeal emphasised that this had to be a conclusion that the Tribunal could properly reach. A mere difference in status and treatment would not be sufficient; there would have to be something else in the facts that could properly lead to the conclusion that discrimination had occurred. In **Hewage v Grampian Health Board [2012] UKSC 37** Lord Hope, with whom the other members of the Supreme Court agreed, stated that it was important not to make too much of the burden of proof provisions and that these "… have nothing to offer when the Tribunal is in a position to make positive findings on the evidence one way or another".

91 Turning to the specific complaints, Section 26 of the Equality Act provides as follows in relation to harassment:-

(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.*

92 In **Land Registry v Grant [2011] EWCA Civ 769** at paragraph 47 the Court of Appeal warned against cheapening the significance of the words used to define harassment in Section 26, describing them as "an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment". The same point was more recently expressed by Simler J in the Employment Appeal Tribunal in **GMB v Henderson [2015] IRLR 451** in the following terms:-

"… the incidents … are quite obviously trivial … although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."

93 For ease of reference, the Tribunal will in the remainder of these reasons use the expression "a harassing environment" to indicate an intimidating, hostile, degrading, humiliating or offensive environment.

94 Section 15 of the Equality Act makes the following provision about discrimination arising from disability.

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

95 The Tribunal then turned to the individual allegations which are listed as A-L in the List of Issues.

96 With regard to allegation A, the Tribunal has found that Ms Arogundade did say something to the effect that the Claimant was looking at her strangely, but that this was a comment of no real significance. So far as harassment is concerned, this complaint failed to reach the level of seriousness required by **GMB v Henderson**. The Tribunal also found that this comment did not have the purpose of violating the Claimant's dignity or creating a harassing environment for her, nor did the Tribunal believe that the comment had this effect on the Claimant. In the circumstances it was improbable that it would do so. Even if the Claimant subjectively felt that it did have such an effect, then the Tribunal was satisfied that it was not reasonable for it to do so.

97 Furthermore, the Tribunal found that the comment was not related to the Claimant's disability. A statement that one person was looking strangely at another was not necessarily or naturally connected with any visual impairment. The natural understanding of such a comment would be that the word "looking" was not a reference to sight but to the expression on the individual's face

98 So far as the complaint under Section 15 is concerned, the Tribunal found that the facts were not such as to form a proper basis for a finding that Ms Arogundade said what she did because of something arising from the Claimant's disability. Ms Arogundade did not, of course, give evidence about why she said this as she denied it, or at least did not recall saying it. The Claimant's case was that, if Ms Arogundade thought that she was looking at her strangely, that impression was because of something arising from her disability, i.e. her visual impairment.

99 The Tribunal repeats what it has said above with regard to the natural meaning of this comment. Without more than the making of the comment, and even if Ms Arogundade knew about the Claimant's visual impairment at the time, the Tribunal found no reason to link this to anything arising from the Claimant's disability.

100 Allegation B was not pursued.

101 In relation to allegation C, it was common ground that it was said to the Claimant that Hammersmith was a flagship office, but the Tribunal finds that there was no reason to read into this the implication that the Claimant was therefore not wanted there. For reasons that have already been given, there is no basis for such a finding. The Tribunal found that this comment did not have the purpose of violating the Claimant's dignity or creating a harassing environment for her, nor did the Tribunal believe that the comment had such an effect on the Claimant, again because it was improbable that it would do so. Even if the Claimant subjectively felt that it did have such an effect, the Tribunal considered that it was not reasonable for it to do so. The test for harassment is therefore not met, as the comment was not related to the Claimant's disability. Nor is there any basis for a finding under section 15 that this was said because of something arising from the Claimant's disability.

102 Turning to allegation D, the Tribunal has found as a matter of fact that the offer of a position as work coach at Hammersmith was not retracted but rather that on the 22 April the Claimant and Ms Barnatt agreed that it was not suitable for her. The allegation therefore fails on the facts. So far as the complaint that Ms Barnatt steered the Claimant into agreeing to that position is concerned, this was not pleaded. In any event, however, the Tribunal does not believe (as we have said) that the Claimant would have been steered into agreeing to anything against her will or her own better judgment. On either view of the matter, this allegation therefore fails on the facts.

103 With regard to allegation E, the Tribunal has found that Ms Barnatt offered the Claimant an ASM role at Hammersmith, that she understood that the Claimant did not want to take up that position, and that the role was filled by another candidate. When the Claimant said on 19 May that she was interested in an ASM role Ms Barnatt spoke about other possible roles. Whether that amounts to a retraction of the offer of an ASM role at Hammersmith is perhaps arguable, but the more important point is that the Tribunal is satisfied that Ms Barnatt's actions in this regard were not in any way related to the Claimant's disability or anything arising from it. We have found that Ms Barnatt moved on from the ASM role because she believed that the Claimant did not want it.

104 The Tribunal has also found that there was no offer of an ASM role at Acton, and so there cannot have been any retraction of such an offer. All that occurred here was that Ms Barratt established from Mr Aina that there was no vacancy for an ASM at Acton: this could not amount to harassment or discrimination.

105 It is correct that, as stated in allegation F, Mr Aina set a deadline of 7 days for accepting the offer of a Work Coach role at Acton. The Tribunal was unable to see what cause for complaint arose from this. The Claimant had already

told Mr Aina that she was turning down the offer of this position. It seemed to the Tribunal that the Claimant would have had no grounds for complaint if Mr Aina had taken that at face value and left the matter there: the "deadline" for accepting the role was in truth the offer of an opportunity for the Claimant to reconsider her position and accept the offer if she wished to do so. The Tribunal concluded that this did not amount to a violation of the Claimant's dignity, or the creation of a harassing environment for her, nor did it involve any unfavourable treatment. If anything, it was favourable treatment.

106 In any event, the Tribunal was satisfied that Mr Aina's actions in this regard were not in any way related to the Claimant's disability or anything arising from it.

107 The Tribunal's conclusions regarding allegation G follow those in relation to allegation F. There was a retraction of the offer of a Work Coach role at Acton, which Mr Aina communicated on 21 June. The retraction of the offer was the natural consequence of the Claimant's failure to accept it by the stipulated date, and the Tribunal finds that this did not amount to harassment or discrimination for the reasons already given in relation to allegation F.

108 Allegation H failed on the facts. The Respondent did not fail to allow the Claimant to return to work after 4 April 2016: as the Tribunal has found, the Claimant brought her employment to an end by resigning.

109 Allegation I was also not made out on the facts, in that the Respondent found and offered the Claimant the roles of ASM at Hammersmith, Access to Work Advisor at Harrow, and Work Coach at Acton. Considering the events concerning these roles in a wider sense, the Tribunal found that Ms Barnatt's and Mr Aina's actions were not in any way related to the Claimant's disability or anything arising from it. Ms Barnatt did not take the Hammersmith ASM role any further as she reasonably understood that the Claimant did not want to take up that post. The Claimant declined the position at Harrow and did not take up the position at Acton, having expressly declined it and then having been given a further opportunity to accept it.

110 With regard to allegation J, it is correct that the Respondent did not pay the Claimant, and that the Tribunal has found that she was employed for one day on 4 April 2016 and is on the face of the matter entitled to be paid for that day (although the latter is only a provisional view as submissions have not been made on the point).

111 Assuming, however, that the Respondent has failed to pay the Claimant one day's pay due to her, the Tribunal found no basis on which it could properly hold that this failure was in any way related to the Claimant's disability or anything arising from it. Understandably, the point was not put to Ms Arogundade or Ms Barnatt that they should have considered sending the Claimant one day's pay, as this was not the Claimant's case. The Tribunal did not therefore have the benefit of evidence from those witnesses directed

to this precise point. Ms Frawley concluded (at page 484) that the Claimant left of her own volition on 4 April and "decided to continue to sign unemployed". Ms Frawley stated that "the fact that [she] emailed to say she was going to continue to sign on does not indicate that she believed herself to be employed by DWP".

112 The Tribunal concluded that the only realistic inference in relation to Ms Arogundade and Ms Barnatt was that it did not occur to either of them that the Claimant should be paid in the circumstances. That was understandable: it is only after fairly extensive legal analysis that the Tribunal has (provisionally) taken the view that the Claimant should have been paid for one day. There was no reason to believe that the Claimant's disability or anything arising from it played a part in Ms Arogundade or Mr Barnatt not thinking that she should be paid. Ms Frawley expressed a reason for finding that the Claimant should not be paid: effectively this was that she had never been employed. The Tribunal considers that Ms Frawley may not have been right about that as a matter of legal analysis: but we accept that this was a genuine conclusion on her part, and it is one that excludes the Claimant's disability or anything arising from it as having had any influence on the decision.

113 Allegation K was not pursued.

114 Allegation L concerned the grievance, and was put in fairly sweeping terms. Ms Frawley was cross-examined about the time taken to deal with the grievance, and no other complaint about it was suggested. Ms Frawley's evidence about the timing was that there were two periods during which her investigation was suspended while discussions took place between the Claimant and the Respondent's legal representatives, these being from about the beginning of her involvement to 14 August 2016 and again between 5 September and 17 October 2016. Thereafter, Ms Frawley stated that there were "various reasons" why the investigation took longer than she had anticipated, with the need to complete other reports being the only specific point mentioned in her witness statement. She was not pressed about the reasons for any delay in cross-examination.

115 The Tribunal concluded that the fact that the investigation took longer to conclude than Ms Frawley would have anticipated was not such as could properly form the basis for a finding of discrimination or harassment. There was no reason on the evidence to find that the Claimant's disability, or anything arising from it, had any influence on the timing of the investigation. The Tribunal was assisted in reaching this conclusion by the observations of the Employment Appeal Tribunal in **Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN**, where in paragraphs 46 and 47 of the judgment, Simler J stated that it was a non-sequitur to find without further explanation that a lackadaisical approach to a grievance indicated the holding of a stereotypical view of the complainant, and that there had to be some evidence to support this such a conclusion.

116 Allegation M failed on the facts in the sense that the Tribunal's findings mean that the Claimant was not constructively dismissed: she resigned of her own volition, doing so by 5 April 2016. There was no basis for finding that the Respondent had by that date (or indeed any later date) committed a repudiatory breach of contract.

117 Furthermore, even if the Tribunal is wrong about that and there was at some point a constructive dismissal of the Claimant, the findings we have made above about the absence of grounds for concluding that the Claimant's disability or anything arising from it influenced the Respondent's decisions and actions, mean that any such dismissal was not an act of discrimination or harassment.

118 The complaints of direct discrimination, discrimination because of something arising from disability, and harassment, were therefore unsuccessful.

119 In relation to reasonable adjustments, section 20 of the Equality Act 2010 includes the following provisions:

> *(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.*

120 The complaint of failure to make reasonable adjustments was based on a PCP that Work Coaches or ASMs were required to use computers and/or read documents in order to carry out their role.

121 The Respondent did not dispute that reasonable adjustments would have been required if the Claimant had taken up such a role. The Tribunal, however, accepted Ms Wolfe's submission that it would not be clear what adjustments would be required until it was known what role the Claimant would be doing and where she would be doing it. Recommendations had been made in 2009 as to what adjustments were required then. The adjustments would, however, have to be made in the context of a particular role and the equipment in use at the location concerned.

122 The Claimant relied on the adjustments identified in the 2009 Access to Work report and contended that these should have been provided. As has already been stated, the Tribunal concluded that, in principle, the duty to make reasonable adjustments could only take effect in practical terms once a particular role had been identified. To the extent that a particular role as a Work Coach at Hammersmith was identified, the Tribunal concluded as follows:

122.1 This was offered on 23 and 26 March.

122.2 The Claimant accepted the offer on Thursday 31 March, and was advised to attend on Monday 4 April. On the same date the Claimant sent an email asserting that adjustments should be put in place before she started work.

122.3 A telephone OH interview took place on Friday 1 April. The report of the same date referred to the 2009 assessment and recommended a referral to Access to Work or the RNIB for an assessment.

122.4 It was understandable that the author of the report would recommend a further assessment rather than repeat that from 2009. All or any of the Claimant's condition, the equipment being used in the workplace, and the visual aids available, might have changed between 2009 and 2016.

122.5 This could not reasonably be addressed between Friday 1 April and Monday 4 April. In practical terms, the same remained true if a "start date" for consideration of 31 March, or even 23 March, were taken rather than 1 April.

122.6 The Respondent had not therefore breached the duty to make reasonable adjustments. The Tribunal could not assume that the adjustments identified in 2009 in relation to a different role would be relevant to the Work Coach role in 2016. Furthermore, the question is not whether it would have been reasonable to make adjustments, but whether there had been a failure to take such steps as it is reasonable *to have to* take. It would not be reasonable to require the Respondent to take steps that it had not had the time or opportunity to identify.

123 The complaint of failure to make reasonable adjustments was also therefore unsuccessful.

124 It follows from the above that the only part of the claim that has been successful is the complaint of unlawful deduction from wages, in relation to employment that lasted for a single day, namely 4 April 2016. As the Tribunal has observed, it would appear that this would give rise to an entitlement to compensation amounting to one day's pay, although the Tribunal has not heard submissions on remedy and is not making a finding that this is the case. Instead, we invite the parties to endeavour to agree on remedy in the first instance, and to inform the Tribunal if agreement is reached. They should seek a further hearing date if this proves to be impossible. In the latter event, the parties should, in applying for a date, identify the nature of the remaining dispute.

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Employment Judge Glennie
22 June 2017

ANNEX TO REASONS

IN THE CENTRAL LONDON
EMPLOYMENT TRIBUNAL

Claim No. 22076602016

BETWEEN: -

MS S JAKUSZEWSKA

Claimant

- and -

DEPARTMENT OF WORK AND PENSIONS

Respondent

AGREED LIST OF ISSUES

References to paragraph numbers are to the Claimant's Grounds of Complaint

Employment / Pay Claims

1. Was the Claimant employed by the Respondent at any stage?
There is an issue as to which role the Claimant was employed in and / or what role(s) the Claimant was offered and / or accepted over the relevant period.

2. If the Claimant was employed?

    a. When did the Claimant's employment start / finish?
    b. What was the Claimant's notice period?

Disability Discrimination

3. Disability: The Respondent accepts that the Claimant is disabled by way of her macular dystrophy.

4. Matters Relied Upon: The Claimant relies upon the matters set out at paragraph 38 of her Grounds of Complaint, which are repeated immediately below. Did those matters alleged occur? (references to paragraph numbers are to the Grounds of Complaint)

a. *When Ms Arogundade asked the Claimant why she was looking at her strangely;* [On 4 April 2016 – para 13 and 14]

b. *Sending the Claimant home from work on 4 April 2016;* [para 15]

c. *Repeatedly telling the Claimant (including by Ms Arogundade and Ms Barnatt) that the Hammersmith JCP was a flagship centre, regularly visited by politicians, with the clear implication being that the Respondent did not want the Claimant to be seen (either because of her disability and/or because of the adjustments that would have been required to accommodate her there);* [On 4 April 2016 by Ms Arogundade, and on 22 April 2016 by Ms Barnatt – para 19]

d. *Retracting the offer of the role of Work Coach at Hammersmith JCP;* [On 22 April 2016 – para 20]

e. *Retracting the offer of the role of ASM at Hammersmith JCP and/or Acton JCP;* [On 6 May 2016 – para 24; on 23 May 2016 – para 27]

f. *Imposing a deadline to accept the offer of Work Coach at Acton JCP;* [On 26 May 2016 – para 29]

g. *Retracting the offer of the role of Work Coach at Acton JCP;* [On or around 21 June 2016 – para 33]

h. *Failing to allow the Claimant to return to work after 4 April 2016;* [from 4 April to 3 July 2016]

i *Failing to find alternative roles for the Claimant to perform;* [from 4 April to 3 July 2016]

j. *Failing to pay the Claimant from 4 April 2016 to 3 July 2016 or at all;* [para 34]

k. *Failing to treat the Claimant as other employees in terms of access to Civil Service Learning and internal recruitment.* [from 4 April 2016 to 3 July 2016 – clarified at preliminary hearing as not being provided with log-in codes to access the Respondent's system which would have provided the Claimant with details of other internal posts available, C confirmed that she did not specifically request these]

l. *Failing to deal with, or hear, the Claimant's grievance adequately or at all;* [from 28 May 2016 to the date of the claim - 28 and 32].

m. *Dismissing the Claimant.* [Constructive dismissal claimed on 3 April 2016 – para 34]

5. If the Tribunal conclude that the Claimant was not employed by the Respondent, it is accepted that the Claimant is entitled to bring a claim under the Equality Act as an applicant for a role. Insofar as the Claimant is an applicant, for the role, the issues wil need to reflect s.39 of the Equality Act.

Direct Discrimination

6. Insofar as the Tribunal concludes that the matters alleged at paragraph 38 occurred:
   a. Do they amount to less favourable treatment?
   b. Was such treatment because of the Claimant's disability?

Discrimination Arising From Disability (s.15 EqA)

7. Did the Respondent treat the Claimant unfavourably insofar as any of the matters at paragraph 38 occurred?

8. Were such matters in consequence of the Claimant's disability? C contends that they gave rise to difficulties for the Claimant in reading small texts in documents and unmagnified computer screens?

9. If so, were the Respondent's actions a proportionate means to achieve a legitimate aim?

Harassment

10. Alternatively, insofar as the matters alleged at paragraphs 38 occurred, did they amount to harassment:

    a. Did R engage in unwanted conduct;
    b. Was that conduct 'related' to her disability?
    c. Did such conduct have the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C;
    d. In considering whether such conduct had that effect, what was the perception of C, the circumstances of the case, and whether such conduct objectively considered could have that effect.

Victimisation

11. The Claimant relies upon 2 protected acts:
    a. E-mail to Ms Mulally of 31 March 2016;
    b. Claimant's grievance of 25 May 2016.

12. Insofar as the acts at paragraph 38 occurred, did they amount to detriment?

13. Was the reason for such treatment because the Claimant had done a protected act?

Reasonable Adjustments (s.21 EqA)

14. Did the Respondent apply a Provision, Criterion or Practice (PCP) which placed the Claimant at a substantial disadvantage in comparison with persons who did not have the Claimant's disability?

    The Claimant relies upon the PCP that Work Coaches, or ASMs were required to use computers and / or read documents to carry out their role.

15. Would the substantial disadvantages have been avoided or mitigated if the Respondent had implemented the adjustments at paragraph 47 and repeated immediately below?

a. *A large screen with zoom text;*

b. *A scanner to scan documents on the screen,*

c. *A high visibility keyboard;*

d. *A microphone recorder for attending meetings;*

e. *A daylight bulb,*

f. *A chair with an above-standard weight limit.*

16. Were the adjustments sought reasonable?

17. Did the duty to make such adjustments arise, and if so, when?

Remedy

18. If the Claimant's claims are successful, what compensation should be awarded?

19 November 2016