THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs O Brou	**v**	Aramark Limited

Heard at: London Central **On**: 24-26 May 2017
(30 May 2017 in Chambers)

Before: Employment Judge Baty

Members: Mr T Robinson
Ms S Plummer

Representation:
Claimant: Mr L Davidson (Counsel)
Respondent: Ms K Reece (Consultant)

RESERVED JUDGMENT

1. **The Claimant's complaint of unfair dismissal was presented out of time, but it was not reasonably practicable to present it in time and it was presented within such further period as was reasonable. The Tribunal therefore has jurisdiction to hear that complaint. The complaint of unfair dismissal, however, fails.**

2. **The Claimant's various discrimination complaints were presented out of time. It is not just and equitable to extend time in relation to the complaints from 2012/2013 and the Tribunal does not therefore have jurisdiction to hear those complaints and they are struck out. It is just and equitable to extend time in relation to the remainder of the Claimant's complaints of discrimination (direct discrimination, discrimination arising from disability, harassment related to disability, failure to make reasonable adjustments, indirect disability discrimination and victimisation) and the Tribunal does have jurisdiction to hear those complaints. All of those complaints, however, fail.**

REASONS

The Complaints

1 By a claim form presented to the Employment Tribunal on 2 September 2016, the Claimant brought complaints of unfair dismissal, disability discrimination (direct discrimination, discrimination arising from disability, harassment related to disability, indirect disability discrimination and for a failure to make reasonable adjustments) and victimisation. The Respondent defended the complaints.

The Issues

2 The parties had agreed in advance a list of issues for the Tribunal to determine and the Tribunal agreed with the representatives that that was the agreed list of issues for it to determine at this hearing. That list of issues is as follows:-

Unfair Dismissal

1. Was the Claimant dismissed for a potentially fair reason under section 98 Employment Rights Act 1996?

2. If so, was the Claimant's dismissal "procedurally" and "substantively" fair taking into consideration the Respondent's size and administrative resources?

3. Did the Respondent act reasonably in all the circumstances?

Disability

Direct disability discrimination

4. Do the Respondent's actions as set out within the following paragraphs from the ET1 constitute "less favourable treatment because of the Claimant's disability?":

    a. 6
    b. 7
    c. 8
    d. 9
    e. 11
    f. 12
    g. 13
    h. 14
    i. 15
    j. 16
    k. 19
    l. 21
    m. 22
    n. 23
    o. 26
    p. 27

q. 28

Indirect disability discrimination

5. Did the Respondent apply to the Claimant a provision, criterion or practice (i.e. the requirement to carry out extra duties at paragraph 5, initiating the Respondent's capability/dismissal procedures at paragraphs 21 - 23, changing the Claimant's original role to a "barista" role at paragraph 7)?

6. Did the PCP put (or would have put) those with the Claimant's disability at a particular disadvantage when compared with others?

7. Did the PCP actually place the Claimant at a disadvantage?

8. Can the Respondent justify the PCP by showing it to be a proportionate means of achieving a legitimate aim?

Discrimination arising from disability

9. The consequences of the Claimant's disability are:

    a. Low/slow input
    b. Inability to take on increased duties Difficulties lifting, carrying and gripping items

10. Does the Respondent's alleged treatment as set out within paragraphs 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 19, 21, 22, 23, 26, 27, 28 of the ET1 constitute discrimination arising from disability (i.e. differential treatment because of the above)?

11. Can the Respondent show that the treatment above is a proportionate means of achieving a legitimate aim?

Harassment

12. Does the Respondent's alleged treatment of the Claimant as set out within paragraphs 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 19, 21, 22, 23, 26, 27, 28 of the ET1 constitutes harassment on the grounds of disability.

13. Did the Respondent engage in unwanted conduct related to the Claimant's disability?

14. Did the Respondent's alleged conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant?

Failure to make reasonable adjustments

15. Did the Respondent's duty to make reasonable adjustments for the Claimant arise during the Claimant's employment?

16. Did the Respondent apply the following PCP's on the Claimant in the course of her employment?

    a. initiating the capability procedure
    b. allegedly altering and increasing the Claimant's duties
    c. requiring the Claimant to carry out "general work"

d. permanently altering the Claimant's original job role to "barista"

17. Did the PCP's place the Claimant at a substantial disadvantage because of her disability?

18. Are the following potential adjustments the Respondent could have made for the Claimant?
    a. modifying the capability procedure

19. In the light of the above, did the Respondent fail to make reasonable adjustments for the Claimant or did the Respondent comply with its duty to make reasonable adjustments for the having:
    a. removing duties from the Claimant that involved contact with water as well as the fridge/freezer.
    b. placing the Claimant on till duties.
    c. employing an agency worker to work alongside the Claimant to do the tasks that she felt unable to complete.

Victimisation

20. Did the Claimant carry out a protected act? Namely "doing anything for the purposes of or in connection with the Equality Act 2010"

21. Did the Respondent subject the Claimant to the alleged detriments as set out within paragraphs 21 – 23 & 26 – 28, ET1, as a result of the above?

3 It was conceded and agreed that at all material times the Claimant was a disabled person for the purposes of the Equality Act 2010 by reason of "Autoimmune Inflammatory Arthritis" and, from August 2015 onwards, "Reynaud's Syndrome".

4 At the start of the hearing, the Judge noted to the parties that there appeared to be a potential jurisdictional issue in relation to the case which was not set out in the list of issues. He noted that there had been some considerable correspondence on the Tribunal file earlier on in the proceedings regarding jurisdictional issues. However, he stated that, in the light of the recent EAT Judgment in HMRC v Garau UKEAT/0348/16, which had only been heard in March 2017, there appeared to be an outstanding jurisdictional issue regarding time limits. Specifically, that case concerned whether or not time spent in ACAS early conciliation prior to the start of the primary Tribunal limitation period counted towards the "stop the clock" provisions which extended that primary Tribunal limitation period.

5 In the case before us, the Claimant had commenced ACAS early conciliation on 23 April 2016 (Day A) and it had completed on 23 May 2016 (Day B). The date of termination of the Claimant's employment, which was the date of the start of the primary Tribunal time limit for both the unfair dismissal complaint and the latest of the allegations of discrimination, was 10 May 2016. If the period of early conciliation prior to 10 May 2016 counted towards the "stop the clock" provisions, then the unfair dismissal complaint and certainly the last of the discrimination allegations were complaints

brought in time; however, if that period did not count, then all of the complaints were brought out of time.

6 Ordinarily, the Judge said that this was a jurisdictional point which could theoretically dispose of the entire claim and that it would normally be appropriate to deal with it therefore at the start of the hearing, before hearing all of the substantive evidence; however, as the representatives had not had a chance to consider the case of Garau**,** the Tribunal considered that it would be unfair to hear submissions on the point right now. However, so as not to waste any of the allocated Tribunal listing unnecessarily, the Tribunal considered that it would be appropriate to start hearing substantive evidence today, but for the Claimant, whom Mr Davidson said would need to prepare a short witness statement on the facts as to why it might be appropriate for the Tribunal to extend time if the claim was out of time, to prepare that short witness statement later today and serve a copy of it on Ms Reece by 8am on the second morning of the hearing; and then there would be the opportunity for Ms Reece to ask any cross examination questions on this issue at the end of her cross examination of the Claimant in general; and then the representatives could make their submissions on the jurisdictional point on the morning of the second day; if that resulted in the claim being disposed of in its entirety, then at least some of the Tribunal time that would otherwise be unnecessary would be saved. The parties agreed on this approach, and the Claimant's additional witness statement was duly prepared and served. We set out our conclusions on this issue below.

7 In addition, after the Tribunal had read the witness statements, particularly that of the Claimant, it appeared to the Tribunal that those statements may contain allegations of, for example, reasonable adjustments which the Claimant maintained should be made, which were neither in the claim form nor in the list of issues. The Tribunal emphasised from the start that it would be determining the issues in the list of issues only and no other. The representatives made no objection to that.

8 However, towards the end of the Claimant's cross examination by Ms Reece, Ms Reece embarked upon a line of questioning about transferring the Claimant to the Marylebone site. The Judge pointed out that this was not a reasonable adjustment pleaded and questioned the relevance of the questions. At this point, Mr Davidson said that one of the adjustments which was pleaded was that the Claimant should have been put on "till work" only. He said that the Claimant would give evidence that such till work was available at other sites, including the Marylebone site. The Tribunal accepted that, to the extent that the adjustment was simply about the availability of till work and that that might include till work at the Marylebone site, that was within scope of the issues, but that alleged adjustments of simply moving the Claimant to the Marylebone site per se or of creating a further role specifically for the Claimant were alleged reasonable adjustments which were outside the scope of the issues. Both Mr Davidson and Ms Reece agreed to this.

9 The agreed list of issues was contained within pages 36-38 of the bundle.

The Evidence

10 Witness evidence was heard from the following:-

For the Claimant:

The Claimant herself.

For the Respondent:

Ms Divya Madhavan, a Catering Manager at the Respondent, who was the Claimant's Line Manager from the point when Ms Madhavan joined the Respondent in September 2015 through to the end of the Claimant's employment;

Ms Felicity Michelli, a Group Manager at the Respondent, who chaired the meeting which led to the Claimant's dismissal; and

Ms Vivienne Shinner, the Director of Operations at the Respondent, who heard the Claimant's appeal against dismissal.

11 An agreed bundle of documents numbered pages 1-118 was produced to the hearing.

12 In addition, there was some discussion at the beginning of the hearing about two further sets of documents which the Respondent had provided to the Claimant. The first of these was a set of invoices in relation to an agency worker whom the Respondent said had been brought in from 23 November 2015 onwards. Ms Reece said it was not clear whether it was accepted or not that the Respondent had done this and that is why the Respondent sought to introduce these invoices. However, Mr Davidson accepted that the agency worker had been brought in from that point and that it was just a question of what he was doing while he was there. On this basis it was agreed that it was not necessary to adduce the invoices as evidence.

13 Secondly, there was a 50 page document which was a print out of vacancies internally at the Respondent around the time of the Claimant's dismissal. Ms Reece was not sure what the Claimant's position was and whether she was alleging that there were in fact vacancies available which were suitable for her and which she was not offered. Mr Davidson said that he was reserving his position on this and would like the 50 page document produced to the Tribunal. It was agreed that Ms Reece would therefore get copies of that document. These were not provided on the first two days of the hearing and neither Ms Reece sought to ask any questions related to them of the Claimant, nor did Mr Davidson seek to ask any questions related to them of

Ms Madhavan. The document was produced by Mr Davidson at the beginning of the third day of the hearing and copies were supplied to the Tribunal. Questions on it were put by Mr Davidson to Ms Michelli.

14 The Tribunal read in advance the witness statements and any documents in the bundle to which they referred. The Tribunal noted that there was one section of Ms Madhavan's statement which appeared to refer to some photographs and that these were not in the bundle. Ms Reece explained that that was correct and in fact the Respondent was not relying on them or seeking to adduce them.

15 A French speaking interpreter, Ms A Gastone, was provided by the Tribunal. This was to assist in interpretation for the Claimant, whose first language is French.

16 A timetable for cross examination and submissions was agreed between the Tribunal and the representatives at the start of the hearing.

17 However, during the Claimant's cross examination, she repeatedly failed to answer questions that were put to her, often several times in relation to the same question and often when they were very simple questions. Notwithstanding the difficulties of cross examining via an interpreter, this meant that it became increasingly clear that the time required for Ms Reece to complete her cross examination of the Claimant was going to exceed the time allocated in the timetable. Mr Davidson did not object to any extensions in time. In the end, rather than the two hour time estimate given, it took three and a half hours to complete the cross examination of the Claimant on the substantive issues.

18 With the exception of the Claimant's evidence, the timetable agreed at the start of the hearing was broadly complied with.

19 In terms of evidence, Mr Davidson had assumed that the Claimant would give evidence first; Ms Reece had assumed that the Respondents would give evidence first. However, as this claim comprised not only an unfair dismissal complaint, but also multiple complaints of disability discrimination, the Tribunal considered that it should stick to the normal practice in such claims and that the Claimant should give evidence first.

20 At the start of the hearing, the Judge asked whether any adjustments were needed for any of the parties. Both representatives confirmed that no adjustments were needed.

21 Given that the Claimant was still giving her evidence at the end of the first day, permission was given to Mr Davidson to speak to the Claimant for the purposes of putting together the witness statement on the jurisdictional points; in addition, at the end of the day, the representatives explained that a settlement offer had been put by Ms Reece to Mr Davidson and sought

permission for Mr Davidson to be able to discuss this with his client, which the Tribunal allowed.

22 Evidence and submissions on liability were completed within the first three days of the hearing and the Tribunal reserved its decision and took the fourth day of the hearing to deliberate on its decision.

Initial Findings on Jurisdiction

23 As noted, the Tribunal decided to deal with the jurisdictional point after the Claimant's evidence was completed on the morning of the second day of the hearing.

24 Both representatives made submissions and Mr Davidson handed the Tribunal a bundle of authorities to which he referred. Having heard the submissions, the Tribunal adjourned over lunch to consider its decision and, when the parties returned, gave them its decision as follows.

25 Firstly, it had been accepted by Mr Davidson that, as a result of the application of the case of Garau, the Claimant's claim had been presented out of time. The Tribunal agreed with Mr Davidson's assessment; the application of Garau meant that the period of time in early conciliation prior to the commencement of the primary limitation period could not count to "stop the clock" and therefore the claim was presented out of time.

26 Therefore, the issues for the Tribunal to determine were, in relation to the unfair dismissal complaint, whether it was reasonably practicable to have presented the claim in time and, if not, whether it was presented within such further period as was reasonable; and, in relation to the discrimination complaints, whether it was just and equitable to extend time.

27 The Claimant had provided a witness statement to the Tribunal, as requested, in relation to the jurisdictional issue. Essentially, her evidence was that, once she had decided that she wanted to bring a claim against the respondent, she applied to ACAS for an early conciliation certificate and duly received the certificate on 23 May 2016; that she then decided that she wanted to discuss the merits of her case with a solicitor and, on 21 June 2016, spoke to a solicitor at the North Kensington Law Centre who invited the Claimant and her husband to her office to discuss the case on 28 June 2016; that at that meeting, the solicitor told them that the deadline for submitting the claim was 8 September 2016; that her husband asked if the solicitor was sure about it because he thought the deadline might be in August, the matter having been discussed with ACAS; and that the solicitor reassured them that the date was 8 September 2016. The Claimant confirmed that she was happy to wave privilege in relation to this advice.

28 We accept that the Claimant's solicitor advised her that the deadline was 8 September 2016 (albeit the claim was submitted on 2 September 2016) and that that, under the principles of Garau, was incorrect.

29 Mr Davidson referred us to the case of Dedman v British Building and Engineering Appliances Limited [1974] ICR 53, CA. There the principle was set out that "if a man engages skilled advisors to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them." He also referred us to Wall's Meat Co Limited v Khan [1979] ICR 52, CA, where Lord Justice Brandon explained the Dedman principle in the following terms. In his view, ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the complainant or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him. In the light of that, we accepted Mr Davidson's submission that, if the Claimant's solicitor could not reasonably be expected to know that the way the time limits operated was as set out in the case of Garau at the time they gave the advice, and, based on the understanding at the time, advised reasonably, then what the solicitor did and the Claimant's late presentation of the claim was not unreasonable.

30 Our answer to the question posed is that the solicitors did not act unreasonably. Both Garau and the Employment Tribunal case of Fergusson v Combat Stress ET Case No 4105592/16 (a Scottish Employment Tribunal case which was decided at a similar time to Garau), were not available to the Claimant's solicitor when she gave her advice on the submission of this claim. There was, as Ms Reece rightly submitted, no appellate authority available at the time of the advice. There were two Employment Tribunal authorities, however. These were Chandler v Thanet District Council Case No 2301782/14 and Myers v Nottingham City Council Case No 2601136/15 and, in similar situations, these judgments went the other way to the decision in Garau; in other words, time spent in early conciliation prior to the commencement of the primary limitation period did count as part of the "stop the clock" provisions and was effectively added on to the end of the primary limitation period. We accept that these were only Tribunal decisions and therefore not binding on us. However, they are evidence that the law in this area was interpreted at the time as being that the whole of the EC early conciliation period could effectively be added on to the primary time limit and represented the views of two separate Employment Tribunal Judges. The Claimant's solicitors were entitled to believe that and were not therefore unreasonable or negligent in their advice to the Claimant that 8 September 2016 was the final date for submission of the claim. For this reason we do not consider that it was reasonably practicable to have submitted the claim on time.

31 That answers the first part of the test on reasonable practicability in relation to the unfair dismissal complaint, but we also pick up a number of the other submissions that were made here at this point.

32 The fact that, as Ms Reece submitted, in a previous letter in correspondence between the parties, the Claimant submitted another reason as to why she did not put her claim in on time, is irrelevant. That was an argument pursued in the alternative to the Claimant's primary submission at the time that (in the pre-Garau world), the claim was in fact in time. Whatever the cross examination of the Claimant on this point which Ms Reece carried out says or does not say about the reliability of the Claimant's evidence is not relevant to the decision that we have to make in this respect.

33 The first instance cases referred to (Chandler and Myers) are not, as Ms Reece submitted, cases that turn on their facts. The facts are not the issue; the issue is that they are evidence of what two separate Employment Judges considered the law to be at the time. Therefore, contrary to what Ms Reece submits, the fact that Employment Tribunal decisions are non binding and can be fact sensitive is irrelevant for these purposes.

34 In the light of the above, we also do not accept Ms Reece's submission that it was incumbent upon the Claimant/her solicitor to "play safe" and put the claim in earlier.

35 Ms Reece made some submissions about the prejudice to the Respondent if time was extended. However, this issue is not relevant to the "reasonable practicability" test. By contrast, such submissions may well be very relevant to the "just and equitable" test in relation to time extensions for discrimination complaints.

36 The fact that the Claimant had access to a Trade Union Representative at the capability hearings which she had prior to dismissal and to ACAS via early conciliation is also, contrary to Ms Reece's submission, not relevant. The Claimant was entitled to rely on the clear advice of her specialist legal advisor (a solicitor) that the deadline was 8 September 2016 and it was not incumbent on her to go back to any other source of advice such as ACAS or the Trade Union. Whatever ACAS said to the Claimant about limitation periods, and we do not know exactly what ACAS did say, the Claimant was entitled to rely on the advice of a solicitor as superseding this.

37 We therefore turn to the issue of whether the claim was presented within such further time as was reasonable and find that it was. The Claimant thought that she was presenting the claim in time. In any event, it was in fact only presented about 10 days after the expiry of the primary time limit.

38 Therefore, as it was not reasonably practicable to submit the unfair dismissal complaint on time and it was submitted within such further period as was reasonable, time is extended and the Employment Tribunal has jurisdiction to hear the unfair dismissal complaint.

39 In relation to just and equitable extensions of time for the purposes of the discrimination complaints, we were referred by Mr Davidson to the case of

Virdi v The Commissioner of Police of the Metropolis UKEAT/0373/06/RN and, in particular, paragraph 35 of the Judgment of Elias P (as he then was) in which he stated that, in relation to just and equitable extensions of time:

> "It is well established, and common ground, that the claimant cannot be held responsible for the failings of his solicitors … For that reason it is not legitimate for a Court to refuse to extend time merely on the basis that the solicitor has been negligent and that the claimant will have a legal action against the solicitor."

40 Mr Davidson submits that, in relation to incorrect legal advice, the test here is even easier to satisfy than the test of reasonable practicability, which we accept. The Claimant cannot be held responsible for the incorrect advice of her solicitors. Firstly, in this case, we have found that her solicitors were not negligent in any event (even if they had been, it would not be something which would stop the Tribunal from exercising its discretion to extend time). Therefore, the fact that they mistakenly put the claim in ten days later than they should have done would not mean that it was not just and equitable to extend time.

41 However, as Mr Davidson conceded, the Claimant should not be put in a better position than she would if she had put in her claim ten days earlier. Although, as the whole claim is out of time, there will be no question of an act extending over a period with an "in time" allegation which might bring earlier allegations into time, it is still right for us to consider just and equitable extensions, in particular regarding the early allegations of 2012 and 2013, when we have heard the evidence, as other considerations regarding whether it is just and equitable to extend time may arise, beyond the Garau point raised here. That would be the stage where issues such as respective prejudice to the parties may be relevant. We therefore reserved our position on whether it is just and equitable to extend time in relation to the discrimination complaints, which will be a further issue to determine when we have heard all the evidence.

The Law

Unfair Dismissal – Capability

42 The tribunal has to decide:

43 Whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(2) of the Employment Rights Act 1996. Capability is a potentially fair reason under s 98(2)(a) and can include lack of capability due to ill health. The burden of proof here rests on the employer who must persuade the tribunal that there was such a reason and that reason was the reason for dismissal; and

44 Whether the tribunal is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The

tribunal refers itself here to s. 98(4) of the Employment Rights Act 1996 and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. Issues which are likely to be relevant in the case of a capability dismissal may include: the nature of any medical investigation or evidence; whether there is any indication of when the employee will be able to return to full duties; consultation with the employee; and consideration, where appropriate, of alternative employment; and whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice?

Direct Disability Discrimination

45 Under section 13(1) of the Equality Act 2010 ("the Act"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Disability is a protected characteristic in relation to direct discrimination.

46 For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Harassment related to Disability

47 Under section 26(1) of the Act, a person (A) harasses another person (B) if A engages in unwanted conduct related to that person's disability and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

48 In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

Discrimination arising from Disability

49 Section 15 of the Act provides that 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.

50 However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Indirect Disability Discrimination

51 Under section 19(1) of the Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of B's. Disability is a relevant protected characteristic.

52 Section 19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic of B's if: (a) A applies, or would apply, it to persons with whom B does not share the characteristic; (b) it puts, or would put, persons with who B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; (c) it puts, or would put, B at that disadvantage; and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Reasonable adjustments

53 The law relating to the duty to make reasonable adjustments is set out principally in the Act at s.20-22 and Schedule 8. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice of an employer 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.

54 A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

Victimisation

55 Section 27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

56 Protected acts include the bringing of proceedings under the Act; giving evidence of information in connection with proceedings under the Act; doing

any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

57 In relation to the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which we could decide, in the absence of any other explanation, that the employer discriminated against the employee. If the employee does so, the burden of proof shifts to the employer to show that on the balance of probabilities it did not so discriminate against the employee. If the employer is unable to do so, we must hold that the discrimination did occur.

Time Extensions and Continuing Acts

58 The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

59 It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

60 In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

61 As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. The tribunal takes into account anything which it judges to be relevant and may form and consider a fairly rough idea of whether the claim appears weak or strong, see TJ Hutchison v Westward Television [1977] IRLR 69 EAT. This is the exercise of a wide, general discretion and may include the date from which a claimant first became

aware of the right to present a complaint. It is likely to include whether it is possible to have a fair trial of the issues, see Mills v Marshall [1998] IRLR 494 EAT.

Findings of Fact

62 We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

63 The Respondent is a food service and facilities management partner operating across the United Kingdom.

64 The Claimant was originally employed by Compass Services (UK) Limited as an assistant at "Uppercrust" at their Marylebone site from 16 September 2002. In 2012, the Respondent took over these operations and the Claimant's employment transferred to the Respondent under TUPE.

65 As noted, the Claimant suffered from Autoimmune Inflammatory Arthritis. In 2013, she was moved on a permanent basis from the Marylebone site to the Respondent's site at New Cavendish Street. The reason for this was that the Respondent perceived that the New Cavendish Street site was less busy than the Marylebone site which would make life easier for the Claimant in the light of her disability.

66 The New Cavendish Street refectory is a student and staff outlet at the University of Westminster's New Cavendish Campus. The Respondent provides lunch for students and staff members from 12pm to 14.30pm Monday to Friday. The operations of the refectory include the student and staff cafeteria, a Costa Coffee outlet and a hospitality and events section which were all based in the same building.

67 The employees who work at the New Cavendish site, as is the case at other sites operated by the Respondent, are required to do a range of duties. This includes but is not limited to preparing salads, filling up the drinks fridge, working on the till, displaying food, and cleaning the tables and the refectory.

68 The New Cavendish refectory has a food preparation open plan kitchen at the back of the room with a walk in fridge at one end and the cooking area at the other. The facility has tables and chairs set out in an open plan room. The service area is a canteen style bar with a till at the end. Customers select what they wish and take it to the till at the end. The till itself is only open from 12pm to 14.30pm, although employees work shifts which are longer than that (for example the Claimant worked a 6 hour shift from 9am to 3.30pm, although in practice she chose to not take her half hour break during the shift and to finish at 3pm). Till working is prized by employees as it provides a respite from the other tasks which involve more moving around and lifting, whereas the till work involves sitting.

69 The Claimant had a good relationship with her previous managers during her employment.

70 For reasons we come to in our conclusions, we do not make any further findings about the earlier period of the Claimant's employment prior to the events of late 2015 onwards.

71 In August 2015, the Claimant was, in addition to her arthritis, diagnosed with Reynaud's Syndrome which she had developed by this point and which had worsened the pain she was suffering in her hands.

72 On 14 September 2015, Ms Divya Madhavan was appointed as Catering Manager for the New Cavendish Street refectory. She became the Line Manager of all of the employees working there, including the Claimant. Ms Madhavan's Line Manager was Ms Felicity Michelli.

73 Ms Michelli had discussed with Ms Madhavan, at the time of her appointment, how it was necessary for Ms Madhavan to improve the Respondent's procedures at New Cavendish Street, especially when it came to stock and recording. She had asked Ms Madhavan at the commencement of her employment to get the stock levels under control as there was often a great deal of wasted stock. This involved making some changes to the processes and advising staff as to how to implement those changes.

74 The Claimant approached Ms Madhavan around the end of September 2015 and provided her with a copy of a letter from a doctor which, Ms Madhavan recalled, was quite old from 2012. It is likely that this was the letter at page 105 of the bundle, which is a letter from a Dr Anne Kinderlerer, a Consultant Rheumatologist, dated 22 May 2012. On the balance of probabilities, we find that it was that letter. The letter stated:

> "This is to confirm that this lady has an inflammatory arthritis involving the small joints of her hands. Her symptoms were exacerbated by heavy work with her hands. Reasonable adjustments should be made to her working conditions in accordance with the Equality Act."

75 On 19 October 2015, the Claimant handed Ms Madhavan a letter from Dr Kinderlerer, dated 1 October 2015, which referred to Dr Kinderlerer's consultation with the Claimant back in August 2015 (page 107 of the bundle). The letter was addressed to "whomsoever it may concern" and stated:-

> "This is to confirm that this patient has an autoimmune inflammatory arthritis with significant hand pain and both pain and damages are worsened by heavy lifting with her hands. She also has Reynaud's syndrome, which causes vasospasm in the cold. This should be viewed as a disability under the terms of the Equality Act 2010 and reasonable adjustments should be made."

Respective Reliability of the Claimant's Evidence and that of the Respondent's Witnesses

76 At this point, it is necessary for us to make findings on the respective reliability of the evidence of the witnesses from whom we heard, as many of our findings of fact depend on that assessment.

77 As noted already, the Claimant persistently and repeatedly failed to answer questions which were put to her in cross examination. Whilst English is not the Claimant's first language, she did have the benefit of a French speaking interpreter and many of the questions asked were straightforward simple questions which were entirely capable of being answered simply and concisely. Furthermore, the Claimant's evidence also contained several contradictions. The most obvious and the one which goes to the core of the issues before us, is that on the one hand the Claimant seemed to suggest that she could not do certain jobs and the Respondent should have made more reasonable adjustments so that she only did till work, but, on the other hand, the Claimant maintained that she could have done lots of extra jobs beyond the till work which she ended up doing towards the end of her employment at the Respondent and should not therefore have been dismissed. As Ms Reece put it, the Claimant cannot have it both ways. There were other contradictions in her evidence but this example suffices. Furthermore, there were contradictions between her evidence and the documentary evidence. For example, all of the documents in the capability meetings seemed to indicate that there was an acceptance that the Claimant could not do the range of tasks which her role required and that what she and her Trade Union Representative were seeking was an enhanced termination package. However, at the Tribunal, the Claimant continued to insist that issues of adjustments and whether she could continue to do her job were still possibilities at that stage.

78 As came out in the evidence, the Claimant had been good at her job and the Respondent, through various witnesses including Ms Madhavan, acknowledged this. We can fully understand that the Claimant may have become frustrated, particularly towards the end of her employment, at not being able to do properly a job which she enjoyed. However, for the reasons above, we have not found that the Claimant's evidence has been, in many respects, reliable.

79 By contrast, all of the Respondent's witnesses were consistent and credible and answered the questions put to them directly.

80 Mr Davidson made various submissions about why we should be suspicious of the Respondent's evidence.

81 These included the fact that Ms Michelli, rather than writing notes, recorded the meeting of 11 November 2015 which she had with the Claimant and then made a transcript of the recording as her note of the meeting, but did not

keep the recording itself. However, we do not find anything suspicious about that; it was simply the way that Ms Michelli chose to produce her note and, as was clear from looking at the note, clearly provided a more accurate note of the meeting than she might otherwise have taken and one which in any event the Claimant accepted in her evidence was substantially accurate.

82 The second point he made was that it came out in evidence that Ms Madhavan had a personal diary which she chose of her own accord to keep and which recorded events which were of note and happened during her working day (she mentioned it in the context of having made a note of speaking to the Claimant on one occasion about some customer complaints). Whilst it is certainly correct that the diary would be disclosable, glitches in disclosure do occur in Tribunal litigation and, if all that the diary recorded was that Ms Madhavan spoke to the Claimant (which the Claimant acknowledges as it is one of her allegations of harassment), very little turns on it. It is certainly nothing which should, as Mr Davidson submitted, lead us to draw an inference that it was deliberately not disclosed because it did not corroborate Ms Madhavan's version of events and would have corroborated the Claimant's version.

83 Finally, Mr Davidson commented that, when he questioned Mr Michelli and Ms Shinner, some of the answers they gave included material that was not in their witness statements. That is correct and is a commonplace in cross examination. There was nothing suspicious about the information which they did give not being in the witness statements and merely supplemented, in response to Mr Davidson's questions, the material that was in the statements already. Certainly, again, there is nothing in that which would cause us to doubt their respective credibility.

84 Therefore, where there is a conflict of evidence, we prefer on the balance of probabilities the evidence of the Respondent's witnesses to that of the Claimant.

85 We should add at this point that, particularly in the context of many of the allegations of harassment where it is said that Ms Madhavan "shouted" at the Claimant, we acknowledge that there may have been a difference in perception as between Ms Madhavan and the Claimant. Ms Madhavan was brought in specifically to deal with issues at the New Cavendish site, particularly to do with stock (which is the background to many of the allegations of harassment) and spoke to all employees about these sorts of issues and not just the Claimant. From hearing her as a witness before this Tribunal, Ms Madhavan is clearly very business like and direct. She was firm in the answers that she gave to the cross examination questions and tended to emphasise her points and sometimes place stress on them when she gave her answers. It is possible that that could be interpreted by some people as being direct or even forceful. The Claimant may therefore genuinely have considered that she was "shouted at"; however, we consider that, on the balance of probabilities, Ms Madhavan was no more than direct and assertive and did not shout at the Claimant.

Further Findings of Fact

86 The Claimant's case is that she had a good relationship with Ms Madhavan to start off with but that this changed after she gave Ms Madhavan the letter from Dr Kinderlerer on 19 October 2015. However, we have seen a reference in the transcript of the meeting of 11 December 2015 with Ms Michelli which states that the Claimant returned to work on 21 September 2015 (a week or so after Ms Madhavan started at the New Cavendish refectory) and "the first thing that happened, I asked her for change and I was shocked)". In other words, in the contemporaneous document, the Claimant said that Ms Madhavan started harassing her from the start, i.e. at a time before she handed either of the letters from Dr Kinderelerer to her. We therefore find that, on the balance of probabilities, to the extent the Claimant had a perception that Ms Madhavan was treating her badly, that perception began around 21 September 2015, before she gave Ms Madhavan either of the consultant's letters.

87 Ms Madhavan told the Claimant that she appreciated her bringing her condition to her attention and asked if she was able to provide her with more evidence in respect of her condition so that she could understand what the issues were. She advised that she would need to speak to Ms Michelli and duly reported the matter to Ms Michelli and asked how she was to proceed with the matter as this was the first she had heard of the Claimant's condition. Ms Michelli gave her guidance as to what steps to take.

88 Ms Madhavan explained to the Claimant that she would need to make sure that the Respondent assisted her in her role in the light of her condition. Ms Madhavan was concerned that the Claimant's role was very active in respect of making salads, collecting stock from the fridges and serving drinks as well as till work. She wanted to obtain further information to establish what she would be able to do comfortably and what the Respondent would need to do by way of adjustments.

89 Although Ms Madhavan had not yet done a formal risk assessment with the Claimant, she decided to make adjustments to the Claimant's role straightaway before the risk assessment was done and she spoke to the Claimant about what she could do and could not. The Claimant told her what was problematic and they came to an agreement as to what to do.

90 As noted, the Claimant then subsequently returned with the further letter from Dr Kinderlerer confirming that she had been diagnosed with Autoimmune Inflammatory Arthritis as well as Reynaud's Syndrome (page 107 of the bundle), and this letter again referenced the need for reasonable adjustments.

91 Ms Madhavan completed a risk assessment with the Claimant. We have seen a copy of the risk assessment in the bundle; it appears to be a reasonably thorough assessment of what the Claimant's problems are and

what changes should be made to her role to accommodate these problems, for example:-

> "Constant supervision, reduce the trips she has to make to the fridge and freezer. Has to stop preparing salads as she cannot have water touching her hands. Causes constant pain. Only remedy is to use the till with a stylo so as not to have any direct contact with the fingers."

92 The reference to the stylo is to a suggestion which Ms Madhavan made to the Claimant that, given the pain in her hands, it might be easier for her to use a stylo to tap in the buttons on the till. In the event, the Claimant decided not to do this going forwards although Ms Madhavan advised her to have the stylo there just in case she felt that she needed to use it.

93 The document containing the risk assessment could only have been put together as a result of a detailed conversation with the Claimant about what she could and could not do and we therefore find that such a conversation took place (in contrast to the Claimant's assertion that it did not).

94 The adjustments were implemented straight away.

95 Despite the agreement that the Claimant would not go to the fridge, on one particular occasion, Ms Madhavan observed the Claimant going into the fridge to get an item. When she saw her do this, she told her that she could call a colleague to assist her as they had agreed that this could make her condition worse or that it would be painful.

96 Part of the Claimant's role had been the cleaning of the tables on the shop floor. Ms Madhavan advised the Claimant that, based on what she had told her, she thought it would not be appropriate for her to stress her fingers and that, as an adjustment, others could do this work instead. The Claimant reacted badly to the suggestion, replying that she was more than capable of cleaning. Ms Madhavan replied to clarify that she did not dispute her capability but that her instruction was nonetheless to stop as from the information which Ms Madhavan had, it could cause the Claimant pain with respect to her conditions.

97 Ms Madhavan also advised the Claimant that, for the time being, it would be best for her to use the till whenever it was in use. This was not very often as the till was, as noted, in operation for the two and a half hour lunch period only but it was the task that caused the Claimant the least difficulty. In addition, the till was not in constant use during that period. The New Cavendish site is not a busy site in any event and the till was only in use when customers came in to buy items; normally the rest of that two and a half hour period would not have someone waiting on the till and an individual who had been using the till to serve a customer would go off and do other tasks once the customer had gone. The Claimant spent some minutes before the till opened preparing the till and some minutes after the period when the till was open, cashing up.

98 The Claimant was able to add value whilst she was at the Respondent during her six hour shift but, however, a large number of the tasks which she would normally do had to be done by someone else. Initially, Ms Madhavan arranged for another individual to do some of the tasks which the Claimant would otherwise have done. From 23 November 2015, Ms Madhavan specifically brought in an agency worker to do this. The agency worker remained in place until the end of the Claimant's employment. Effectively, therefore, whilst the Claimant was adding value, the Respondent was engaging two individuals to do the Claimant's job, in a loss making site and in a business where margins are very small.

99 In addition, Ms Madhavan arranged for the Claimant to consult the Respondent's Occupational Health Physician, which she duly did, and the report in relation to which we will refer to later.

100 The Claimant alleges that: on 4 November 2015 at around 1.30 – 2pm Ms Madhavan asked her why she had not filled up the soft drinks in the fridge; that she said that she had filled it up in the morning but then she had been too busy on the till; that instead of understanding her explanation, Ms Madhavan had shouted at her; that on 5 November 2015, Ms Madhavan said that she had made a mistake on the till; that Ms Madhavan said "you want to do the till but you can't even do till work" and; that on 6 November 2015, at the busiest time of day, in the lunch period between 12 noon and 2.30pm, Ms Madhavan asked her, with an angry sounding voice, to bring her a list of items for order before 2pm.

101 Ms Madhavan cannot recall any of these incidents and denies that they occurred in the way that the Claimant alleges. In the light of our findings above, we find that Ms Madhavan was, in accordance with her brief from Ms Michelli, making reasonable management requests of the Claimant, albeit perhaps in a way that the Claimant had not been used to before; that she had not shouted at the Claimant or said anything to her which was offensive.

102 The Claimant maintains that, on 10 November 2015, Ms Madhavan asked her to check stock availability; but she explained to Ms Madhavan that she could not find the black pepper sachets and brought the salt and pepper instead; that Ms Madhavan said "check it properly!"; that the Claimant said that she could not find the black pepper sachets; that Ms Madhavan said "if you don't find this, you will get into trouble"; that Ms Madhavan shouted at the Claimant and said "you never find anything!".

103 Ms Madhavan recalls asking the Claimant to locate an item of stock on 10 November 2015 and that the reason she remembered the incident is because on two previous occasions, the Claimant had informed her that a particular item was to be ordered and when she checked the store there was plenty of the stock in question; that the item was tomato ketchup sachets required for lunch service; that all she told the Claimant was to make sure that she checked the store properly before ordering as a lot of items had

been ordered unnecessarily by the Claimant when they were still in stock; and that she said this calmly and politely.

104 For the reasons of respective reliability of evidence referred to above, we prefer Ms Madhavan's evidence in this respect.

105 The Claimant maintains that, on 11 November 2015, Ms Madhavan shouted at her twice in front of customers in an angry voice because she ran out of change on the till; that Ms Madhavan shouted "why didn't you ask for change before?"; that the Claimant said when it is too busy it happens; that Ms Madhavan said "you have to ask the manager to bring change!"; that because it was so busy the Claimant ran out of change for a second time on the same day and, when she did this, that Ms Madhavan shouted at her again; that she felt stressed and tried to explain this to Ms Madhavan and Ms Madhavan just said "the job is stressful"; that the Claimant said "no you stress me"; that Ms Madhavan then said she had just been "joking", however Ms Madhavan's tone of voice had clearly sounded angry not joking.

106 Ms Madhavan's account of what happened on 11 November 2015, was that she recalled that the Claimant got into a heated conversation with a customer about a payment; the customer was using an app to pay for his food which was not being accepted by the till; that Ms Madhavan became aware of this because she was assisting with food service close to where the Claimant was standing by the till when she heard her raising her voice and saw that she was quite agitated with the customer; that she went over to intervene and to try and defuse the situation, as other customers were looking at what was happening; that when she got near the Claimant she politely asked her to take a small break and advised that she would deal with the customer; that the Claimant was not "shouted at" for any reason; that the Claimant was trying to explain to the customer that his payment was not going through and he could try paying by cash; that the customer was adamant that he wanted to know why his payment was not going through at which point the Claimant became frustrated which led to the heated argument; that later that day it was apparent to Ms Madhavan that the Claimant was not in a great mood; that the Claimant appeared disengaged with herself and her colleagues; that when a few of the other employees were talking about a worker at their student restaurant, the Claimant believed that the conversation was about her as they shared the same name; that the Claimant approached Ms Madhavan as she had believed the other employees had been talking about her; that Ms Madhavan immediately reassured her that they were in fact talking about another employee who was based in a different student restaurant; and that Ms Madhavan believed that she had dispelled the Claimant's concerns.

107 For the reasons of respective reliability of evidence referred to earlier, we prefer Ms Madhavan's version of events.

108 The Claimant maintains that, on 12 November 2015, Ms Madhavan asked her why she had not made more salad; that she said that she had made the

same amount every day, but everything had run out that day because it had been busy; that she said "she never listened!" and accused her of being argumentative; that she, the Claimant, did not raise her voice or enter into a "heated discussion" with any customers either this day or any other day (as claimed by the Respondent in the ET3).

109 Ms Madhavan's account is that she recalls that on 12 November 2015, the Claimant ended up in another heated discussion with a customer; that Ms Madhavan could see that the Claimant was getting frustrated and she was banging her closed fist on the till desk in front of her; that she did not like seeing her frustrated and could not allow aggressive behaviour so went over to the till and asked what the matter was; that Ms Madhavan said that she would deal with the situation while the Claimant got a sip of water; that afterwards she asked the Claimant if she could explain to her what had happened at her till point; that she wanted to understand how she and a customer had ended up in a disagreement; that as the manager it was her responsibility to address any issues that arose; that at no point did she make any allegations towards the Claimant but just wanted to understand what had happened so that she could see if there was any action that needed to be taken in respect of training or client service.

110 For the reasons of respective reliability of evidence referred to above, we prefer Ms Madhavan's version to that of the Claimant.

111 Mr Davidson submitted to us that, if the Claimant had indeed banged her fist on the till desk, it was inconceivable that Ms Madhavan would not have subjected the Claimant to disciplinary action and this is a reason to doubt Ms Madhavan's version of events. However, in the context of a long serving employee who was a good worker but who was frustrated with the limitations that her condition was placing on her and in relation to whom incidents of this nature were rare, we do not find it surprising that Ms Madhavan took the course of action she did in speaking to the Claimant, trying to diffuse the situation and taking a decision based on her conversation with the Claimant as to whether or not further action needed to be taken and deciding that it did not. We do not, therefore, consider that this casts any doubt on the credibility of Ms Madhavan's account.

112 The Claimant was then absent from work from 16 - 30 November 2015. The fit note simply stated "stressors" and went on to state

> "She says she has been shouted and abused by manager. It does appear that reasonable adjustments have been made by employer following medical information given by rheumatologist in May 2012 and August 2015. Needs Occupational Health review."

113 What is in the fit note of course reflects the information which the Claimant gave to the doctor. It seems therefore that at that stage the Claimant herself acknowledged that reasonable adjustments had been made.

114 We accept that the Claimant did perceive that Ms Madhavan was treating her unfairly, although, as our findings of fact above reflect, we do not find that was the case.

115 The Occupational Health Report was dated 7 December 2015. It includes the following:-

> "… She tells me that the condition affects both hands and as a consequence she has difficulties at work performing her expected duties. She reports difficulties lifting, carrying or gripping any objects and is also unable to do any work associated with cold temperatures. In light of her medical conditions I understand that she has recently been restricted from washing food items in cold water or removing them from the fridge. I also understand that she has been placed on the tills and she tells me that she finds this form of work manageable. …
>
> **Present situation**
>
> I understand that Mrs Brou required a two week absence at the end of November 2015 whilst suffering with stress. She tells me that there are interpersonal problems with her manager. She says that she feels as though she is being forced out of her role and is being allocated duties which management knows she is unable to do. She tells me that she is also being shouted at in front of customers whilst on the tills and has concerns that her ability to work on the tills will be questioned. …
>
> **Fitness Advice and Specific Recommendations**
>
> It is my opinion that Mrs Brou is not fit to perform the general assistant duties within the kitchen. She has a combination of both inflammatory arthritis and Reynaud's disease affecting both hands and for this reason she would find it difficult to perform the majority of kitchen assistant duties. It would be beneficial if she could maintain employment in an alternative role such as on the tills. It may also be beneficial to address the interpersonal problems that Mrs Brou described with her Manager.
>
> In response to the specific questions outlined within your referral:
>
> 1. I do recommend placing Mrs Brou on the tills, as I feel these duties are suitable and will fit in with her current symptom profile. Given that she has difficulties lifting, carrying, or gripping items it would be difficult for her to work within the kitchen or even serving within the canteen.
>
> 2. Apart from looking for alternate duties as described previously, I do not feel that the company can assist in any other way.
>
> 3. Mrs Brou informed me that she required a period of absence in relation to stress and this was a direct cause of interpersonal problems with her Manager. She reports incidences of being shouted at in front of customers and feels that she is being victimised due to her medical conditions and is essentially being forced out of her job. I therefore feel that it would be beneficial if these interpersonal problems can be addressed in order to minimise the risk of further absences in relation to stress. She did not state that any other aspects of her role, i.e. on the tills, causes stress. …"

116 A meeting was arranged between Ms Michelli, Ms Madhavan and the Claimant for 11 December 2015. Whilst the intention was to discuss the

Occupational Health Report, Ms Michelli was concerned about the comments in the report regarding the relationship between the Claimant and Ms Madhavan. She therefore asked Ms Madhavan to leave the meeting and the bulk of the meeting involved Ms Michelli discussing with the Claimant primarily the issues concerning Ms Madhavan. However, in the context of discussing the Claimant's role, Ms Michelli asked the Claimant what she would like to do and she replied:-

"It is for Aramark to decide, I cannot do salad, I cannot hold a knife. I can only use the till."

117 As regards Ms Madhavan, the Claimant explained to Ms Michelli some of her perception of Ms Madhavan's actions which now forms the basis of part of this claim, albeit in considerably less detail. The transcript of the meeting then goes on:-

"FM: … The problem that we have is that a large part of your role is to complete these tasks, preparing the baguettes and salads is more than 50% of your day. This is why we are in the tricky situation now of working out what we do moving forwards. We do not want to lose you. In regards to Divya and the way she talks to you, I will of course talk to her about the way she speaks to you. I do not want you to feel uncomfortable at work or stressed. However, having said that, I have tasked Divya with getting the stock system under control here. There is far too much stock here for the size of the operation we run. Her job is to manage that and a part of that is questioning the team to ensure everyone is working together to get it right. She is not doing it to be spiteful, she is doing it because it is her job. I do agree that she could be speaking to you better. …"

118 Ms Michelli's view, as she set out in her evidence before the Tribunal, was that there was a misunderstanding regarding the communication between the Claimant and Ms Madhavan. Ms Michelli did follow up with Ms Madhavan and spoke to her about the manner in which she should be speaking to the Claimant. Ms Michelli's view was that there was a "clash of personalities" between the two. The Claimant did not raise any concerns concerning Ms Madhavan again thereafter.

119 Ms Michelli subsequently sent the Claimant an invitation letter to a medical capability meeting to take place on 16 December 2015. The purpose of the meeting was to discuss the Occupational Health Report, any reasonable adjustments and alternative employment. The Claimant was informed of her right to be accompanied by a fellow employee or Trade Union Representative. The letter informed the Claimant that, if the meeting indicated that there was little likelihood of a return to work within a reasonable timescale and there were no reasonable adjustments that could be made or alternative employment available, then the outcome may be notice of the termination of her employment on the grounds of ill health.

120 In fact, the medical capability hearing did not occur until 18 January 2016. At the meeting, the Claimant was represented by Andy Murray, a Regional Officer of Unite. Ms Madhavan was also in attendance because she had detailed knowledge of the role (although, as it turned out, she was not in the

end needed to be called upon to speak to any of that knowledge for the purposes of the meeting).

121 At the meeting, those present went through the medical report. The Claimant said that she found it very difficult to operate the coffee machine or prepare salad; that her fingers hurt if she held the knife or went to the fridge or the freezer and that the ideal job for her would be operating the till.

122 (The Claimant now says in her witness statement (paragraph 43) that there was other work that she could do besides till work and sets out things which she now says that she feels she could have done; however, she did not say any of this at the meeting and, as noted above in our findings about reliability of evidence, the Claimant's evidence seemed to swing from one way to the other in terms of what she could and could not do).

123 Ms Michelli told the Claimant that within the University of Westminster contract it would be very difficult to find a job role for her where she could only operate the till. That is because the roles that the Respondent has include various other duties which the Claimant would not be able to perform based on the OH Report.

124 The notes of the meeting record that the Claimant understood her situation and knew that her capabilities were limited and hence did not know what lay ahead for her and that she wanted to know if it was possible to see if there may be any positions available within the Respondent, not necessarily within the University contract. Furthermore, Mr Murray advised the individuals at the meeting that he had informed the Claimant that one of the conclusions from the hearing might result in the termination of her contract and asked if they could look at other contracts within the Respondent to see whether there were any positions suitable for her. He suggested a follow up meeting; that meeting was then set for 1 February 2016.

125 The Respondent produces vacancy lists on a weekly basis which set out what vacancies are available within it. Ms Michelli checked these lists on a weekly basis from that time through to the end of the Claimant's employment. Each of the job vacancies on the lists had a contact name and Ms Michelli spoke to a lot of them and she also spoke to the Divisional MD about vacancies and raised it on regular meetings which she had with other managers. In addition, Ms Michelli specifically spoke to other managers about whether or not they might have roles which might be compatible for someone with the restrictions which the Claimant had.

126 However, at no point were any such roles available. The main reason is that there are no roles at the Respondent which require till work only and all employees do a mix of tasks. Furthermore, there are no sites where the till is constantly in use. In addition, as already noted, even when the till is in use, it is not constantly in use and at those times the employee who might otherwise be working on the till would be expected to be doing other duties.

Furthermore, as noted, given the Claimant such a role would diminish the amount of till work for other staff which would deprive them of the opportunity to sit down and have a variation in their role which would otherwise be repetitive and, as noted, such work is prized by other staff.

127 Ms Michelli continued the search up to the end of the Claimant's employment.

128 Having conducted an ongoing search, therefore, there were no suitable alternative vacancies for the Claimant either at her current location or elsewhere at the Respondent.

129 The second medical capability meeting took place on 1 February 2016.

130 At the meeting, Ms Michelli explained that they had tried to find a suitable position for the Claimant within the Respondent but that there were no vacancies that would be suitable for her given her medical conditions.

131 At no point during this meeting did either the Claimant or her representative, Mr Murray, say that there were any other duties which the Claimant could do apart from the till work or that it was unreasonable, in the light of the fact that the Claimant could only do till work duties and there was no alternative employment, to terminate the Claimant's employment by reason of medical capability.

132 Ms Michelli informed the Claimant that, therefore, the decision was to terminate her employment due to medical capability.

133 Reference was made at the meeting to the terms of the Claimant's departure. As is evident from the subsequent documents, there was clearly some confusion as to what was said or intended by Ms Michelli in this respect. Ms Michelli's evidence was that at no point did she advise the Claimant that the Respondent would be providing her with a sum as a gesture for her service; and that, whilst it was acknowledged that the Claimant would be entitled to her 12 weeks' notice (with the option not to work it and have it paid in lieu of notice, which was an unusual gesture over and beyond what the Respondent normally offers in the light of the margins in its business) and holiday pay, there was nothing offered beyond that. There was some reference in the notes of the meeting to whether, back in 2012, the Respondent should have referred the Claimant to Occupational Health, which appears to have been a reason given by Mr Murray as the basis for perhaps making a payment over and above notice pay to the Claimant. Certainly Mr Murray asked Ms Michelli if they could put together "a package" (as the minutes of the meeting record). The minutes go on to state that Ms Michelli said that "she will put together a package after speaking with HR and will let them know". It is not clear who produced the notes of the meeting and what is meant by the words "package". However, Ms Michelli did not have the authority to authorise a settlement agreement over and

above notice pay (and such agreements are virtually never entered into by the Respondent) and her evidence at this Tribunal was consistent, that whilst she did talk about notice pay and holiday pay and getting the details from HR, she did not offer anything over and above that. Mr Murray was not at the Tribunal to give evidence. Therefore, in the light of our findings regarding reliability of evidence above, and notwithstanding the reference to "package" in the minutes, we accept Ms Michelli's evidence and find that she did not say that she would provide a settlement package over and above notice pay and holiday pay.

134 Mr Michelli's decision was recorded in a letter of 15 February 2016 to the Claimant. It explained that any right of appeal would be to Ms Shinner within 7 days.

135 By letter of 17 February 2016, the Claimant wrote to Ms Shinner. The letter included the following:-

> "Agreed that the company had been informed of my medical condition in 2012 and that there has been a problem of communicating this information to my line managers subsequently.
>
> It was clearly stated at the last meeting on 1st February 2016 that if the company decided to terminate my employment that any termination package would recognise this position and I would receive a payment in recognition of this. This was stated in front of my trade union representative. So that I can fully consider whether, I wish to appeal the decision to terminate my contract with you.
>
> Please clarify the payment I will receive when my employment is terminated. I would particularly appreciate clarification on any additional payment in addition to payment for any notice period. …"

136 There is no mention in this letter of any suggestion that the decision to terminate employment is unfair or that the Claimant could do other work apart from till work.

137 As Ms Shinner did not know the context of this, she spoke to Ms Michelli about this letter. Ms Michelli explained to her that she had discussed with the Claimant that she would have a 12 week notice period due to her length of service but if the Claimant wanted it could be agreed that she would receive this in lieu rather than being required to work it and denied providing any assurance that an additional sum would be given and stated that in addition to notice pay she will of course be provided with any holiday pay that she had accrued. Ms Shinner explained this in her response to the Claimant of 23 February 2016 and asked if she wished to appeal.

138 The Claimant appealed by letter of 25 February 2016. The only ground of appeal given in that short letter was:-

> "It was clearly stated that my medical conditions and the failure of managers to pass on information about it to relevant managers would be taken into account in any termination payment."

139 There was no reference to the decision to terminate employment being unfair or to the Claimant being able to do other work apart from till work.

140 The appeal meeting took place on 3 March 2016 before Ms Shinner. The Claimant attended with Mr Murray. Prior to the meeting, Mr Murray came to Ms Shinner and said that they did not have a problem with "medical termination" but would like Ms Shinner to think about a payment.

141 The subsequent appeal meeting was predominantly about Mr Murray seeking a payment for the Claimant. Whilst Ms Shinner was very much aware that the Respondent virtually never offered payments in excess of notice pay, she nonetheless asked them what it was that they were seeking. Mr Murray said that the Claimant wanted time to think about the figure. Ms Shinner asked if she could come back to her with that figure and she said that she would do so the following week.

142 The Claimant duly came back and suggested a payment of two years' pay to Ms Shinner. The Respondent was not prepared to accept this. Ms Shinner turned down the appeal by letter of 9 March 2016.

143 Notwithstanding the Respondent's offer, the Claimant nonetheless elected to work her notice period.

144 The Claimant maintains that on 4 April 2016 Ms Madhavan told her that six customers had complained about her; that she asked if there was any evidence of complaints; and that Ms Madhavan did not show her evidence of the complaints.

145 Ms Madhavan's evidence in cross examination was that these complaints did occur and that she told the Claimant about them; that she did not show her any evidence as the complaints were verbal and she spoke to the Claimant immediately after the complaints were made; that, because the Claimant was good at her job and complaints were therefore rare, when she did receive these complaints, she was concerned; and that, therefore, she went to address them with her at that point.

146 There is in fact, very little discrepancy between these two accounts, although Ms Madhavan's is a little fuller than the Claimant's and we accept it.

147 The Claimant maintains that on 7 April 2016, the last day before the Easter holiday, after she and Ms Madhavan had finished cashing up in the office, Ms Madhavan closed the door and told her again that six customers had complained and that she should not come back to work after the Easter holiday.

148 Ms Madhavan denies this.

149 For the reasons of respective reliability of evidence referred to above, we accept Ms Madhavan's evidence. It should also be noted that there was no obligation on the Claimant to come back to work in any event as the Respondent had already offered her the opportunity to be paid in lieu of notice rather than work her notice.

150 On 10 May 2016, the Claimant's notice period expired and her employment terminated with effect from that date.

Conclusions on the Issues

151 We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Jurisdiction

152 There remains the question, in relation to the discrimination complaints, of whether it is just and equitable to extend time (as all of the complaints, it is acknowledged, were presented out of time).

153 In time terms, the various discrimination complaints fall into two tranches. Firstly, there are the early complaints which are said to relate to 2012 and one complaint in 2013. Thereafter, there is a large gap until the next complaint, which is said to arise in October 2015, and all of the remaining complaints take place over a self contained period from October 2015 through to May 2016. Furthermore, the bulk of this hearing was concerned with evidence relating to the latter tranche of complaints and witness evidence was called by the Respondents which covered all of those complaints. By contrast, the Respondents did not bring any witness evidence relating to the earlier tranche of complaints, in part because relevant managers had long since left the Respondent and could not be traced.

154 In relation to the latter tranche of complaints, we consider that, given that the last of these was only out of time because of the Claimant's solicitors understanding of the law in the pre-Garau era, it would not be just and equitable not to allow that last complaint (relating to the dismissal on 10 May 2016) to be heard, for the reasons given earlier in our initial assessment of jurisdiction. Furthermore, all of the other complaints from October 2015 onwards would, were that complaint of 10 May 2016 to have been in time and were it to have been successful, as alleged, a continuing course of conduct over that period, with the same individuals, Ms Madhavan, Ms Michelli and Ms Shinner, involved. The Respondent was fully prepared to defend the case in relation to these complaints. For these reasons we consider it would be just and equitable to extend time in relation to these complaints and to hear them.

155 By contrast, we do not consider it would be just and equitable to extend time in relation to the complaints from 2012 and 2013. Firstly, there is a large gap

between them and the later complaints so that we do not consider that they could form a continuing act for the purposes of the statute, and the managers involved were different. Secondly, the Claimant has offered no reason (other than a generalised assertion that she was too concerned about her job to bring those complaints at the time, which we do not consider to be a credible reason, given that she was happy to raise her perceived issues regarding Ms Madhavan when they arose) as to why she did not bring a claim in relation to the 2012/2013 complaints at the time. Finally, and most importantly, there would be huge prejudice to the Respondent if these complaints were heard. As noted, the Respondent has been unable to bring the witnesses to defend these complaints and there was therefore very little evidence about them.

156 Therefore, the Tribunal does not have jurisdiction to hear those complaints and they are struck out. To be clear those complaints are: the allegations in the claim form at paragraphs 6, 7, 8 and 9 (variously brought as allegations of direct discrimination, discrimination arising from disability and harassment); for the purposes of the indirect discrimination complaints, the PCPs of "the requirement to carry out extra duties at paragraph 5" and "changing the Claimant's original role to a "barista" role at paragraph 7"; and, for the purposes of the reasonable adjustments complaints, the alleged PCP of "permanently altering the Claimant's original job role to "barista"".

Direct Discrimination/Discrimination Arising from Disability/Harassment

157 Many of the allegations set out in the claim are brought under all three of these headings and we consider them under all three headings in chronological order below. Before doing so, we consider whether or not the three alleged consequences of the Claimant's disability (for the purposes of the discrimination arising from disability complaints) set out at issue 9 of the list of issues were in fact consequences of the Claimant's disabilities of Autoimmune Inflammatory Arthritis and Reynaud's Syndrome.

158 The first alleged consequence was "low/slow input". Whilst we might imagine that this could be a possible consequence of the Claimant's disabilities, we have not heard any evidence that this was indeed a consequence of the Claimant's disabilities and therefore, for these purposes, we find that it was not.

159 As to the second alleged consequence, "inability to take on increased duties", we have seen a great deal of evidence of the difficulty that the Claimant had in doing many duties in consequence of her disabilities. Therefore, she would have difficulty in taking on increased duties in consequence of her disabilities and this is therefore a consequence of her disabilities. (As a matter of fact, however, we have not found that the Claimant was ever required to take on increased duties over the period from October 2015 onwards which is the focus of these complaints.)

160 The third alleged consequence, "difficulties lifting, carrying and gripping items" is made out. There is an abundance of evidence, set out in our findings of fact, not least of all the Occupational Health Report, that the Claimant had difficulties lifting, carrying and gripping items and that these were in consequence of her disability.

161 Having made these findings, we turn to each of the individual allegations in turn.

19 October 2015, No Adjustments Made to the Claimant's Role (ET1 Para 11)

162 As we have found, as soon as Ms Madhavan was given the letter from the Consultant by the Claimant in late September 2015, she discussed with the Claimant what she could and could not do and what adjustments needed to be made. She continued this process further following the second letter with the risk assessment and then later as a result of the Occupational Health Report. The Respondent did therefore make adjustments to the Claimant's role and this allegation is not made out. These complaints of direct discrimination, discrimination arising from disability and harassment therefore fail.

4/5/6 November 2015, Ms Madhavan's treatment of the Claimant (ET1 para 12)

163 In relation to all of these allegations, we have found that Ms Madhavan was simply carrying out ordinary management tasks in relation to the role that she was tasked with and that she did not shout at the Claimant. She treated the Claimant as she would treat any other member of her team in those circumstances. There was, therefore, no less favourable treatment and indeed no unfavourable treatment for the purposes of the discrimination arising from disability complaint and these complaints fail. Furthermore, the treatment was in no way related to the Claimant's disability and therefore the harassment complaint fails.

10 November 2015, Ms Madhavan asking the Claimant to check stock etc (ET1 para 13)

164 Again, in relation to this issue regarding stock and ketchup sachets, Ms Madhavan was in accordance with her mandate simply making a reasonable management request of the Claimant. There was therefore no less favourable treatment of the Claimant and indeed no unfavourable treatment for the purposes of the discrimination arising from disability complaint and these complaints both fail. Ms Madhavan would have made the same request to another non disabled employee in the same circumstances. Furthermore, as the treatment was in no way related to the Claimant's disability, the harassment complaint also fails.

11 November 2015, Ms Madhavan shouting at the Claimant in front of customers (ET1 para 14 and 15)

165 We have found that Ms Madhavan did not shout at the Claimant in front of customers or at all. Therefore, the allegation in this complaint is not made out. There was no less favourable or unfavourable treatment of the Claimant and the direct discrimination and discrimination arising from disability complaints therefore fail and there was no unwanted conduct nor, to the extent that there was, was it related to the Claimant's disability, so the harassment complaint also fails.

12 November 2015, the Claimant accused of being argumentative etc (ET1 para 16)

166 As we have found, the Claimant was not accused of being argumentative by Ms Madhavan. Rather, the Claimant was involved in an incident with a customer and Ms Madhavan sought to sort the situation out in a proportionate and reasonable manner, which she did. The allegation is therefore not made out and the complaints of direct discrimination, discrimination arising from disability and harassment fail.

11 December 2015 Following meeting with Claimant, Ms Michelli takes no action against Ms Madhavan and the bullying continued … (ET1 para 19)

167 It is not correct that, following the meeting which Ms Michelli had with the Claimant, at which she explained the complaints which she had already made to the Occupational Health doctor regarding her alleged treatment at the hands of Ms Madhavan, that Ms Michelli did not take any further action. She told the Claimant that she would speak to Ms Madhavan about how she spoke to the Claimant and she did so. It is true that she took no specific disciplinary action against Ms Madhavan but, in the circumstances, that was an entirely reasonable decision and Ms Michelli concluded not unreasonably that there was just a clash of personalities. Furthermore, we have not found that there was any bullying prior to this meeting and we have also found that there was no bullying by Ms Madhavan afterwards either; therefore the allegation that "the bullying continued" is also not made out. As the alleged treatment is not made out, the complaints of direct discrimination, discrimination arising from disability and harassment all fail. Even if they had been made out, the reason why Ms Michelli took action only to the extent that she did against Ms Madhavan was because it was appropriate in accordance with the circumstances of the situation; there is no evidence that it was anything whatsoever to do with the Claimant's disability or anything arising in consequence of it.

15 December 2015, Claimant given a letter inviting her to attend medical capability hearing … (ET1 para 21)

168 The Claimant was given a letter on 15 December 2015 inviting her to attend a medical capability hearing, which duly took place on 18 January 2016.

169 As far as the direct discrimination complaint goes, this letter was not sent specifically "because of" the Claimant's disability, it was sent because the Claimant was unable fully to do her job. The direct discrimination complaint therefore fails.

170 As to discrimination arising from disability, the Claimant was invited to the meeting in consequence of her inability fully to do her job because of her difficulties in lifting, carrying and gripping items. A medical capability hearing, which can lead to dismissal, can certainly amount to unfavourable treatment. That treatment was therefore in consequence of the Claimant's disability.

171 Turning to the question of justification, the Respondent relies on the aim of maintaining a profitable and viable business as keeping employees on the payroll when they cannot work or can only work significantly less productively is not a sustainable business model. It has not been suggested that this is not a legitimate aim and we find that it is. Furthermore, the Respondent relies on the aim of having consistency in approach to capability management, an aim which seeks to ensure fairness, which we also accept. As to proportionality, so long as the medical capability procedure is carried out consistently and fairly, which for reasons which we come to, it was in this case, the matter will have been carried out proportionality. We therefore find that the justification defence is made out and that the discrimination arising from disability complaint fails.

172 As to the harassment complaint, being invited to a capability hearing can be described as unwanted conduct and, in the sense that, but for the Claimant's disability she would not have been invited to such a hearing, the treatment can be said to be related to the Claimant's disability. However, the invitation to the meeting was under the Respondent's procedures and was fair and reasonable. In no sense do we consider it could either have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Indeed, it has not been submitted to us that it did. The harassment complaint therefore fails.

1 February 2016, the Claimant was required to attend her second medical capability hearing (ET1 para 22)

173 The issues hear are the same as in relation to the issue above and we repeat our conclusions here. These direct discrimination, discrimination arising from disability and harassment complaints therefore fail.

16 February 2016, the Claimant was dismissed on 12 weeks' notice for not being "fit to perform the general assistant duties in the kitchen", a position she had not worked in since 2012 (ET1 para 23)

174 Firstly, although this is the way the allegation is pleaded in the claim form, the issue about her job title is entirely irrelevant to the complaints. It appears that the job titles changed back on 2012. However, the Claimant was certainly dismissed on 12 weeks' notice on the grounds of medical incapacity, in that she could not perform the majority of duties of her job.

175 However, in relation to direct discrimination, the dismissal was because the Claimant could not do her job and not because of her disability. Therefore, the direct discrimination complaint fails.

176 As to discrimination arising from disability, the Claimant had difficulties lifting, carrying and gripping items which stopped her doing her job fully and this was in consequence of her disability; therefore the unfavourable treatment of dismissal was because of something arising in consequence of her disability. However, we repeat the findings that we have made in relation to the justification defence above and, for those reasons, this discrimination arising from disability complaint fails.

177 As to harassment, the dismissal was unwanted conduct and, in as much as it came about as a result of her inability to do her job because of her disability, it was related to disability. However, in no sense was it done with a purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, nor has this been submitted to us. The harassment complaint therefore fails.

9 March 2016, the Respondent rejected the Claimant's appeal (ET1 para 26)

178 The Respondent rejected the Claimant's appeal because it was not willing to accede to her request for an additional termination payment. It did not do so because of her disability and therefore the direct discrimination complaint fails. Furthermore, it did not do so because of her inability fully to carry out her job and therefore did not do so because of something arising in consequence of her disabilities; therefore the discrimination arising from disability complaint also fails. Furthermore, the decision to reject the appeal was not related to the Claimant's disability; rather it was about the issue of a termination payment. Therefore the harassment complaint also fails.

4 April 2016, Ms Madhavan told the Claimant that six customers had complained about her … (ET1 para 27)

179 As we have found, Ms Madhavan did tell the Claimant that six customers had complained about her. However, she did so because those customers had complained and, even at this late stage in the Claimant's employment, she felt it was her duty as a manager to raise the issue with the Claimant. This

was an entirely reasonable and appropriate management decision to make. It was not because of her disability and therefore the direct disability discrimination complaint fails. Furthermore, it was not done because the Claimant had difficulties lifting, carrying or gripping items and was not therefore done because of something arising in consequence of the Claimant's disability. Therefore, the discrimination arising from disability complaint also fails. Furthermore, it was not related to her disability therefore the harassment complaint also fails.

7 April 2016, Ms Madhavan told the Claimant to stop working her notice period on a daily basis (ET1 para 28)

180 As we have found, Ms Madhavan did not tell the Claimant to stop working her notice period. Therefore, the allegation is not made out and the complaints of direct discrimination, discrimination arising from disability and harassment fail.

Indirect Disability Discrimination

181 Further to our decision in relation to jurisdiction, the only remaining PCP alleged in relation to the indirect discrimination complaint is that of initiating the Respondent's capability/dismissal procedures as set out at ET1 paras 21-23, which we have dealt with to a large extent in our conclusions above.

182 In terms of indirect discrimination, the Respondent certainly applied the PCP of applying its capability procedures. That would put those with the Claimant's disability at a particular disadvantage when compared to others because, given the limitations which the disabilities caused, it would be likely that they would not be able to perform fully the role with the result that they would be more likely to be subject to those procedures. Furthermore, the PCP actually put the Claimant at that disadvantage.

183 The question therefore is as to whether implementing the procedures was justified. Here we repeat our conclusions on justification set out above in relation to discrimination arising from disability. We therefore conclude that the application of the capability procedure was justified and the indirect disability discrimination complaint therefore fails.

Reasonable Adjustments

184 Following our decision regarding jurisdiction, three remaining alleged PCPs remain for the purposes of the reasonable adjustments complaint.

185 Firstly, the Claimant alleges there was a PCP of initiating a capability procedure. Clearly the Respondent did that.

186 Secondly, the Claimant alleges that there was a PCP of altering and increasing the Claimant's duties. However, the Respondent did not increase the Claimant's duties; by contrast, they removed various of her duties by way of making adjustments, such that ultimately she was left doing mainly till work. This PCP is not therefore made out.

187 Finally, the third alleged PCP is requiring the Claimant to carry out "general work". The Claimant was required to carry out general work, in accordance with her normal job duties, prior to her presenting Ms Madhavan with the letters from the consultant and, therefore, up until that point, that PCP was made out. Thereafter, however, Ms Madhavan implemented various adjustments such that the Claimant was no longer required to carry out "general work".

188 As to the question of substantial disadvantage, the initiation of the capability procedure did put the Claimant at a substantial disadvantage because, inevitably, someone with her disability, and the impact it had on her ability to do her work, was more likely to be subject to the capability procedure. As to the requirement to carry out general work, the Claimant would have been put at a substantial disadvantage had she been required to continue to carry out general work because her disability made it difficult for her to do all of her duties.

189 We therefore turn to the various adjustments which have been suggested should have been made and were reasonable.

190 Firstly, the Claimant submits that the capability procedure should have been modified. She has never submitted in what way the capability procedure should be modified. There has been no suggestion that the procedure should be completely disapplied in relation to her. Even if that suggestion had been made, it would not have been a reasonable adjustment. For the reasons above, it is reasonable at some point for a Respondent to implement a capability procedure in relation to employees who are unable to do fully the job that they are employed to do. In the absence of any other suggestions as to what way the capability procedure might be modified in a way that was reasonable and which would assist alleviating the disadvantage to the Claimant, we find that there was no such potential reasonable adjustment and, in relation to this suggested adjustment, the complaint fails.

191 The remaining three adjustments alleged to be reasonable adjustments are: removing duties from the Claimant that involved contact with water as well as the fridge/freezer; placing the Claimant on till duty; and employing an agency worker to work alongside the Claimant to do the tasks that she felt unable to complete. All of these adjustments were implemented following the Claimant's notifying the Respondent of the impact of her disabilities in September/October 2015. We agree that these adjustments were reasonable ones to make. However, they were made so there was no failure to make a reasonable adjustment and the reasonable adjustment complaints all therefore fail.

Victimisation

192 The protected act which the Claimant alleges and relies on for the purposes of the victimisation complaint is the conversation which the Claimant had with Ms Michelli on 11 December 2015 (incorrectly stated as being 3 December 2015 in the ET1) in which she explains some of the instances of Ms Madhavan's behaviour which she said stressed her. However, at no point does she state or allude to any of Ms Madhavan's behaviour being because of or in any way in connection with her disability. She makes complaints about things she has said to her but there is no link to anything that might be discriminatory treatment for the purposes of the Equality Act 2010. We do not therefore find, although the 11 December 2015 meeting involved her making some complaints to Ms Michelli, that she was "doing anything for the purposes of or in connection with the Equality Act 2010". There was therefore no protected act and the victimisation complaint therefore fails at this stage.

193 As to the various alleged detriments which the Claimant maintains she was subjected to because of what she said at that meeting (referred to as being paragraphs 21-23 and 26-28 of the ET1), we do not find that any of them were because of what she said at that meeting. Paragraphs 21-23, which relate to her being invited to the medical capability hearings and being dismissed, are events which happened because of her inability fully to do her job; they were not because of her complaints about Ms Madhavan. Paragraph 26, which was the rejection of the appeal, was because the Respondent was not prepared to make the payment which the Claimant wanted and was not to do with her complaints about Ms Madhavan. Ms Madhavan, in relation to paragraph 27, told her about the six customers complaining about her because she thought that it was a reasonable management action to take at the time in relation to an individual about whom complaints were rarely made; it was not because of her having made complaints about Ms Madhavan previously. Finally, we found that the allegation at paragraph 28 did not occur.

194 Therefore, even if the complaints about Ms Madhavan to Ms Michelli on 11 December 2015 had amounted to a protected act, none of the alleged detriments, to the extent that they were done at all, were done because of the Claimant making those complaints.

195 The victimisation complaints therefore fail for these reasons.

Unfair Dismissal

196 We turn first to the reason for dismissal. The Claimant was dismissed by reason of capability, in particular because she was unable fully to do her job. The evidence set out in our findings of fact above as to what the Claimant could and could not do, in particular in the risk assessment and in the Occupational Health Report, and in the Claimant's own comments in her

meeting of 11 December 2015, and in her and Mr Murray's failure to suggest in any of the capability hearings that she could do duties other than till duties, is extensive and compelling evidence that she could not do the majority of tasks associated with her job.

197 Mr Davidson has suggested a number of alternative explanations: firstly that there was a conspiracy between all of the managers involved to dismiss the Claimant and that her capability was not therefore the reason; and that Ms Madhavan in particular, because she treated the Claimant badly anyway once she had discovered she had a disability (which we have found not to be the case) was always out to get the Claimant and was out to get her because, as a new manager, she would be keen to impress and therefore to dispose of someone who had a disability. There is no evidence other than speculation and assertion for any of these theories. By contrast, all of the evidence that we have seen and accepted indicates that the reason for dismissal was capability.

198 We turn therefore to the question of reasonableness. In terms of the process which the Respondent followed, we have not found anything unreasonable. The Respondent, in the person of Ms Madhavan, as soon as she was put on notice of the Claimant's disability, took action and spoke with her manager and put in place temporary arrangements to alleviate the problems caused by the Claimant's disability. However, these were only temporary arrangements and the Respondent was in effect employing two people (the Claimant and the agency worker) to do one person's job. Furthermore, there are other reasons why keeping the Claimant permanently on till work was inefficient, because the till was not continually in use and because it was unfair on other employees, for whom till work was seen as a break from the rest of the work that they did. Following receipt of the Occupational Health Report, which, in contrast to what Mr Davidson submits, clearly indicated that the Claimant ought to do till work going forwards, the Respondent was faced with a situation where, with the current arrangements being unsustainable, it was entirely reasonable for it to start its capability procedure. This procedure is applied not just to the Claimant but to other employees in capability situations. Two meetings were arranged, the Claimant was warned of her risk of being dismissed and was told of her right to be accompanied and was indeed accompanied at both hearings by Mr Murray of Unite. Whilst there was not a huge amount of time between the two meetings, the reason for this was that nobody, including the Claimant and Mr Murray, suggested that there were any alternatives which could be put in place which would enable the Claimant to continue to work for the Respondent, given the Respondent's (reasonable) position that keeping her on till work going forward was not possible. The discussions in those meetings therefore were, as time went on, not about keeping the Claimant in work but about what payment she might receive in the event of being dismissed.

199 We refer to our findings above regarding the Respondent's search for alternative employment. We accept that it made reasonable efforts for the reasons set out above. The fact of the matter was, however, that there were

no roles where the Claimant could have been permanently doing till work and therefore there were no suitable alternative roles available. The obligation on the Respondent is to make a search for suitable alternative employment and not an obligation actually to find a job; if there is not one available, that is another matter; however, the issue is whether they make reasonable efforts to find work which we find that they did.

200 The Claimant was offered the right of an appeal, which she exercised. The appeal was not brought on the grounds of the unfairness of the dismissal, but only in relation to whether a further termination payment should be paid.

201 Mr Davidson has suggested that Ms Michelli made a promise that there would be a settlement payment and that, relying on this, the Claimant did not make any further representations about how her employment might be able to continue, only to find the rug pulled from under her feet when the Respondent went back on its promise to make such a payment. However, firstly, our findings are that there was no such promise and that all there was was a misunderstanding in terms of what Ms Michelli was referring to when in actual fact she was just talking about the payments which would be made in terms of the payment in lieu of notice clause and holiday pay. Whilst it is unfortunate if there was any confusion or misunderstanding, we are satisfied that Ms Michelli did not make a promise to this effect. It therefore follows, that if she did not make a promise, there was no pulling the rug from under the Claimant's feet at the point when the Respondent confirmed that they would not pay a payment over and above the Claimant's notice pay.

202 Furthermore, there is absolutely nothing beyond speculation to suggest that there was somehow some sort of plan on behalf of the Respondent to try and induce the Claimant not to make further representations about her ability to work by floating the possibility of a termination payment; nor is there anything beyond speculation to suggest that the Claimant would have made such further representations had she not been offered termination payments. By contrast, the contemporaneous documents are silent on this issue and, accordingly, we found that the issue of whether the Claimant could carry on her job was one which had ceased to be discussed by the second meeting, where the only issue that remained thereafter was the question of what the Claimant's entitlements were on termination. We do not, therefore, accept this theory which Mr Davidson submits.

203 The Respondent therefore acted reasonably in dismissing the Claimant and the complaint of unfair dismissal therefore fails.

Conclusion

204 Therefore, in summary, the Tribunal does not have jurisdiction to hear the complaints from 2012/2013 and the remainder of the Claimant's complaints all fail.

Employment Judge Baty
6 June 2017