Case Number: 2201980/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR S SOSKIN**
MS J GRIFFITHS

BETWEEN:

Ms A Iunes

Claimant

AND

Marks and Spencer plc

Respondent

ON: **12, 13, 14, 18, 19 and 20 December 2018**
IN CHAMBERS ON: **21 December 2018 and 3 and 4 January 2019**

Appearances:
For the Claimant: **Mr J Coutts, lay representative**
For the Respondent: **Ms R Thomas, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim for wrongful dismissal for notice pay is dismissed upon withdrawal.
2. The claims for sex discrimination, religious discrimination, age discrimination, disability harassment and discrimination arising from disability fail and are dismissed.
3. The claim for unfair dismissal succeeds.
4. The claim for disability discrimination for failure to make reasonable adjustments succeeds on one issue (the third reasonable adjustment issue).

REASONS

1. By a claim form presented on 12 April 2018 the claimant Ms Angela Iunes brought claims which from the ET1 were difficult to discern save that it was clear that she claimed unfair dismissal. She was ordered to state whether

she brought a discrimination claim, if so what type and how this was apparent from her claim form.

2. It was clarified that the claim was for discrimination on grounds of age, sex, disability and religion.

3. The claimant worked for the respondent's retail store from 5 December 2010 until her dismissal on 21 November 2017. From 4 July 2016 until her dismissal she worked as a customer assistant in the Bureau de Change in the respondent's Fenchurch Street store.

The procedural background

4. The case has been the subject of two preliminary hearings for case management, both before Employment Judge Snelson. The first was on 2 August 2018 and the second on 11 October 2018. At the first preliminary hearing the claimant was represented by a solicitor acting under the ELIPS scheme and at the second preliminary hearing, by counsel acting under the ELIPS scheme. The claimant has otherwise acted in person.

5. At the first hearing Judge Snelson made orders that the claimant produce a schedule identifying all the acts and omissions relied upon for her discrimination claims other than for direct disability discrimination. She was also to deliver a schedule setting out full particulars of her harassment claims and a separate schedule setting out her disability discrimination claims.

6. Orders were also made on 2 August 2018 for the claimant to disclose medical records and a disability impact statement so that the respondent could say whether or not disability remained in issue.

7. On 13 September 2018 the respondent admitted that "*at this point in time*", understood to mean in September 2018, they admitted that the claimant had a disability within the meaning of section 6 of the Equality Act. The respondent did not admit that the claimant was disabled at all material times within these proceedings. They did not say which condition was admitted.

8. The respondent applied for the second preliminary hearing because it could not fully understand the case it had to meet. Respondent said that the claimant had not fully complied with the orders made at the first preliminary hearing. Further orders were made at the preliminary hearing on 11 October 2018 requiring the claimant to produce schedules of her harassment and direct discrimination claims and her disability discrimination claims. The hearing was deliberately listed on a Thursday so that the claimant could receive assistance under the ELIPS scheme.

9. It was ordered that the schedules to be produced would stand as joint pleadings and there was no need for further amendment. This hearing is confined to liability only.

The issues

Disability

10. Was the claimant a disabled person within the meaning of section 6 of the Equality Act 2010 at all material times, with the condition of depression which led to auto immune disease? The respondent said at the outset of this hearing that it admits that as at September 2018 the claimant met the definition of disability for depression but denies this in relation to the material times. No admission is made in respect of auto immune disease. The respondent disputes that the claimant's condition of depression had a substantial adverse effect on her ability to carry out normal day to day activities.

11. The disability claims are for disability related harassment, discrimination arising from disability and failure to make reasonable adjustments. There are eight allegations relied upon in the claimant's disability discrimination schedule. From the schedule we identified the claims as being:

Failure to make reasonable adjustments – EqA sections 20 and 21

12. Did the respondent not know and could it not reasonably have been expected to know the material time that the claimant was a disabled person?

13. First reasonable adjustments issue: Did the respondent apply a provision, criterion or practice (PCP) of having a manager make a call to an employee on sick leave every week?

14. Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that it worsened her depression? The period during which this is alleged to have taken place is in May, June and July 2017.

15. If so did the respondent know could reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

16. If so, were there steps that were not taken which could have been taken by the respondent to avoid such disadvantage, the burden of proof does not lie on the claimant but she contends that it would have been a reasonable adjustment to allow her to call in on her own initiative.

17. Second reasonable adjustments issue: Did the respondent apply a provision, criterion or practice (PCP) of requiring employees to work at till points where they had to stand for prolonged periods?

18. Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that it was physically difficult for her because of her autoimmune disease, diagnosed in July 2017, in that it caused pain and swelling in her legs

worsened by standing? The date on which this is alleged to have taken place is on 7 August 2017.

19. If so did the respondent know could reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

20. If so, were there steps which were not taken that could have been taken by the respondent to avoid such disadvantage, the burden of proof does not lie on the claimant but she contends that it would have been a reasonable adjustment to moderate or avoid some requirements.

21. Third reasonable adjustments issue: Did the respondent apply a provision, criterion or practice (PCP) of ignoring OH recommendations and having HR with employees in meetings?

22. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The substantial disadvantage was not set out. The date on which this is alleged to started place is from 11 July 2017 onwards.

23. If so did the respondent know could reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

24. If so, were there steps that were not taken which could have been taken by the respondent to avoid such disadvantage either by complying with the recommendations of OH.

25. Fourth reasonable adjustments issue: Did the respondent apply a provision, criterion or practice (PCP) of refusing a rehabilitation period once an employee has used up all their sick leave thus requiring employees to work full contractual days and placing a limit on sick leave entitlement?

26. Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that she had to attend frequent medical appointments and had to use her holiday allowance to do so. The date on which this is alleged to have taken place is from 25 August 2017 onwards.

27. If so did the respondent know could reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

28. If so, were there steps that were not taken which could have been taken by the respondent to avoid such disadvantage, the burden of proof does not lie on the claimant but she contends that it would have been a reasonable adjustment to allow her to take paid or unpaid leave and/or to give flexibility with shift hours to allow her to attend medical appointments.

29. Fifth reasonable adjustments issue: Did the respondent apply a provision, criterion or practice (PCP) of requiring that the bureau de change is never left unattended?

30. Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that her depression made it more difficult for her to stay in the bureau alone for long periods without her symptoms worsening? The date on which this is alleged to have taken place is on 20 November 2017.

31. If so did the respondent know or could reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

32. If so, were there steps that were not taken which could have been taken by the respondent to avoid such disadvantage, the burden of proof does not lie on the claimant but she contends that it would have been a reasonable adjustment not to have dismissed her for leaving the bureau unattended.

33. Sixth reasonable adjustments issue: the matters relied upon for the dismissal are also relied upon for the appeal against dismissal which took place on 31 December 2017.

Disability related harassment – EqA section 26

34. Allegation 1: Did the respondent engage in unwanted conduct in August 2017 by store manager Ms Angela Barker telling her that her depression was her fault because she took M&S punishments too seriously?

35. If so, did that conduct relate to her disability?

36. Allegation 2: Did the respondent engage in unwanted conduct on 17 October 2017 by Ms Suzanne Field reprimanding her for leaving the bureau unattended and telling her that she could not have special treatment? The claimant's case is that she had been given permission in August 2017 from her line manager Ms Jane Siduna that it was a reasonable adjustment for her depression that she could leave the bureau for short periods provided she informed floor staff so that they could monitor the bureau.

37. If so, did that conduct relate to her disability?

38. Did the conduct relied upon have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Discrimination arising from disability – EqA section 15

39. Did the respondent treat the claimant unfavourably as follows:

    i. On 17 October 2017 by Ms Suzanne Field, commercial manager, reprimanding her for leaving the bureau unattended and telling her that she could not have special treatment?

ii. On 20 November 2017 Mr Joseph Marshall dismissing her for leaving the bureau unattended?
iii. On 31 December 2017 Mr Timothy Rumble, HR support manager, dismissing her appeal against dismissal?

40. If so, was that unfavourable treatment because of something arising in consequence of her disability? What arises from the claimant's condition was said to be her need to leave the bureau unattended.

41. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

42. Alternatively, has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had a disability?

Unfair dismissal

43. What was the principal reason for dismissal and was it a potentially fair reason under section 98(1) and (2) of the Employment Rights Act 1996? The respondent's case is that it was a reason related to the claimant's conduct which is a potentially fair reason under section 98(2)(b).

44. Was the dismissal fair or unfair in accordance with section 98(4) and did the respondent act within the band of reasonable responses?

45. If the claimant's dismissal was unfair, did she contribute to her dismissal by culpable or blameworthy conduct?

Wrongful dismissal

46. Was the claimant dismissed without notice? The respondent's case is that she was paid six weeks' notice on termination of employment. The claimant accepts that she was paid her notice pay. The claimant said that wrongful dismissal was not pursued. It was withdrawn.

Direct discrimination or harassment

47. The claimant relies upon 15 allegations as either direct discrimination or harassment. By reason of section 212(5) Equality Act 2010, direct discrimination and harassment are mutually exclusive so that if the conduct is proven, it must be found to be either harassment or direct discrimination but not both.

48. All 15 allegations are relied upon as either direct sex discrimination or harassment related to sex.

49. Allegations (v), (vi), (viii), (xii), (xiii), (xiv) and (xv) are relied upon as direct age discrimination or harassment. In relation to age discrimination the claimant relies upon being over 60.

50. Allegation (x) and (xi) are also relied upon as either direct discrimination because of religion or belief or as religious harassment. The claimant told us on day 1 that she is Catholic Christian.

51. The allegations are set out below with the name of the comparator (or if hypothetical) so far as the claim is for direct discrimination:

    i. November/December 2016 Mr M Patel, customer assistant, hiding the paperwork that the claimant needed at the handover from his shift to the claimant's shift, including the interim balance sheet. Comparator: hypothetical.
    ii. December 2016 Mr Patel making an unfounded complaint to Ms Susan Smith, the claimant's coordinator, about a draft interim balance the claimant had drawn up. The claimant says the document was purely for her own use and not intended to be put on record. Comparator: hypothetical.
    iii. 5 December 2016 by Ms Maria Halkon and Mr Andrew Dowty: On 11 November 2016 the claimant made an innocent counting mistake and reported it to Ms Halkon who told her that she needed to be more attentive. Ms Halkon gave the claimant the impression the matter would not be taking any further. On the claimant's return from holiday on 5 December 2016 Ms Halkon called her to an investigatory meeting without prior warning and gave her an informal written warning for the error. Ms Halkon told the claimant she had been told by management which the claimant understood to mean Mr Dowty to do this. Comparator: Mr M Patel who is said to have made such an error in early 2017 and that he was not investigated or given any warning.
    iv. On 5 December 2016 Ms Halkon and Mr Dowty - the claimant explaining to Ms Halkon that her counting error resulted from aggressive behaviour by Darren Phillips which had distracted her. The comparator is Darren Phillips who was not investigated or warned for his contribution to the claimant's mistake. Comparator: hypothetical and Darren Phillips.
    v. December 2016 – when the claimant pointed out that Mr Dowty was in breach of procedure by taking delivery of a large sum of cash during working hours he allegedly responded by telling her "*I am the manager, next time you come in earlier do the delivery yourself*". The claimant's case is that he was very cordial with other colleagues including Lorraine Conroy, Rani Matharu and a male colleague named Owen Lewis. Comparators: Lorraine Conroy, Rani Matharu and Owen Lewis.
    vi. December 2016 until dismissal – The claimant's case is that at least once a week, whenever there was a shortfall in daily accounts, Mr Dowty blamed the claimant for any counting and recounting mistakes made over the previous day whether or not they have been made during her shift. She says he would regularly threaten to investigate her including just before she went on holiday in May 2017. Her comparators are Lorraine Conroy, Jacqueline (Jackie) Smith, M Patel and Darren Phillips, none of whom were criticised or threatened

with investigation. Comparators: Lorraine Conroy, Jackie Smith, Darren Phillips and M Patel.

vii. 27 January 2017 Mr M Patel writing a note saying that the claimant was "*a bitch who should f*** off".* Comparator: hypothetical.

viii. In February 2017 claimant says that Mr Dowty called her to the shop floor and told her that she had to work with Mr Patel again and accept his apology. Mr Dowty is alleged to have refused to help her when she repeatedly told him that the situation with Mr Patel's worsening her health. Her comparator is Mr Patel who was only given informal written warning for his offensive note. Comparator: hypothetical.

ix. In February2017, two or three days after the incident relied upon above, Mr Patel is alleged to have arrived for his first shift back from two weeks leave signing his name on the interim balance sheet in very large letters in order to impress the claimant that he was back. Comparator: hypothetical.

x. 21 February 2017 guard Mr Kashif Ilyas refusing instructions to guard the bureau when it had a broken lock. He is alleged to have been shouting and waving his arms aggressively at the claimant. This is put as direct sex and religious discrimination and harassment. Comparator: hypothetical.

xi. 24 February 2017 - Mr Ilyas (above) and operational assistant Mr Yusuf Ahmed preparing colluded statements falsely claiming that the claimant had said in front of Mr Ilyas "*Oh Allah, he thinks that he is Allah*". The claimant's case is what she actually said was "*oh my God, he thinks he's God"*. Comparator: hypothetical and Mr Kashif Ilyas.

xii. 27 March 2017 Ms Monique Joseph, section manager and Mr Dowty – the allegation is that Ms Joseph acting on Mr Dowty's instructions, gave the claimant a final written warning for making offensive comments in front of Mr Ilyas and Muslim colleague. The letter did not specify what the allegedly offensive comment was and the punishment was unjustified in the circumstances. The claimant's comparator was Mr Patel whom she says was not given any formal warning for his offensive note. Comparator: hypothetical for age discrimination and Mr Patel and Mr Ilyas for sex discrimination.

xiii. 9 May 2017 Mr Matthew Frith, commercial manager and Mr Dowty. The claimant relies upon the final written warning being upheld on appeal by Mr Frith and given to her by Mr Dowty 40 minutes before she went on holiday. Comparator: hypothetical for age discrimination and Mr Dowty for sex discrimination.

xiv. February and March 2017, Mr Dowty and Ms Halkon. The claimant relies upon this how can calling her to say that she would not be paid for sickness absence and finding out that Ms Halkon had been hiding her medical certificates and recording this is unpaid sick leave. Ms Halkon later told the claimant that she was doing this because she was told to do so by management, implying it was Mr Dowty. Comparator: hypothetical.

xv. 27 March 2017 to 7 August 2017 Mr Dowty advertising the claimant's job as a vacancy on the staff notice board and possibly in other places while the claimant was on sick leave in an attempt to replace

her. On the claimant's return from sick leave a new permanent member of staff was in place on her shift. Comparator: hypothetical.

52. In relation to each allegation, for the purposes of direct discrimination the issue for the tribunal is whether the respondent subjected the claimant to the treatment and whether it was less favourable treatment than the respondent would have treated comparators in not materially different circumstances?

53. In each case the issue for the tribunal on direct discrimination is whether the less favourable treatment was because of any of the protected characteristics relied upon, namely gender, age or religion as specified?

54. For allegations (v), (vi), (viii), (xii), (xiii), (xiv) and (xv), relied upon as direct age discrimination, if the treatment is proven, was it a proportionate means of achieving a legitimate aim?

55. In each case the issue for the tribunal on harassment is whether the unwanted conduct was related to the protected characteristic relied upon?

56. For harassment it is also an issue as to whether the conduct relied upon had the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Time point

57. The claim form was presented on12 April 2018. Accordingly and bearing in mind the effects of ACAS Early Conciliation, acts or omissions relied upon by the claimant may potentially be out of time, so that the tribunal may not have jurisdiction.

58. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

59. Was any complaint presented within such other period as the Tribunal considers just and equitable?

Witnesses and documents

60. For the claimant the tribunal heard from 3 witnesses: (i) the claimant (ii) Mr Ian Darby, her BIG (Business Involvement Group) representative and subsequently workplace companion, and (iii) Ms Lorraine Conroy who works at the Fenchurch Street store.

61. We also had a statement on the claimant's side from Ms Lamija Berbic, who worked with the claimant at the respondent's White City store before the

claimant joined Fenchurch Street. Ms Berbic did not attend this hearing. We were told on day 2 that she had been ambulanced to hospital. We did not see any medical evidence.

62. For the respondent the tribunal heard from 8 witnesses:

    i. Ms Monique Joseph, the disciplinary officer on the comment to the security guard.
    ii. Mr Matthew Frith, appeal officer on the comment to the security guard.
    iii. Ms Jane Siduna, section manager and in August 2017 claimant's line manager.
    iv. Ms Angela Barker, store manager, Fenchurch Street.
    v. Mr Andrew Dowty, at the relevant time the Finance and Operations Manager. He is no longer in the respondent's employment.
    vi. Ms Jacynta Sholay, investigating officer into the disciplinary allegation leading to dismissal.
    vii. Mr Joseph Marshall, the dismissing officer.
    viii. Mr Timothy Rumble, the appeal officer on the decision to dismiss

63. We had a statement from the respondent from Ms Suzanne Field, a commercial manager at the Fenchurch Street store. The respondent was unable to call Ms Field because she was unwell. The tribunal was shown the medical certificate which covered the period of this hearing. For confidentiality reasons the certificate was not shown to the claimant but we confirmed that we had seen it and we were satisfied that it covered the period of the hearing. We were asked to read the statement and to attach as much weight to it as we considered appropriate.

64. There was a bundle of documents contained in 2 lever arch files of around 700 pages. There were further supplementary documents handed in during the hearing.

65. We had a cast list, a chronology which was largely agreed, a suggested reading list and list of issues from the respondent. The tribunal had gleaned the list of issues from the claimant's Scott schedules and confirmed the issues with the parties at the outset of the hearing. The claimant added some further pages for the suggested reading list.

66. We had written submissions from both parties to which they spoke plus a bundle of authorities from the respondent. All submissions and authorities referred to were fully considered, even if not expressly referred to below.

67. The claimant wished to rely on some typed out text messages between the claimant and a Ms Traynor who worked in the bureau at the respondent's White City store. The claimant said that Ms Traynor had not been permitted to attend this hearing. The respondent said she was an HSBC employee and not an employee of the respondent. We noted that there had been no application for a witness order and the claimant had received help from lawyers within the ELIPS service at both preliminary hearings and had seen the CAB (statement paragraph 18). No reference was made in the

claimant's witness statement to these messages.

Findings of fact

68. The claimant worked for the respondent from 5 December 2010 and was dismissed for misconduct on 20 November 2017. Her job role from 4 July 2016 was as a customer assistant, primarily in the bureau de change, referred to as "the bureau" in the Fenchurch Street store. From time to time the claimant also assisted on tills. Customer assistants are trained to work anywhere in the respondent's store although there was an extra level of training required for bureau assistants. We also find that English is not the claimant's first language.

69. The claimant worked at customer assistant role which is at Reward level A. These employees report to section managers who are at Reward level B and they report to manager at Reward level C. Section managers deal with managing employees' absences and performance.

Disability

70. The claimant's evidence in her disability impact statement was that depression started in September/October 2016 as she was being harassed by colleagues. This did not match with the OH report (page 329) where the claimant told the OH adviser that she had a history of depression which had been under control since a "recent episode". The OH assessment took place on 11 July 2017. The GP letters that we also saw in the bundle said (598 and 609) referred to recurrent depression first diagnosed in 1994.

71. In her impact statement the claimant said that she was prescribed antidepressants in November 2016 and the dose was increased in February 2017. She described her symptoms as tiredness, sadness, insomnia, mood swings and then from February 2017 panic attacks and suicidal thoughts.

72. The claimant said that by May 2017 her depression was at its worst and she ascribed physical symptoms to her depression such as joint swelling and stiff joints and having difficulty getting out of bed, standing or moving. She said she started falling over and needed to walk with a stick. She says her antidepressant medication was further increased.

73. Amongst the effects upon her the claimant could not go out alone (May 2017), in June 2017 she was finding it impossible to sleep, in July 2017 she said she was housebound and bedbound. In August 2017 she was exhausted all the time. By November 2017 she was having panic attacks, crying and could not go out alone. We find that the condition had a substantial adverse effect upon her ability to carry out normal day to day activities such as going out alone, sleeping properly and when bedbound we find that this affects most day to day activities. The claimant did not tell us what the effect upon her would have been had she not been on medication. We can only find that her condition would have been much worse.

74. The claimant's evidence in her impact statement was that in June 2017 she "*found [she] had been suffering with autoimmune disease, a side-effect of depression".* The claimant accepted in oral evidence before the tribunal that she was not diagnosed with this condition until late July 2017 and prior to her diagnosis she did not even know herself that she had this condition.

75. The claimant also described having Chronic Obstructive Pulmonary Disorder (COPD) but this was not relied upon as a disability in these proceedings. She also referred to taking chemotherapy medication but does not rely on cancer as a disability. The claimant also described being diagnosed with carpal tunnel in June 2018. This was post dismissal. She said "*I'm struggling to cope with this as well as all the other ailments*". She said that back pain began in July 2018. It is clear from the claimant's evidence that she has a large number of difficult medical conditions. The task for us is to focus upon the conditions upon which she relies for the purposes of these proceedings, namely depression and auto immune disease. A letter from her GP dated 25 November 2016 page 598 confirmed that the claimant has a number of ongoing medical issues. The only conditions relied upon for the purposes of this claim were depression and auto-immune disease. We will make further findings as necessary below as to what the respondent knew and when.

76. A GP letter dated 20 March 2018 described the claimant's current symptoms related to depression. It did not describe the symptoms historically, relating to the material times in these proceedings.

77. The bundle contained a GP letter dated 29 August 2018 (page 610) in which the GP had specifically been asked to provide evidence that the claimant was disabled and in regards to her symptoms and medication. It appears from the letter that the GP was not specifically asked to focus on depression and/autoimmune disease and therefore covered all the conditions for which the GP was providing treatment.

78. We saw no reference in the GP letter to autoimmune disease. We noted a reference to vasculitis and treatment from a rheumatologist. There was very little contemporaneous medical evidence from the claimant. The GP expressed a view as at 29 August 2018 that the claimant met the definition of disabled in the Equality Act (page 610). Unfortunately this was not specific either to depression or auto immune disease and did not cover the position historically. We are aware that in any event it is a question of fact for the tribunal, although we have taken account of what is said by medical practitioners.

79. The GP letter and historical medical records at pages 610 and 611 refer to both recurrent and reactive depression. In the body of the letter at page 609 the GP refers to "*chronic and recurrent depression."*

80. The claimant was continuously off work from 17 May 2017 to 7 August 2017. We saw medical certificates dated 27 February 2017, 8 March 2017, 28

March 2017, 17 May 2017, 22 June 2017 and 27 July 2017 signing the claimant off work with depression (pages 220, 223, 243, 292, 320 and 383). We find that from 27 February 2017 the respondent knew that the claimant had the condition of depression because of the medical certificate of that date, which she handed in to them in person.

81. The claimant's evidence in her disability impact statement was that her medication for depression gradually increased, it was at 30mg in November 2016, increased to 40mg in February 2017, to 50mg in May 2017 and to 60mg in November 2017. The claimant therefore remained on medication for depression during the material time and that medication gradually increased.

Cash practices

82. In August 2016 shortly after starting at Fenchurch Street the claimant raised an issue regarding a practice of dealing with cash surpluses or shortages in the bureau. The claimant was interviewed about this and it was decided that no action would be taken against her, as she had rightly brought the matter to the respondent's attention. The claimant stated in her investigation that her colleague Mr Patel had acted differently towards her since this matter had been raised. This was a continuation of bad feeling that existed between the two of them.

The November/December 2016 disciplinary issue

83. During her employment the claimant was the subject of a number of investigations into her conduct.

84. The claimant alleged that Mr Patel, also a customer assistant, hid her paperwork. The claimant's witness evidence in this case was sparse and we had very little to assist us factually on the point. In the absence of factual evidence from the claimant on this point and a denial from the respondent, we find that the claimant has not made out her case on the facts on this issue. The claimant did not get on well with Mr Patel. The claimant's witness Ms Lorraine Conroy was asked whether the issues between the claimant and Mr Patel arose out of the claimant's forthright nature as to how the bureau should be operated. Ms Conroy said: "*Yes, he was used to his ways and she was used to her ways".* We find they had different views on working practices.

85. In late November 2016 the claimant made a counting error resulting in a loss to the bureau of approximately £400. She gave the customer 10 times more currency than that which had been ordered and paid for. On her return from holiday on 5 December 2016 she was called at short notice to an investigatory meeting with Ms Maria Halkon. The tribunal did not hear from Ms Halkon because she has left the respondent's employment.

86. The claimant contends that Finance and Operations Manager Mr Andrew Dowty was involved with this and it was personal. Mr Dowty's evidence was that he did not move to Fenchurch Street until late January 2017. This

was supported by store manager Ms Barker's evidence that he started at Fenchurch Street in January, after she did. Ms Barker started there on 6 January 2017. Mr Dowty said that prior to joining Fenchurch Street he worked at the Finsbury Pavement store and he launched their menswear sale and this meant he did not join Fenchurch Street until late January. Mr Dowty had no professional reason to be at Fenchurch Street before his move to that store. We found Mr Dowty credible in his evidence and find that he did not move to the Fenchurch Street store until late January 2017.

87. Mr Dowty was not the claimant's line manager. He was her manager's manager. He did not have responsibility for and did not manage her on a day to day basis. He did have some managerial oversight of her work in managing her managers.

88. The claimant accepted that she counted out 10 times the sum requested and paid for by the customer. She admits that she made this mistake and said it was a human error. She said she had allowed herself to become distracted by her colleague Mr Darren Phillips but she nevertheless admitted the error and accepted it was her responsibility.

89. The claimant also accepted that in such circumstances it was normal to have an investigatory interview and there was nothing objectionable about this. Her claim was being called to the investigatory meeting at short notice and without prior warning, that she understood from Ms Halkon that the matter would not be taken any further and that Mr Dowty was behind all of this.

90. The claimant was asked in cross-examination whether she thought Mr Dowty did this because she was a woman. She said she did not know whether it was because she was a woman, she said perhaps there was some technical expertise he did not have, perhaps it was because she was a woman or maybe it was because she was an old woman. We find that Mr Dowty was not involved in the matter of the counting error on 5 December 2016 because he did not join Fenchurch Street until late January 2017. The claimant's case was that Mr Dowty was behind all of this and we find that he was not.

91. The claimant attended an investigatory interview with Ms Carly Kriebe-Hodgetts and then attended a disciplinary hearing with Ms Sally Murphy on 15 December 2016. The claimant accepts that she had prior notice of the meeting with Ms Murphy and that she was informed of her right to be accompanied, which she declined.

92. The claimant accepted that disciplinary process was normal procedure. Her objection was that when she arrived in the store on her return from holiday on 5 December 2016 she was given what she says was about five minutes notice of her investigatory interview. When asked about her allegation of sex discrimination or harassment against Ms Halkon, the claimant said in evidence that it was not about the warning, it was about the notice she was given to attend the meeting. The claimant accepted that there was a

requirement to give notice of a formal hearing and she did not know whether there was a requirement to give notice of an investigatory meeting. We find that there was no obligation to give such notice of an investigatory meeting.

93. In evidence, the claimant also accepted that she was not told by Ms Halkon that the matter would not be taken any further. She accepted that Ms Halkon told her that she would investigate the CCTV and the claimant felt reassured by this because she considered that she had not done anything particularly wrong.

94. The claimant was asked in cross-examination whether she thought Ms Halkon treated her differently because she was a woman. The claimant's clear answer was "no". In being taken through the evidence the claimant accepted that there was no hint of any involvement from Mr Dowty.

95. The claimant was given an informal warning in relation to the counting error which she accepted in evidence was reasonable.

Taking delivery of cash in December 2016

96. On his arrival at Fenchurch Street the claimant pointed out to Mr Dowty that she considered he was in breach of procedure by taking deliveries of cash during store working hours. Mr Dowty accepted in evidence that this was a breach of procedure but that he took responsibility for this. The claimant was concerned about this.

97. The claimant's case was that in December 2016 she pointed out that Mr Dowty was in breach of procedure by taking delivery of a large sum of cash during working hours and responding to her "*I am the manager, next time come in earlier and do the delivery yourself".* We find on a balance of probabilities that Mr Dowty said words along these lines. Our reason for this finding is based on the subsequent grievance outcome in September 2017 in which manager Ms Becky Wilson recommended that Mr Dowty attend training on Coaching and Inspiring Your Team. We find that Mr Dowty did not like his authority being challenged. The claimant's case was that in contrast, he was very cordial with her comparators, Ms Conroy, Ms Matharu and Mr Lewis. We find that this comment was not because of, or related to the claimant's gender. The claimant relies on female comparators with whom she said Mr Dowty was cordial. We find that the comment had nothing to do with the claimant's gender.

98. We find that the reason he made the comment was because he did not appreciate his authority being challenged and not because of her age. We find that Mr Dowty would have reacted in the same way to anyone who challenged his authority in that way. It was not related to or because of her age. Because of these findings we have not addressed the inconsistency with the date, as our finding is that Mr Dowty did not in any event join Fenchurch Street until late January 2017.

99. The claimant's case was that at least once a week, whenever there was a

shortfall in daily accounts, Mr Dowty blamed her for any counting and recounting mistakes made over the previous day, whether or not they had been made during her shift. She said he would regularly threaten to investigate her, including just before she went on holiday in May 2017. The claimant was the member of bureau staff who was on duty at closing time and had responsibility for balancing the accounting at the end of the day.

100. The claimant accepted in evidence that there was a counting error the day before she went on holiday in May 2017. The claimant also accepted that it was reasonable to raise this with her promptly before memory faded. The claimant confirmed in evidence that her complaint was that it was raised with her the day before she went on holiday, as she thought that Mr Dowty should have waited before raising it with her. The claimant also accepted in evidence that she did not think that Mr Dowty did this because of her sex. She thought it was because of her age because he was "*always picking on her*".

101. Mr Dowty's view was that there was a lot going on with the claimant, in terms of investigations and absence management issues and he concurred with what was later said in the claimant's grievance outcome letter (page 419) that because of the number of incidents occurring, this could potentially have left the claimant feeling victimised. He did not accept that this was in fact the case.

102. The claimant's representative asked all the respondent's witnesses their ages and we allowed the question as it was an age discrimination claim. The majority of the witnesses are in their 20's. Ms Barker is close in age to the claimant (though younger) and Ms Siduna is in her 40's. The dismissing officer was just into his 30's.

<u>Mr Patel's note</u>

103. The claimant complains that in December 2016 her colleague Mr M Patel, also a customer assistant in the bureau de change, made an unfounded complaint to Ms Susan Smith, the claimant's coordinator, about a draft interim balance the claimant had drawn up. As we have said above, the claimant's witness evidence in this case was sparse and we had very little to assist us factually on this point. In the absence of factual evidence from the claimant on this issue and a denial from the respondent, we find that the claimant has not made out her case on the facts on this issue. The claimant was used to doing things her way, as she had in her previous store at White City. She was vocal and not reticent to come forward and speak up if she saw things she thought were not in accordance with the rules. Mr Patel was used to doing things his way. As a result, they did not get along.

104. The tribunal did not hear from Mr Patel. He has left the respondent's employment. As set out above, the claimant's witness Ms Conroy was of the view that the issues between the claimant and Mr Patel were due to their respective views on how things should be done in the bureau.

105. Mr Patel reported a shortfall on the claimant's part in relation to handling Norwegian Krone. She accepted that it was right for the respondent to investigate this. The claimant complained that this was done just before she went on holiday but accepted that if a mistake is made it is best for this to be investigated as soon as possible while memories are fresh.

106. The claimant was asked whether she considered that investigating this matter had anything to do with her sex or age. She said it could be because of her age because Mr Dowty, who she said is much younger than her, was always picking on her. She accepted it had nothing to do with her gender.

107. Mr Patel wrote on the bottom of a note written by the claimant. He then tore it up and put it in the bin at the top where it remained visible. He did not give it to the claimant or leave it on her desk. We saw the note at page 207 of the bundle. It said: "*I think this Bitch should F*** OFF!".* There is no dispute that Mr Patel wrote this comment about the claimant. The claimant retrieved the note from the bin. We consider that Mr Patel left it for the claimant to see because he left it on top of the bin and the purpose of the document was a handover note, to which the claimant anticipated a reply.

108. Mr Patel admitted writing the note and he was disciplined and received a formal written warning for this. Although the respondent had not retained a copy of the warning, they produced a copy of a screenshot from their HR system (page 208) recording the warning. The sanction expiry date was 14 February 2018.

109. The claimant complained that after Mr Patel's disciplinary, Mr Dowty told her that Mr Patel would be returning to work in the bureau and that he wanted to make the bureau into a team. The claimant's case was that Mr Dowty told her that she had to accept Mr Patel's apology and that she told Mr Dowty that the situation with Mr Patel was worsening her health.

110. The claimant complained about this in her subsequent grievance of 8 June 2017 which was heard by Ms Becky Wilson (and referred to in more detail below). At the grievance hearing, the notes of which were at page 358, the claimant said "*The day I was told he [Mr Patel] was returning to work and we must work together, 7 February, I asked for a facilitated conversation and was not given one. I asked Andrew [Dowty] and got one in April".* The claimant was asked how her relationship was now with Mr Patel and she replied "*Good – he said sorry".*

111. We also saw in the note of the claimant's meeting with Mr Dowty on 31 March 2017 (referred to below) and we find, that Mr Dowty told the claimant that she would not have to work with Mr Patel until they had the facilitated conversation (notes page 253). It was put to the claimant in cross examination that Mr Dowty did not treat her less favourably because of sex or age in relation to Mr Patel. She accepted this.

112. The claimant further complained that when Mr Patel returned to work, he wrote his name in large letters on a Balancing Handover Sheet which we

saw at page 624 which she took to mean that he was announcing that he was back. The claimant was asked whether she thought this was harassment because of her sex. She thought it was rude and she treated him cordially.

113. The respondent did not accept that Mr Patel had written his name in large letters as some sort of act against the claimant and they took the matter no further.

The claimant's disciplinary in February 2017

114. The claimant's disciplinary arose out of an incident which took place on Tuesday 21 February 2017. The door to the bureau de change was broken. This posed a security risk and naturally it needed to be repaired as soon as possible. The security guard Mr Kashif Ilyas was called to the bureau by one of the managers. He was informed of the situation. The claimant accepted that he had an important role to play. The claimant was not aware at the time, but is now aware, that Mr Ilyas was not an employee of the respondent. He was employed by a security firm.

115. Before Mr Ilyas arrived at the bureau the claimant telephoned him. Mr Ilyas began to explain to the claimant what she should do if she saw anything suspicious and gave her information about the alarms. This was information she considered she already knew and she wanted to attend to immediate matters in the bureau so she told Mr Ilyas she had a customer waiting and she hung up the call. It was not true that there was a customer waiting but claimant wanted to end the call with Mr Ilyas. Mr Ilyas could see the CCTV and he also arrived just as the claimant had hung up the call. He could see there was no customer waiting so he knew that the claimant had not told the truth about this, so as to get him off the phone.

116. An operative, Mr Ahmed had also arrived at the bureau and he was looking at the lock on the door. The claimant had decided that it was more important to assist Mr Ahmed than speak to Mr Ilyas. When Mr Ilyas arrived and seeing there was no customer, the claimant asked him whether he thought he was more important that Mr Ahmed and went on to make a comment which became the subject of disciplinary proceedings.

117. It was alleged that the claimant said to Mr Ilyas "*you are the most important person in the world, you are God and Allah, that's why I should listen to you"* (Mr Ilyas' interview record page 210). He said he told her that he thought she was very rude. Mr Ahmed's interview record was at page 212. He told the investigating officer that he heard the claimant say "*Oh, so I should listen to you because you're Allah, Oh, you're Allah".* Mr Ilyas subsequently complained about the comment. Mr Ilyas is Muslim.

118. The claimant admits saying to Mr Ilyas: "*Oh my God, he thinks he is God*". This was also shown in the note of her investigatory interview at page 212. The claimant was investigated for making an unwelcome comment to the security guard.

119. The claimant had to accept that on 21 February 2017 she did not know Mr Ilyas was Muslim because it was the first time she had met him. She asserted that he should have known she was Christian. She initially asserted that he would have known this because she was wearing a cross but went on to concede that she could not remember if she was wearing a cross or not. She accepted that she did not know how Mr Ilyas would have known her religious belief.

120. The matter was investigated by section manager Ms Sayma Nasrin. Ms Nasrin prepared a brief Investigation Report (page 218) recommending disciplinary action. The claimant complains that Ms Nasrin is also Muslim.

121. The claimant said that Mr Ahmed would have known her religious belief because they were on friendly terms and went for coffee together. She said Mr Ahmed is Muslim and that he and Mr Ilyas colluded to prepare false statements together within the investigatory process.

122. The claimant complains that Mr Ilyas and Mr Ahmed prepared colluded statements falsely claiming that she had made the reference to "Allah". We saw the statements at pages 209 and 212. The statements record Mr Ilyas as quoting the claimant as saying "*You are the most important person in the world, you are God and Allah*". Mr Ahmed's statement quotes the claimant as saying "*Oh so I should listen to you because you're Allah, Oh you're Allah*". We find that they did not collude to produce these statements. Our reasons for this are that their statements are not identical and we find that had they been colluding they would have prepared statements that were more closely aligned. We also take account of the fact that these were statements taken contemporaneously on the day of the incident.

<u>The disciplinary process in February/March 2017</u>

123. On 24 February 2017 the claimant was interviewed by Ms Nasrin about the incident. This was followed by a letter dated 24 February inviting her to a disciplinary hearing on Monday 27 February (217). The claimant said she had a breakdown at work on 24 February.

124. The claimant made a doctor's appointment for Monday 27 February. Her evidence as to what took place on 27 February 2017 was very confusing. She initially said that she had been to the doctor that day, was advised not to work and travelled to work to give in her medical certificate. As a result of the medical certificate, her disciplinary for that day was postponed.

125. The Balancing Handover Sheet for 27 February 2017 was put to the claimant (page 624) which indicated that she had worked that day. The claimant agreed upon seeing page 624 that she had worked that day. She said that she had gone to hand in her medical certificate and when she was told by her colleagues that Lorraine Conroy had not had a break, the claimant agreed to cover the break. The document at page 624 showed working time of 11:55am to 14:35pm which is over two and a half hours.

Although the claimant lived in Welling in Kent and her GP practice was in Clerkenwell in Rosebury Avenue not far from the Fenchurch Street store.

126. We find that whilst the claimant was at work on 27 February 2017 she was handed a letter inviting her to a postponed disciplinary date of 1 March 2017. The postponement was because of the medical certificate.

127. In a letter to Ms Halkon dated 10 March 2017 (page 599) the claimant said that when she came back from the doctor to hand in her certificate, Dorothy Seaton, the section manager told her not to worry about the bureau until she had recovered. She said that although she was crying she stayed at work for another hour. The claimant was certificated unfit for work until 20 March 2017.

128. The disciplinary hearing took place on 27 March 2017 before Ms Monique Joseph, a section manager from the Marble Arch store. The notes of the disciplinary hearing were at page 229. The claimant was accompanied at that hearing by her representative Mr Ian Darby.

129. The disciplinary procedure (at page 106) set out examples of misconduct for which disciplinary action may be taken. The fifth such point was "*Demonstrating an uncooperative and/or disrespectful attitude towards customers (including internal customers and suppliers), colleagues and managers e.g. swearing in front of customers/colleagues."* We find that this encompassed Mr Ilyas who was not employed by the respondent, as he fell into the category of internal customer and/or supplier (of security services).

130. In a letter to Ms Maria Halkon on 10 March 2017 the claimant enclosed a further medical certificate. She told Ms Halkon that her depression began immediately she was told by Mr Dowty on the shop floor in front of customers and staff that Mr Patel was coming back to work with her in the bureau.

<u>The disciplinary hearing of 27 March 2017.</u>

131. The disciplinary hearing took place on 27 March 2017. The outcome letter dated 29 March 2017 was at page 256. The claimant was given a final written warning to remain live for 12 months. Ms Joseph's outcome letter was at pages 256-257. Ms Joseph concluded that the claimant had used a "white lie" in telling the security guard she had a customer present, the claimant knew the importance of the security guard's role, that she could not explain the reason for the comparison of the security guard to God and that she was "kidding" and that she did not find what she said offensive.

132. It is clear from the outcome letter and we find that Ms Joseph considered that the claimant had been disrespectful to the security guard; she told the claimant that in future she was expected not to demonstrate such behaviour. The claimant was informed "*If your behaviour falls below the expected standard in any area of conduct in future this may lead to your dismissal".* The claimant complained that the letter did not specify what the

allegedly offensive comment was but we find that she was in no doubt as to what was relied upon. We find that she was in no doubt that it was the comment as to whether Mr Ilyas thought he was "*God"* or "*Allah*", as she made continual representations about this in the hearing.

133. The claimant immediately went off sick following the disciplinary hearing. We saw the sick note at page 220. She was signed off sick with depression, initially for a period of two weeks.

134. The claimant appealed against her final written warning, by letter dated 13 April 2017, pages 260-273. In her appeal letter she referred to the Equality Act 2010 and specifically mentioned age discrimination, disability discrimination, religion or belief discrimination and sex discrimination (page 273). She also made reference to the employment tribunal (page 273) and said she considered she was being discriminated against (page 268). The claimant also said that what she said to Mr Ilyas was "*banter, a light-hearted comment to try to calm [his] temper*" (page 260). The claimant's main point in issue was that she had simply said "*Oh my God*" and "*does he think he is God*" and her position was that she had not made reference to "*Allah*".

135. The claimant also said that Mr Ilyas was not offended. We find that he was sufficiently offended to complain.

<u>Sickness review meeting 31 March 2017</u>

136. On 31 March 2017 Mr Dowty held a sickness review meeting with the claimant to discuss her condition. The claimant said Mr Dowty's behaviour a couple of days earlier in speaking to her on the shop floor had upset her. He apologised for this at the time. He also reassured her that her sick pay would be paid and that he would organise a facilitated conversation between Mr Patel and herself.

137. The claimant also complained that Mr Patel had signed a sheet in large letters to let her know he was back. This was on a Balancing Handover Sheet for the bureau (page 624) where all four members of staff had written their names in capital letters. Mr Patel's handwriting put his name in slightly larger letters than the other three members of staff. The form specifically says "Print Names" so we find that this is the reason they wrote in capitals. The size of the writing is not dissimilar between the four employees and fits the size of the space provided. We can find nothing untoward in this. Mr Dowty also told the claimant that she could still appeal against her final written warning. The notes of the meeting were at page 247-251.

138. A facilitated conversation took place between the claimant and Mr Patel, facilitated by Mr Dowty and this put them in a position where they could continue working together.

<u>Appeal against final written warning.</u>

139. The claimant exercised her right of appeal against the final written warning

and was invited to an appeal hearing on 27 April 2017. It was heard by Mr Matthew Frith, a commercial manager. Once again, the claimant was accompanied by Mr Darby.

140. Mr Frith sent a very detailed outcome letter on 9 May 2017, pages 287-290. He did not allow the appeal and upheld the final written warning. He made three recommendations (i) to arrange coaching for the manager who prepared the statements (ii) that if in future the claimant believed she had not received all relevant paperwork she should raise it at the earliest opportunity and (iii) he pointed out that diversity awareness video training was available if she wished to view it. The final written warning was to remain live until 26 March 2018.

The discrimination allegations in relation to 21 February 2017

141. The claimant's case is that on 21 February 2017 guard Mr Ilyas shouted and waved his arms aggressively at her as an act of both sex and religious discrimination and harassment. Mr Frith the appeal officer on this matter viewed the CCTV footage and he could not recall seeing Mr Ilyas waving his arms. There was no sound on the footage.

142. We find that Mr Ilyas was agitated. He was not happy that the claimant had told him that there was a customer waiting when there was not, as she wanted him off the line. We find on a balance of probabilities that he did raise his voice and wave his arms but this was because he was agitated at being told, when it was not correct, that the claimant had a customer waiting. It was not because she was female or related to her sex and it was not because of her religion because she had not disclosed this to him. It was not related to her religion because we find on a balance of probabilities that he did not know her religious group.

143. The complaint of alleged collusion on the statements of Mr Ilyas and Mr Ahmed is put as sex and religious discrimination or harassment of her as a woman and a Catholic Christian.

144. The warning given by Ms Joseph and the upholding of the appeal against the warning by Mr Frith were put as sex and age discrimination or harassment. The claimant relied upon being over 60.

145. The claimant's position was that the final written warning was unjustified in the circumstances. She compared herself with Mr Patel whom she said was not given any formal warning for his offensive note. We find, as set out above, that Mr Patel did receive a written warning for the offensive note and we saw the HR record of this at page 208. For confidentiality reasons the claimant was not aware of Mr Patel's warning at the time. She thought he only had an informal warning as he told her this (as per her chronology on page 17).

146. The claimant's case was that her final written warning, given by Ms Joseph, was on the instructions of Mr Dowty. We found no evidence to support this

allegation and having heard from Ms Joseph, we find that she made her own decision. claimant complained that the outcome letter did not specify what the allegedly offensive comment was.

147. The invitation to the disciplinary hearing (221) and the investigation report attached (218), did not set out the precise comment relied upon. At the start of the disciplinary hearing there was continued reference to an "*unwelcoming comment*" rather than a precise allegation as to what this comment was said to be. The claimant admitted in the hearing (notes page 235) that she said: "*oh my God, Yusuf, he thinks that he is God".* We find that Ms Joseph told the claimant in the disciplinary hearing (page 236) that the comment relied upon was "*oh so I should listen to you because you're Allah, oh you're Allah"* and "*you are the most important person in the world, you are God and Allah".*

148. It is correct that the letter setting out the final written warning did not specify the precise comment relied upon. Ms Joseph did not make clear her finding as to the exact comment made by the claimant. The claimant's case was also that the punishment was unjustified in the circumstances and she compared herself to Mr Patel and Mr Ilyas on sex discrimination and a hypothetical comparator for age discrimination. This was not relied upon as religious discrimination.

149. We find that Ms Joseph did not impose this disciplinary sanction because the claimant was female and it was not related to her gender. We find that Ms Joseph made her own decision, uninfluenced by Mr Dowty as the claimant has suggested and that she made the decision on the facts as she found them. There was no evidence that Ms Joseph knew at the time of her decision about Mr Patel's warning and we find that she was not the decision maker for Mr Patel (paragraph 22 of Ms Joseph's statement). Her evidence was that she would have made the same decision if Mr Patel had been the person making the comment towards Mr Ilyas. We accepted this evidence. The claimant did not make the comparison with Mr Patel in her appeal against the final written warning when she believed (incorrectly) that he had only received an informal warning. There were no disciplinary proceedings against Mr Ilyas so we find that there were no material circumstances for comparison.

150. We saw no evidence to lead us to the view that the final written warning was imposed because the claimant was over 60. The claimant's contention was based on no more than that the managers involved were much younger than her. We accept and find that Ms Joseph would have made the same decision if Mr Patel had been charged with the same disciplinary offence. We find that the final written warning was not because of or related to the claimant's age.

151. We make the same findings in relation to the appeal. We find that Mr Frith approached the appeal in an even-handed open-minded manner. He viewed the CCTV which was additional to the steps taken by Ms Joseph. He re-interviewed the witnesses and spoke to the hearing manager. It was

more than a paper exercise. He was thorough. We found nothing to suggest that he upheld the warning because of the claimant's age or gender. We find that his actions in upholding the warning were related to his view of her conduct and not related to her age or gender.

152. The claimant complained that Mr Dowty gave her the appeal outcome letter just before she went on holiday. It was clear to us that the claimant did not get along with Mr Dowty but we find that the handing over of a letter, prepared by Mr Frith, was not done because she was female or over 60 nor was it related to her age or gender. Mr Dowty accepted that he gave her the outcome letter in a sealed envelope, given to him by Mr Frith. Mr Dowty handed the claimant the letter at the earliest opportunity (his statement paragraph 46). We accept and find that he handed the letter to her at the earliest opportunity so that she would not have to wait for the outcome and he was not calculating when her annual leave was taking place. Although the claimant has named Mr Dowty as her comparator on this issue we find no material or comparable circumstances to make such a comparison.

153. As we have found above in relation to Mr Dowty's investigation at that time into a currency issue, the claimant accepted that this was not because of her sex.

<u>The claimant's absence management and OH report</u>

154. At the sickness review meeting on 31 March 2017 the claimant told Mr Dowty that she was experiencing depression which she attributed to events at work. She requested an OH referral which was made by section manager Ms Seaton. The OH assessment took place on 11 July 2017 by telephone.

155. The OH report was at page 329-334 prepared by OH Adviser Lisa Lockett on 11 July 2017. Ms Lockett is a registered nurse. The report recited that the claimant told Ms Lockett that she had a history of depression which had been under control until a recent episode.

156. The report set out the current situation as described by the claimant (page 330). (The section below is not quoted verbatim).

- *Her symptoms had improved significantly….[including as to sleep patterns]*
- *Her GP had prescribed antidepressants and sleeping tablets*
- *She had been reviewed regularly by her GP, her last appointment was in 7 July 2017 and she was given a fit note until the end of July 2017*
- *Her GP gave her mindfulness exercises to do which she said had really helped reduce her symptoms*
- *She did not feel she would benefit from face to face counselling as her treatment to date had been really effective. She was aware of M&S Live Well Work Well advice line*
- *They completed a questionnaire which indicated that her current levels of anxiety and low mood were moderate*
- *She said her symptoms were so severe that she could not go to any M&S store but she said she could now manage to go if her partner accompanied her*
- *She wanted to return to her job and considered that if she continued to improve she*

would be fit to return by the end of the month (July 2017) said it would depend on whether issues she had raised in her grievance were addressed.

157. The OH practitioner gave the opinion that the claimant was currently experiencing moderate levels of anxiety and depression manifesting in panic attacks. Her systems were exacerbated by thoughts of returning to work situation in which she felt she was being victimised and bullied. She was taking steps to reduce and manage her symptoms. With the recommendations made, put in place and subject to the advice of her GP, the OH practitioner considered that the claimant was likely to be fit to return to work within the next 2 to 3 weeks. This coincided with the claimant's own view that she would be fit by the end of the month namely the end of July 2017.

158. Ms Lockett's view was that the claimant's mental state was much improved and she did not currently meet the respondent's definition of Underlying Ill Health. The definition of Underlying Ill Health was set out in the Absence Management Procedure (page 88) which said that it is a condition which: "*Has a substantial and long term detrimental effect on an individual's physical and/or mental health; and the condition has occurred, or is likely to occur more than once, and is due to the same underlying medically diagnosed cause or the employee is currently undergoing professional medical investigation to ascertain diagnosis. The condition could have an intermittent effect or be progressive in nature*."

159. The claimant sought a correction of the OH report as regarded her history of depression (page 373) to reflect her past history of depression. The OH practitioner agreed to amend the report (page 372). There were two versions of the OH report in the bundle, one at 329 and one at 374. We find that the version at 329 is the later and amended version, containing the amendment sought by the claimant.

160. The OH recommendations were set out in two parts, for the employee and for the employer. These are set out below, again not verbatim.

For the employee

- *it was recommended that the claimant continue to engage in mindfulness exercises to help manage and reduce levels of anxiety and low mood*
- *that there be a meeting before her return to work with her line manager and an HR representative to discuss the issues she had raised in the grievance. She should be accompanied by a trusted friend or colleague and that the meeting take place off site.*
- *She was pointed towards the Live Well Work Well advice line*

For the employer

- *That there be the off-site meeting recommended above*
- *That there be open lines of communication between the claimant and her line manager so that she could communicate when she was experiencing heightened anxiety and associated symptoms*
- *Guidance for line managers was attached as a tool to prepare a Wellness Action Plan to manage psychological well-being in the workplace*

- *One-to-one meetings, weekly to start off with, to discuss the return to work, any challenges that have been faced and overcome and any concerns that may be ongoing*

161. The claimant complained about being telephoned by the respondent during her sick leave. Mr Dowty did not personally make any calls to the claimant. The day to day management of her sickness absence was carried out by Ms Seaton, a section manager.

162. Ms Siduna took over the management of the claimant's sickness absence from late August 2017. She saw a copy of the OH report. Ms Siduna only managed the claimant for about 2 months.

163. The claimant returned to work on 7 August 2017 and had a return to work meeting on that date with section manager Ms Seaton. Although the OH report had recommended an off-site meeting, the claimant made no complaint about this either at the time or in evidence. The record of that meeting was at page 391 and said that the claimant was feeling a lot better but had struggled for the last three months with ongoing depression.

164. The respondent did not see the OH report until 7 August 2017, the day the claimant returned to work. The claimant had prior approval on sending the report to the respondent.

165. The report was seen by Ms Seaton who was the claimant's manager in early August 2017. Ms Siduna took over from Ms Seaton in late August 2017. During the handover Ms Seaton showed Ms Siduna the report (Ms Siduna's statement paragraph 4). We noted from Ms Barker's witness statement, an acknowledgement that there had been an oversight in following through on OH recommendations (her statement paragraph 14). She said that Mr Rumble spoke to her about it and she took this feedback on board and believed that the oversight had not been repeated. This leads us to find that there was a failure by the respondent to implement properly the OH recommendations for the claimant.

<u>The claimant's grievance of 8 June 2017</u>

166. The claimant raised a seven-page grievance dated 8 June 2017 (pages 293-300) raising many of the matters now raised in these proceedings. The investigating officer was Ms Becky Wilson from the Kensington Store. The claimant remained on sick leave.

167. Mr Dowty was interviewed as part of the investigation into that grievance. The notes of that meeting were at pages 384-389.

168. On 15 June 2017 Ms Seaton wrote to the claimant to invite her to a sickness absence meeting to take place on 19 July 2017.

169. The grievance outcome was sent to the claimant by letter dated 6 September 2017 (pages 416-421). Ms Wilson decided that there was no evidence to believe that the claimant had been bullied, harassed, sexually

harassed or victimised as she had suggested (page 420). She found no evidence to lead her to uphold the claimant's allegation that Mr Dowty had misused his power within the store and there was no evidence to suggest to the claimant had been treated any differently to other staff members across the store. Ms Wilson was satisfied that all the correct procedures and policies had been followed with regard to the claimant's investigations hearings and sanctions.

170. Ms Wilson recommended a facilitated meeting between Mr Dowty and the claimant, that the claimant's training be revisited to support the minimisation of mistakes and that Mr Dowty was to attend a course on Coaching and Inspiring Your Team. Mr Dowty attended such a course and found it very helpful.

171. The claimant did not appeal the grievance outcome.

Calls during sickness absence

172. The claimant complains that she received weekly telephone calls from managers while she was on sick leave. We saw the respondent's absence management policy at page 86 which said:

> *"The appropriate level of contact should be agreed between the employee and line manager during the entire period of absence. Unless agreed otherwise, as a minimum employees should report to their line manager on a daily basis during the first week of absence and thereafter on a weekly basis."*

173. The calls came from Ms Seaton, Ms Halkon or Ms Joanne Bradshaw. The claimant said that over a 13 week period she probably had about 11 calls, which is slightly less than 1 a week. The claimant had a good relationship with Ms Seaton, she said she liked her a lot. She accepted that weekly contact was the minimum provided for under the policy. Although she suggested that she had told the respondent that she did not want weekly contact she could not remember who she told.

174. At a sickness review meeting on 19 June 2017 with Ms Seaton and Ms Bradshaw (notes page 311) the claimant accepted that she did not tell them that she did not want to receive a weekly phone call. At some point the claimant told Ms Seaton that she would prefer it if she (the claimant) could make the call to Ms Seaton rather than receive the call from the respondent. They made an arrangement that the claimant would call every Thursday at a time to suit her. This was agreed.

175. So far as meeting with the claimant after her return to work on 7 August 2017 was concerned, Ms Siduna said that that she was available to the claimant and that she did have discussions in a private environment, to find out how the claimant was doing. They discussed her depression and symptoms. Ms Siduna admitted that this was not necessarily on a weekly basis. We find that meetings were not regular as the OH report recommended. They were not weekly and salient points were not documented. We find that there was a failure to implement the fourth OH

recommendation.

Working on tills

176. The claimant returned to work on 7 August 2017. She complained that she was placed to work on tills and that this was physically difficult for her because of her auto immune disease which was diagnosed in late July 2017. The claimant's auto immune disease is not mentioned in the OH report because this had not been diagnosed by the date of the assessment. There was no reference to physical difficulties.

177. Ms Siduna's evidence was that the claimant was "*quite vocal*" about her health conditions and what she needed. Ms Siduna also confirmed and we find that although the default position for working on the tills is that the employee is standing, anyone with a mobility problem can simply ask for a stool and it is made available.

Meeting between the claimant and Ms Angela Barker on 25 August 2017

178. Ms Angela Barker is the store manager at Fenchurch Street and held this post in 2017 when the claimant worked there. Ms Barker has a long standing career with the respondent of over 42 years. Ms Barker has an office in the store which has glass panels so that she and anyone in her office can be seen by those passing by.

179. Ms Wilson who had heard the claimant's grievance had a conversation with Ms Barker in August 2017 which led Ms Barker to arrange an informal meeting with the claimant. The claimant had sent a further complaint to Ms Wilson on 21 August 2017 (page 392), following her return from sick leave on 7 August 2017. The meeting of 25 August was therefore initiated by Ms Wilson because of the 21 August complaint. One of the matters about which the claimant complained was her concern that she was being replaced in the bureau and this was causing her anxiety levels to rise and this was resulting in pain.

180. Ms Barker made some informal notes of that meeting which were at page 393. Ms Barker explained to the claimant that her role was not being replaced. She explained that there were operational needs for cover and she was not losing her place. Her role was as a customer assistant which was not attached to one department or another. The claimant told Ms Barker that she had worked in the bureau before her sickness absence and would like to continue working there.

181. They discussed the claimant's preference to have a specific seat in the bureau, Ms Barker explained that staff in the bureau did not have assigned seats. They also had a discussion about the fact that the claimant's eligibility for company sick pay had run out.

182. The claimant also made notes of this meeting with which Ms Barker does not agree. There was a note of the meeting at page 635 and a slightly

different version at page 645.

183. The claimant's case is that Ms Barker told her that her depression was her fault because she took punishments too seriously. This was denied by Ms Barker. Ms Barker's evidence was that they discussed the claimant's final written warning and she explained that this had been upheld on appeal and the matter had been concluded; therefore the decision would not change and the claimant should move on from it.

184. Ms Barker denied telling the claimant that her grievances must stop, she said she explained that in many cases disagreements or concerns could be resolved informally by speaking to her line manager or Ms Barker herself. The claimant's evidence was that it was "fantastic" to know from Ms Barker that her job was not at risk and it was "really nice" for her to know this.

185. Ms Barker completely denied telling the claimant that her depression was her own fault and that she took M&S punishments too seriously, or words to that effect. She described her approach in that meeting as supportive yet firm. She said she was trying to persuade the claimant to move on and not to dwell on things that could not be changed like the final written warning. Ms Barker considered that the claimant became aggressive when talking about the final written warning raising her voice and waving her arms around. She said that the claimant was very emotional during their meeting and suggests that this coloured the claimant's recollection. The claimant accepted that she cried a lot during this meeting.

186. Both sides accept that the claimant was asked in this meeting to move on and both sides accept that she was upset and emotional during the meeting. We find that there was a discussion along the lines of moving on and Ms Barker took a firm approach with the claimant. We find on a balance of probabilities that the claimant, who was upset at the time, interpreted the meeting negatively. We find on a balance of probabilities that Ms Barker did not tell the claimant that her depression was her fault because she took M&S punishments too seriously.

<u>Reduction in hours</u>

187. On 19 September 2017 the claimant wrote to Ms Siduna to ask if she could reduce her hours to three days per week, until her health improved (page 423). Ms Siduna agreed to this and confirmed this in writing on 25 September 2017. The claimant told Ms Siduna that she had auto immune disease and this was recorded on the respondent's HR system (pages 574-575) dated 20 September 2017. She also told Ms Wilson on 21 August 2017 (page 602).

188. The claimant had previously attended a sickness review meeting with Ms Siduna on 25 August 2017 (notes page 404). The claimant was accompanied by Mr Darby in that meeting. The notes show and we find that the claimant did not want "*rehabilitation hours*" (page 413).

The incident on 17 October 2017

189. On 17 October 2017 the claimant left the bureau unattended for a period of time. The claimant was entitled to a break of 30 minutes. She had agreed with her manager Ms Jane Siduna that she could split her break so she could take her medication and clear her thoughts. This meant that she could take two 15 minute breaks.

190. On 17 October 2017 commercial manager Ms Suzanne Field, noticed the claimant and another member of staff in the bureau with M&S shopping bags at the back containing shopping including pizzas and flowers. She asked the claimant about this.

191. If staff make in-store purchases, they must keep the items with the receipt and store them in the staff room. For security reasons all staff are also subject to random searches. If staff do not have the receipt on them, they are liable to have the goods confiscated pending an investigation. We find these rules unsurprising in a retail environment.

192. The claimant admitted that she had bought pizzas and flowers. The other employee admitted purchasing some baguettes. They were in bags at the back of the bureau. Neither employee could immediately produce a receipt.

193. Ms Field asked her about this. Ms Jacynta Sholay was also present. Ms Sholay had only been in the Fenchurch Street store for two weeks so she did not really know the claimant. Ms Sholay had previously worked for M&S Bank at the White City store. It was situated next to the bureau de change so she knew the bureau and the security rules. There was another employee present, named Crystal from the lingerie department, who had also bought M&S goods and left them at the back of the bureau. Ms Field told them that this was unacceptable and no-one received special treatment. Ms Sholay went to fetch staff search forms and went on to confiscate the goods from both members of staff in accordance with policy (page 173a).

194. Ms Field asked Ms Sholay to conduct a disciplinary investigation into the purchase of the pizzas as the claimant could not produce a receipt. Ms Sholay did three things within her investigation. She looked at the swipe card records, the CCTV and interviewed the claimant and Ms Field. The swipe records and CCTV established that the claimant had purchased the pizzas. What the records also showed was that the claimant had taken rather more than her 30-minute break entitlement and she had left the bureau unattended.

195. We saw in the bundle the Bureau de Change Security Policy and Guidelines at pages 114-143 and the Bureau Workbook at pages 144-173. Two further pages from the Policy and Guidelines were at pages 173a-173b.

196. There were five issues Ms Sholay was asked to investigate:

i. Unauthorised breaks on 17 October 2017
ii. Leaving the bureau unattended
iii. Purchasing M&S goods during working hours
iv. Failing to produce a receipt for M&S goods purchased
v. Keeping purchased goods in the bureau during the claimant's shift.

The investigation

197. Ms Sholay met with the claimant on 23 October 2017 for an investigatory interview. During that meeting Ms Sholay showed the claimant the CCTV footage of the day and the record of the claimant's swipe card. These showed that the claimant left the bureau on three occasions: at 15:34 for a break returning at 15:56; at 17:16 returning at 17:29 (during which the claimant left the building by the staff exit); and at 17:45 returning at 17:52. The total was 42 minutes. The claimant's break allocation is 30 minutes. On the last two breaks, the bureau was left unattended. She ascertained the reason for each of the three breaks which were to go to the toilet, to buy the goods and to go for a smoke. Each time the claimant informed a colleague in lingerie to monitor the bureau, as she said had always been her practice.

198. The claimant said in relation to buying the goods, it was then that she had the "*bad idea*" to buy the pizzas. This shows us and we find that the claimant knew that she should not have been buying the pizzas at that time.

199. There was a later absence from the bureau which was not contentious because the claimant had been called by a manager to attend as a first aider. The respondent did not take any issue with this absence.

200. Ms Sholay produced an investigation report which we saw at page 454-455. Ms Sholay concluded that there was sufficient evidence to believe that the claimant took unauthorised breaks on 17 October 2017, that she left the bureau unattended, purchased M&S food during working time, failed to produce a receipt for it and kept the goods in the back of the bureau.

201. Where we find that the investigation fell down was in relation to leaving the bureau unattended. There was no proper investigation into what rules the claimant had to follow. Ms Sholay did not investigate what the claimant knew as to the rules on leaving the bureau unattended and what she had been trained in. There was no training or induction record and at no point could the respondent produce a copy of the rules they relied upon. All they could point to was a Management Tool at page 120, a document to which was not applicable to the claimant because she was not a manager. During the course of this hearing, the respondent disclosed a document which was said to be the claimant's training record (page 658) but it was not a document considered within the disciplinary process.

The disciplinary hearing

202. The disciplinary hearing took place over three dates; 30 October, 1

November and 20 November 2017 before Mr Joseph Marshall. The adjournments took place to allow Mr Marshall the opportunity to carry out further investigation and interview witnesses.

203. The claimant accepted in evidence that she understood the disciplinary charges that she faced. She was again accompanied by Mr Darby. At this point Mr Darby was no longer acting as a BIG representative. He accompanied the claimant as a workplace colleague.

204. The disciplinary procedure (at page 106) set out examples of misconduct for which disciplinary action may be taken. The sixth such point was "*Leaving your allocated place or area of work without permission or good reason, e.g. going to breaks at an inappropriate time or without permission, excessive smoking breaks."* We find that this was generic and not specific to the bureau.

205. In the disciplinary hearing (notes page 466) the claimant said to Mr Marshall that she knew the policy was that they could not leave the bureau unattended but she thought that because it was being monitored (by colleagues in lingerie) it was OK.

206. The claimant complained that during the hearing Mr Marshall was seen going in to Ms Barker's office and that Ms Field was also present. As we have set out in our findings above, Ms Barker's office has glass panels so the occupants of the room can be seen. The claimant accepted that she could not hear what was being said in Ms Barker's room so we find that she did not know whether Mr Marshall was discussing her disciplinary hearing. Ms Barker and Mr Marshall denied this. Mr Marshall said that it was not uncommon for him to go into Ms Barker's room to discuss operational matters throughout the day. On a balance of probabilities we find that the fact of the claimant's disciplinary hearing was mentioned, but the content of it was not discussed.

207. For advice purposes Mr Marshall had access to PPS which is the respondent's term for HR. He spoke to HR in preparation for the disciplinary hearing and a record of that was at page 579. We find on a balance of probabilities that he was not discussing the claimant's disciplinary in the breaks and that if he needed advice he had easy access to HR.

208. At the conclusion of the hearing on 20 November 2017 Mr Marshall told the claimant that she was being dismissed for misconduct. He was not very clear with the claimant as to exactly which of the disciplinary charges were proven and had resulted in dismissal. He said that full details would be provided in the letter confirming dismissal.

209. On 23 November 2017 Mr Marshall wrote to the claimant confirming that all allegations had been dismissed save for the allegation that she had left the bureau unattended (letter page 508-509). This was therefore the reason for dismissal. The other four disciplinary charges were unproven.

210. Mr Marshall confirmed in evidence that without the existing final written warning, he would not have dismissed the claimant but he would have imposed a disciplinary sanction.

211. In his outcome letter, bullet point 2 (page 508) Mr Marshall referred to the claimant's "*clear understanding*" of the Bureau policies and the claimant's awareness that she had breached policies. We find that this was Mr Marshall's reference to what the claimant said as shown in the notes at page 466 (as set out above) where she said she considered that leaving the bureau monitored in her absence was OK. Mr Marshall did not set out in his outcome letter, the exact policy referred to, what it said, or how the claimant was made aware of it.

212. We find that Mr Marshall's belief in the claimant's misconduct was not a reasonable belief, because it was not based upon a reasonable investigation as to whether the claimant was aware of the policy which he considered applied. This was the Bureau Section Manager's Tool at page 120 which is designed for management action.

213. The claimant's case (allegations 12 and 13) was that the disciplinary procedure was orchestrated by Mr Dowty. We find that it was not. Mr Marshall made his own independent decision. There was no evidence before us to suggest that Mr Marshall or Ms Sholay were influenced by Mr Dowty.

<u>The appeal against dismissal</u>

214. The claimant appealed by email dated 1 December 2017, page 511. In her appeal letter the claimant said "*it is common practice to leave the bureau empty, eg to go to the toilet if bureau staff notify another member of staff nearby to watch over the bureau. This has been standard procedure before I started at Fenchurch Street and still continues".*

215. The appeal against dismissal was heard by Mr Timothy Rumble, who at the relevant time was an HR Support Manager and is now a Head of Region HR Business Partner. The claimant was accompanied by Mr Darby. The appeal hearing took place on 31 December 2017.

216. Mr Rumble's view was that he did not consider it was common practice for staff to leave the bureau and simply inform colleagues working in the lingerie department. Given the claimant's length of service, he considered that the claimant ought to have been aware of the correct process and she should have known the risks of leaving the bureau unattended (witness statement paragraph 15).

217. We considered the document to which Mr Rumble referred, page 120 of the bundle. This was clearly marked as the management document titled "Bureau Section Manager Tools". The claimant was not a manager and we find that she did not have access to this document. It said that the bureau

"*MUST NEVER*" fall below single control and "*MUST NEVER*" be left unattended during store opening hours.

218. Ultimately, Mr Rumble considered that the claimant had breached the policy by leaving the bureau unattended and that this was misconduct, which when combined with her final written warning, justified dismissal with notice. When Mr Rumble referred to the policy he always cross-referenced the Management Tool.

219. As part of the appeal process Mr Rumble conducted an interview with the dismissing officer Mr Marshall on 14 December 2017. Mr Rumble asked whether Mr Marshall could see clearly that the claimant had completed training and had knowledge of the policy and that documentation was signed (interview notes page 523). Mr Marshall replied: "*When you become a bureau customer assistant you do have training and there be expectation to keep up-to-date on policy. There should also be communication from line manager. She has been a bureau customer assistant for at least 3 years and has done this role in another store. You could make a logical assumption that she is qualified and has the competence to understand the risk.*"

220. Mr Rumble also conducted an interview with Mr Patel, on 27 December 2017 page 538. Mr Patel was asked whether he would let the manager know if he needed to leave the bureau unattended for a short period of time for example a toilet break. Mr Patel replied: "*I get on with the staff in lingerie so would also let them know as well. And if they can't get no one in straightaway and it's an emergency I would go, I can't hold on for long if it's an emergency but will always wait for someone to replace me for as long as possible. You need to let someone know that's the basic thing."*

221. Essentially, Mr Rumble's oral evidence was that the policy was to inform the duty manager and security if the bureau customer assistant was to leave the bureau unattended. Although Mr Rumble said that this was the policy, he did not have any such policy in front of him. The lack of identification of the policy both in the investigation and Mr Marshall's decision, was not corrected on appeal by Mr Rumble. The investigating, dismissing and appeal officers had an expectation as to what the claimant should and should not have done, but this was not based upon evidence of a policy of which the claimant was aware.

222. The appeal was not upheld. The outcome letter dated 31 December 2017 (page 542-544) said:

> *"You have raised that all members of the bureau team would agree with you that the process for leaving the bureau unattended would be to request the lingerie team to monitor the bureau as the correct measure of safeguarding and not communicate to the duty manager. I have since reviewed the interview notes Joe [Marshall] completed with [5 named individuals] I have also interviewed [Mr] Patel…..and Lorraine Conroy on this matter…… All individuals, except Lorraine Conroy, highlight the correct process is to inform a duty manager when leaving the bureau unattended. Therefore, it is fair for me to conclude the team practice on this is correct and in line with policy. However, I have*

advised to the store to immediately highlight to Lorraine the correct process on leaving the bureau unattended."

223. It is also not in dispute between the parties, that after the claimant's dismissal, on 27 November 2017, the respondent sent out a document called "Bureau Action" and under the heading "*Bureau Staffing"* stated: *"UNDER NO CIRCUMSTANCES can Bureaux be left unattended/undermanned during store trading hours, this is a security risk for your Bureau and Store*".

224. A copy of this document was introduced during the hearing. It was a company-wide document and not specific to the Fenchurch Street store. The evidence from the respondent's witnesses was that this was not connected with the claimant's disciplinary. We do not agree. We find on a balance of probabilities that it was sent out as a result of the claimant's disciplinary. It was issued only a week after her dismissal and we saw no other documents to suggest that this sort of message was sent out on any other occasion or was an established practice.

Job advertisement

225. The claimant complained that Mr Dowty advertised her role and put it on the notice board while she was off sick from 27 March to 7 August 2017. Mr Dowty's evidence was that the claimant had complained to him that they did not have enough staff on the bureau and this led to difficulties when opening and closing when two members of staff are needed. The bureau was becoming increasingly busy with queues at particularly busy times. Mr Dowty made the decision to recruit additional resource. The successful applicant was an existing employee. Mr Dowty's evidence was that the claimant's role has never been replaced and he did not advertise her role on the notice board.

226. The claimant had also been reassured by Ms Barker in the meeting on 25 August 2017 that she was not being replaced.

227. The successful applicant was female. We find this from Mr Dowty's statement paragraph 48 where he refers to the successful applicant as "she". We find that this had nothing to do with the fact that the claimant was a woman. Mr Dowty did not do this because he preferred to appoint a man. We find it was not because of or related to the claimant's sex.

228. We were not told by either side the age of the successful applicant. All we had was Mr Dowty's denial that this had nothing to do with gender or age. Without such evidence we have nothing upon which to find that this was done because of or was related to the claimant's age.

Sick pay

229. The entitlement to contractual sick pay was set out in the attendance at work policy at page 94. The entitlement was based on length of service and the claimant's entitlement was to full pay for 14 weeks.

230. Company sick pay is discretionary. The policy sets out circumstances in which the manager may consider not paying for a period of absence. One such example was:

    - *If there is evidence to show that an employee is absent because of a formal investigation or procedure related to their conduct or performance.*

231. On 27 February 2017 the claimant was invited to the disciplinary hearing for the comment to the security guard. This was the day upon which she went off sick. She accepted that the letter inviting her to the disciplinary hearing was handed to her by Ms Joseph on that day.

232. We saw an HR record at page 563 dated 15 March 2017 in which Ms Halkon told HR that the claimant had been off sick with stress for three weeks and was signed off until 20 March 2017. She believed there was a link between the disciplinary hearing and the absence. This is one of the circumstances in which the respondent can refuse to exercise the discretion to pay company sick pay.

233. The claimant's case was that Ms Halkon had been hiding her medical certificates and recording this is unpaid sick leave. The claimant's case was that Ms Halkon later told her that she was doing this because she was told to do so by management, implying it was Mr Dowty. This was put as either direct discrimination because of gender or harassment related to gender.

234. The following took place in cross-examination of the claimant on this issue:

    Counsel: And there is no indication that Ms Halkon acted the way that she did because of your sex?
    C: No I cannot see that.
    Counsel: And you don't really believe that to be the case?
    C: No.

235. The claimant had a sickness review meeting with Mr Dowty on 31 March 2017 in which he told her, contrary to her assertion that she would not be paid sick pay – that she <u>would</u> be paid sick pay. He asked Ms Seaton to take care of this. The claimant was asked, whether in these circumstances she believed that Mr Dowty was discriminating against her because of her sex or age? Her reply in evidence was: "*In this situation on 31 March 2017 I cannot say that he was discriminating."*

236. We were taken to the policy, we find that sick pay was discretionary, the claimant was told that she would continue to be paid. On the claimant's evidence and on the facts we have found above, the claimant has not shown enough to shift the burden of proof to the respondent. We find that there was no discrimination because of or related to the claimant's age or sex on this sick pay issue and allegation (xiv) fails on its facts.

<u>The time point</u>

237. The claimant's evidence (statement paragraph 18) was that in early 2018 she searched for legal help. She saw the CAB and a solicitor. She said the solicitor told her that they could only help if she could pay and advised her to go to ACAS.

238. On 29 September 2017 the claimant wrote to Ms Wilson saying that she had spent "*countless hours seeking justice"* and "*IF*" (which she put in capital letters) she decided to continue her search for justice she would do so outside the company (page 427).

239. The claimant was accompanied at the disciplinary hearings and at her grievance hearing by Mr Ian Darby who was her "BIG" representative, (Business Improvement Group). BIG is not a recognised trade union. Mr Darby has previous experience as a Unison shop steward so we find on a balance of probabilities that he had knowledge of tribunal time limits. We find on a balance of probabilities that as a trade union official, Mr Darby would have at the very least known about the importance of time limits and mentioned it to the claimant.

240. The claimant's evidence at paragraph 19 of her witness statement was that she went to ACAS to be given a certificate without which she could not bring the matter to the employment tribunal. She said: "*Therefore there were no delays on my part*". The claimant commenced Early Conciliation on 5 February 2018 and the certificate was issued on 15 March 2018. Her ET1 was issued on 12 April 2018.

241. The claimant said in evidence that she did not know about employment tribunals, other than to know they existed. We find that she had clearly done some research on her options, or taken some advice because in the notes of her disciplinary hearing on 1 November 2017 (page 474) she made reference to constructive dismissal and said that she thought she had exhausted everything with Marks & Spencer she had "*decided to take it further*". The claimant told the tribunal that her English was not good enough to know what the expression "*constructive dismissal*" meant and it was her GP who told her about it. For reasons we set out below we find that she knew much more.

242. The claimant was sent her P45 in January 2018. It was put in submissions that she had no knowledge of her right to bring a claim in the tribunal until she saw the CAB in January 2018 and she could not see them until she had her P45. We do not agree.

243. We find that she was aware of her right to bring a claim to the tribunal from a much earlier stage. We find from her letter of 13 April 2017 (page 273) appealing against the final written warning, she had clearly done her research in relation to the Equality Act 2010. In that letter the claimant referred to the Equality Act and clearly asserted that she had been discriminated against and set out a list of protected characteristics: age, disability, religion or belief and sex. She said that decisions made by an

Employment Tribunal must also follow the principles laid out in the Convention on Human Rights. Despite being off sick when she wrote this letter, it did not prevent her from looking in to these legal matters.

244. On the issue of prejudice, the claimant's case was not fully clarified until after the second preliminary hearing in August 2018, when she produced her Scott Schedules. Both Mr Patel and Ms Halkon had left the respondent's employment by this time. Ms Halkon left in March 2017 and Mr Patel in April 2018, two days before the ET1 was presented.

245. The claimant presented no evidence as to why she did not bring her claim any earlier than 12 April 2018 other than to tell the tribunal that she did not know until early 2018 that she could do so. We did not accept that evidence.

The law

Unfair dismissal

246. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

247. The tests in ***British Home Stores Ltd v Burchell 1980 ICR 303*** as restated in ***Graham v Secretary of State for Work and Pensions (JobCentre Plus) 2012 IRLR 759 (CA)*** are first, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; second, did the employer believe that the employee was guilty of the misconduct complained of; and third, did the employer have reasonable grounds for that belief.

248. If the ***Burchell*** test is satisfied, the tribunal must consider whether dismissal falls within the range of reasonable responses open to the employer – see ***Post Office v Foley 2000 IRLR 827 (CA)***. In a case where the individual has previous disciplinary warnings, guidance is given by the EAT in ***Wincanton Group plc v Stone 2013 IRLR 178.*** This was relied upon by the claimant in submissions. Paragraph 37 of ***Wincanton*** (Langstaff P) states:

> *We can summarise our view of the law as it stands, for the benefit of tribunals who may later have to consider the relevance of an earlier warning. A tribunal must always begin by remembering that it is considering a question of dismissal to which s.98, and in particular s.98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it*

is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

> *(1) The tribunal should take into account the fact of that warning.*
>
> *(2) A tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an employment tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a tribunal is entitled to give that such weight as it sees appropriate.*
>
> *(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the tribunal is satisfied as to the invalidity of the warning.*
>
> *(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore tribunal should be alert to give proper value to all those matters.*
>
> *(5) Nor is it wrong for a tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.*
>
> *(6) A tribunal must always remember that it is the employer's act that is to be considered in the light of s.98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.*

Disability discrimination

249. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

250. Under section 212(1) of the Equality Act 2010 “substantial” means more than minor or trivial.

251. This was considered by the EAT in ***Aderemi v London and South Eastern Railway Ltd 2013 ICR 591*** by Langstaff P who said at paragraph 14:

> *It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an*

> *adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.*

252. In ***Herry v Dudley Metropolitan Council 2017 ICR 610*** (Richardson J) the EAT, taking account of the decision of the EAT in ***J v DLA Piper UK LLP 2010 ICR 1052*** said that there is a distinction between a mental impairment and a reaction to life events. ***Herry*** was a case in which one of the conditions relied upon as a disability was work related stress. The EAT said:

> *"**[70]** It is to our mind plain, as both counsel accepted, that the Employment Judge concluded that the Claimant did not establish any mental impairment by reference to stress, which was the basis upon which his absence was certified. The Employment Judge, when he said that the Claimant's stress was "clearly a reaction to life events" was drawing the distinction identified in para 42 of J v DLA Piper between a mental impairment and a reaction to life events.*
>
> ***[71]** It is true that in para 42 Underhill P said that in a case where mental impairment was disputed the ET might begin with findings as to whether there was a long-term effect on normal day-to-day activities, because reactions to adverse circumstances were not usually long-lived. He was, however, not setting out any rule of law; he was considering a case where the principal diagnosis in issue was depression; and he did not rule out the possibility of a reaction to adverse circumstances which was long-lived. As we have explained above, when commenting on J v DLA Piper, there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive of the existence of a mental impairment.*
>
> ***[72]** In this case the Employment Judge found that the Claimant's "stress" was "very largely a result of his unhappiness about what he perceives to have been unfair treatment of him"; and he also found that there was "little or no evidence that his stress had any effect on his ability to carry out normal activities". The Employment Judge considered these two aspects together. We do not think he committed any error of law in doing so; and we do not think he was bound to find that the Claimant had a disability because he had been certified unfit for work by reason of stress for a long period. The Claimant failed to establish that he was under a disability for the linked reasons that he did not establish a mental impairment and he did not establish the requisite substantial long-term adverse effect. We see no error of law in the Employment Judge's reasoning;"*

253. Discrimination arising from disability is found in section 15 Equality Act 2010:

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

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

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

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

254. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

255. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

256. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it (judgment paragraph 31b).

257. The duty to make reasonable adjustments is found under section 20 Equality Act 2010.

(2) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

258. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

259. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

260. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

261. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant.*

262. In relation to knowledge of disability and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

Direct discrimination

263. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others

264. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Harassment

265. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

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

266. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

267. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

268. In order to fall within section 26, the conduct must be "related to" race and/or disability. Behaviour which is unreasonable or bullying, but unconnected to those protected characteristics will not therefore fall within this category. This was emphasised by the EAT in ***Nazir v Aslam EAT/0332/09*** (Richardson J at paragraph 69).

> "*The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law - such as a person's race and gender."*

Burden of proof

269. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

270. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

271. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

272. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

273. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

274. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. *The judgment of Lord Hope in* ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

275. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

276. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** recently confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed.

277. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

278. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

279. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

280. The burden is on the claimant to prove, either by direct evidence or inference, that the 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.

281. In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

> *It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the party sued had cooperated with any requests for information;*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

282. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

283. The decision of the Court of Appeal in ***Apelogun-Gabriels v London Borough of Lambeth 2001 IRLR 116*** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

284. In ***Abbey National plc v Chagger 2009 IRLR 86*** the EAT and CA (***2010 IRLR 47***) confirmed that the ***Polkey*** principle may apply in discrimination cases. The burden is on the respondent to prove that it is appropriate to make a ***Polkey/Chagger*** deduction.

Conclusions

Unfair dismissal

285. We have found above that Ms Sholay's investigation was not a reasonable investigation. We have found that there was no proper investigation into what rules the claimant knew she had to follow. Ms Sholay did not investigate what the claimant knew as to the rules on leaving the bureau unattended and what she had been trained in, particularly given her position that she was acting as she had always done by notifying another colleague to monitor the bureau. The respondent could not point to the policy they relied on, other the Management Tool which was not applicable to the claimant.

286. As the investigation was not a reasonable investigation, we find that Mr Marshall did not hold a reasonable belief that the claimant was guilty of misconduct in leaving the bureau unattended, whilst monitored.

287. The position was not corrected by Mr Rumble on appeal.

288. We find therefore that the dismissal was unfair.

289. We have considered whether the claimant contributed to her dismissal by culpable or blameworthy conduct. We find that the claimant did not contribute to her dismissal by culpable or blameworthy conduct. The respondent could not point to a policy of which the claimant was aware. In Mr Marshall saying that she knew the bureau should not be left unattended, this was in the context (page 466) of the claimant saying provided it was being monitored. The only reason the respondent knew about the claimant's practice was because it came to light during the investigation into the purchase of the goods and looking at the CCTV.

290. The original warning on the security guard issue plays no part in our determination on this issue because we find that the October 2017 disciplinary issue stands on its own in so far as no policy could be identified.

Time point

291. The claimant commenced Early Conciliation on 5 February 2018. The certificate was issued on 15 March 2018. This means that anything prior to 6 November 2017 is on the face of it out of time. The ET1 was presented on 12 April 2018 within one month of the certificate being issued. The respondent accepts that the following complaints were presented in time: (i) the unfair dismissal claim, (ii) the claim for discrimination arising from disability by dismissal and the rejection of the appeal against dismissal and (iii) the claim for failure to make reasonable adjustments in relation to not leaving the bureau unattended. The respondent also accepted in oral submission that allegation (vi) relied upon for direct discrimination and harassment was also potentially within time as it was relied upon up until dismissal although said that there was no factual evidence within time to support this.

292. The remainder of the claim is on the face of it out of time. This encompasses all the harassment and direct discrimination claims.

293. The claimant's submission was that it was just and equitable for the tribunal to extend time. The claimant said she received her P45 in January 2018. It was submitted on her behalf that she could not take matters further with a complaint to the tribunal until she received her P45 because the CAB asked to see this in connection with providing her with advice. This was not covered in the claimant's evidence and was put for the first time in submissions.

294. The claimant also submitted that because Ms Angela Barker told her that the internal process was over and she should move on, the claimant thought she could not do anything else about it. Once again this was not something that she said in evidence. It is not the respondent's responsibility to advise the claimant that she can bring a claim against them in the employment tribunal. Ms Barker was on our finding, in any event referring to the respondent's internal process.

Was the claimant a disabled person

295. The burden is on the claimant to prove disability. The medical evidence at the relevant time was limited.

296. On the OH report, we found above that the version at page 329 was the later and amended version, containing the amendment sought by the claimant. In the earlier version, the OH practitioner said that the claimant did not (our underlining) have a past history of depression and also said that the claimant did not have a pre-existing condition or underlying medical reason for the employee's absence. There was correspondence between the claimant and the OH practitioner which led to the amended version. The

amended version at page 329 said that the claimant "*does have a history of depression which has been under control until the recent episode"* (again our underlining).

297. Based on the GP letter and historical medical records at pages 609-611, referred to above, we find that the claimant had the mental impairment of depression. On her own evidence she did not know she had auto immune disease until late July 2017, after the OH report had been prepared.

298. We have found above that the claimant's depression had a substantial effect upon her ability to carry out normal day to day activities. It had persisted on a recurrent basis since 1994 so we find that it was a long-term condition. We find that the claimant met the definition of a disabled person under section 6 of the Equality Act at the material times with the condition of depression.

299. We have found above that from 27 February 2017 the respondent knew that the claimant had the condition of depression because of the medical certificate of that date, which the claimant handed to them in person.

300. The claimant did not know about her auto immune condition until late July 2017. It was not known to the OH practitioner so the respondent had no information on this condition via the OH report. We have found that the claimant told Ms Siduna about the condition on about 20 September 2017 and Ms Wilson on 21 August 2017.

301. The claimant gave the tribunal very little information about the specific effect upon her of this condition, on her ability to carry out normal day to day activities. As she has and had a large number of medical conditions, it was difficult for us to separate the effects upon her of different conditions. The claimant did not detail for us in her disability impact statement exactly how this condition impacted upon her normal day to day activities.

302. We are also unable to make a finding that from July to November 2017 this was a condition that was long term, or likely to be long term. The claimant told the respondent that she was receiving treatment and it is not clear from the evidence as to what the effect of this treatment was likely to be. We noted from Dr Renukanthan's letter dated 29 March 2018 (page 605) that the condition had "*improved overall*" and gave a positive prognosis (page 606).

303. We find that the claimant has not satisfied the burden of proof on disability for auto immune disease but she has satisfied the burden of proof in relation to the condition of depression.

304. We distinguish this case from ***Herry*** because we find that this was not simply the claimant's reaction to life events at work but part of an ongoing chronic and recurrent condition of depression diagnosed as far back as 1994.

Disability
Reasonable adjustments

305. First reasonable adjustments issue: We have considered whether the respondent applied a PCP of having a manager make a call to an employee on sick leave every week. We find that they did as it formed part of the absence management policy (page 86 of the bundle and set out above).

306. We found above that at a sickness review meeting on 19 June 2017 the claimant accepted that she did not say that she did not want to receive a weekly phone call. When the claimant eventually told Ms Seaton that she would prefer it if she (the claimant) could make the call, rather than receive the call, they agreed to this.

307. Prior to being told this, the respondent could not reasonably be expected to know that the weekly call placed the claimant at a substantial disadvantage. As soon as they knew about it, they made the necessary adjustment. We find that there was no failure on the part of the respondent to comply with the duty to make reasonable adjustments on this issue.

308. Second reasonable adjustments issue: We have considered whether the respondent applied a PCP of requiring employees to work at till points where they had to stand for prolonged periods. We find that they did not apply this PCP. The starting point was that when working on tills, employees would be standing. To this extent we find that the respondent applied that PCP. We find that in August 2017 this put the claimant at a substantial disadvantage because of her difficulties in standing by August 2017. She was using a stick at the time.

309. We have found above that a stool would be made available if it was requested. If any employee had a mobility issue, all they had to do was ask for a stool to sit on. We find that the respondent made the necessary reasonable adjustment.

310. Third reasonable adjustments issue: Did the respondent apply a PCP of ignoring OH recommendations and having HR with employees in meetings?

311. We did not evidence from the claimant about the respondent having a practice of having HR with employees in meetings. The claimant did prove the facts of her case on this point and therefore we find no such PCP was applied.

312. The only evidence we had as to the respondent's practices on OH recommendations was in relation to the claimant. We have set out above the four employer recommendations made by OH in the claimant's case. On the first one, we have found that there was no off-site meeting before her return to work in August 2017 but the claimant did not object to this at the time and did not tell us that she experienced a substantial disadvantage as a result of not having an off-site meeting. We have found above that the claimant returned to work before the respondent saw the OH report. They

received the report on the day of the claimant's return to work on 7 August 2017.

313. So far as open lines of communication were concerned, we have found that the claimant was confident about raising her concerns at work and the evidence showed this. The claimant showed us no evidence that there was a lack of open lines of communication with her manager.

314. We have found above that there was a failure to comply with the fourth OH recommendation on weekly meetings with the claimant. We have also found that Ms Barker acknowledged that the OH recommendations had not been followed through and acknowledged this oversight which Mr Rumble picked up with her. We find on a balance of probabilities that the respondent applied this PCP.

315. We have considered whether this put the claimant at a substantial disadvantage in comparison with persons who are not disabled. The claimant had a return to work meeting on 7 August 2017 and no further meeting until her meeting with Ms Barker on 25 August 2017. This meeting only took place because she had written to Ms Wilson on 21 August 2017. We find that there was a substantial disadvantage to the claimant in the failure to have the weekly meetings. We found above that on her return she was concerned that she was being replaced in the bureau and this caused her anxiety levels to rise and resulted in pain (letter to Ms Wilson 21 August 2017). Had a meeting taken place on or before 14 August 2017 this worry and concern and its effects would have been alleviated.

316. We find that had the respondent held the meetings as recommended by OH this would have avoided some if not all of the disadvantage. We find that holding the meetings as recommended would have helped the claimant with any concerns she might have been dealing with in the workplace, not just confined to the question of whether or not she was being replaced. The OH reported intended this to deal with any challenges that she faced and any concerns that may have been ongoing.

317. We find that there was a failure to make a reasonable adjustment by complying with the OH recommendations. We find that this claim is within time because it formed part of an ongoing adjustment that needed to be made.

318. Fourth reasonable adjustments issue: We have considered whether the respondent applied a PCP of refusing a rehabilitation period once an employee had used up all their sick leave thus requiring employees to work full contractual days and placing a limit on sick leave entitlement.

319. The respondent applied its Absence Management Policy which we have referred to above. It provided for a fixed period of company sick pay dependent upon length of service. It did not place a limit on sick leave entitlement, it provided for a period of contractual entitlement to full pay. Any employee who was unfit for work would not be compelled to attend

work. The claimant, as we have found above, sought a reduction in her working pattern to assist her with her recovery and this was agreed by Ms Siduna.

320. As we have found above, the notes of the 25 August 2017 meeting with Ms Seaton and Ms Siduna showed and we find that the claimant did not want rehabilitation hours (page 413).

321. We find that the respondent did apply a PCP of requiring the claimant to work her full contractual days when she was fit enough to do so, but they did not apply a PCP of requiring her to work full contractual days when she was signed off sick. There was a limit on contractual sick pay based on years of service. The claimant did not want rehabilitation hours. She made a request in September 2017 to reduce her days of work and this was granted.

322. The claim in this respect was difficult to follow but we find that there was no failure to make reasonable adjustments. There was no refusal by the respondent to grant a rehabilitation period. The claimant was offered this and refused it. The reduction in working time that she requested was granted.

323. Fifth reasonable adjustments issue: The respondent does not deny applying a PCP of requiring that the bureau de change is never left unattended. This was in their Management Tool document at page 120.

324. We have considered whether this PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled. The claimant relies on the date of 20 November 2017 which was her effective date of termination. We therefore understood her to be relying on her dismissal.

325. The adjustment contended for was allowing her to leave the bureau for short periods as previously agreed with Ms Siduna in August 2017 (page 71m). This adjustment had been granted.

326. The dismissal of the claimant was not for taking disability related breaks, it was for leaving the bureau unattended and only monitored by lingerie staff. We have found that the dismissal was unfair for the reasons outlined, namely the lack of a reasonable investigation into the precise policy and what the claimant had been told and trained to do. This in turn affected the reasonableness of the belief in the misconduct on the part of the dismissing officer.

327. We find that the PCP itself did not put the claimant at a substantial disadvantage in that she had been given permission to split her breaks and she was not prohibited from taking breaks if she took the correct steps.

328. Even if we are wrong about this, we find that it is not a reasonable adjustment to allow the bureau to be left unattended when very large sums

of cash and currency are at risk or when customers might need to be served. The unfair dismissal issue relates to the terms of a policy of which the claimant was aware. The reasonable adjustments issue is different. Had the respondent been able to point to a precise policy, known to the claimant and ideally a training record signed by her, then our findings on unfair dismissal would have been different.

329. We find that it was not a reasonable adjustment to allow the claimant to leave it unattended in the circumstances that she relied upon.

330. Sixth reasonable adjustments issue: The claimant relied upon the same matters as for the fifth reasonable adjustment (page 71o) in relation to her appeal against dismissal. Therefore our reasoning is the same as above and we find that there was no failure to make reasonable adjustments.

Disability related harassment

331. There were two allegations of disability related harassment: (i) Ms Barker telling her that her depression was her fault because she took M&S punishments too seriously and (ii) Ms Field reprimanding her for leaving the bureau unattended and telling her that she could not have special treatment.

332. We have found above that Ms Barker did not tell the claimant that her depression was her fault because she took M&S punishments too seriously.

333. On the second allegation we have found above that Ms Field told the claimant that having M&S goods in the back of the bureau was unacceptable and no-one received special treatment. We find that the reprimand was for leaving the goods at the back of the bureau and our finding above was that it was not until the CCTV was viewed, that the respondent knew what breaks the claimant had taken on 17 October 2017. Ms Field did not know this when she reprimanded the claimant and her colleague. We find that the reprimand was not related to any disability.

334. The claim for disability harassment fails and is dismissed.

Discrimination arising from disability

335. The claimant's case is that she was reprimanded by Ms Field, dismissed and her appeal was not upheld because of something arising from her disability. That which arose from her disability was said to be her need to leave the bureau unattended because of her condition.

336. We repeat our finding above in relation to Ms Field's reprimand which we have found related to the purchase of the goods and was not because of something arising from any disability.

337. The claimant's case is that Mr Marshall dismissed her for leaving the bureau unattended because of something arising from her disability. What was put

as arising from the claimant's disability (Scott Schedule page 71m) was that her depression made it more difficult for her to stay in the bureau alone for long periods without her symptoms worsening. The claimant had permission from her manager to split her breaks because of her need to take medication and to clear her thoughts. The breaks taken on 17 October 2017 were to buy the pizzas and flowers, a toilet break and a smoke break. She took 42 rather than her allowed 30 minutes.

338. Our finding is that the claimant was unfairly dismissed because she was not aware of the policy that the respondent relied upon. The respondent could not point to a policy in writing which had been communicated in writing.

339. Our finding was that Mr Marshall dismissed the claimant because of his view that the policy was that the bureau should not be left unattended even if monitored. We find that this was not because the claimant was taking disability related breaks but because she had left it unattended and monitored, without notifying a manager. She was not dismissed because she took the breaks, but because of the way in which she left the bureau during the breaks. We find that this was not a dismissal because of something arising from disability.

340. The same applies to Mr Rumble's appeal. The claimant relied upon the same reasoning in her Scott Schedule and the respondent's reasons for not upholding the appeal were the same.

Direct discrimination or harassment

341. All fifteen allegations were relied upon as sex discrimination or harassment related to sex. Allegations (v), (vi), (viii), (xii), (xiii), (xiv) and (xv) are relied upon as to the protected characteristic of age and (x) and (xi) as to the protected characteristic of religion.

342. As per our findings above allegations (i), (ii), (iii), (iv) and (v) fail on their facts.

343. On allegation (vi) we found as a fact, based on the claimant's own evidence, that Mr Dowty did not act as he did because of or related to her sex. In addition she relied upon female comparators as well as male comparators. So far as age is concerned, we find that it was reasonable for Mr Dowty to have a conversation with the claimant about shortfalls during the daily accounts because our finding was that she was the employee on duty at close down at the end of the working day. The claimant had challenged Mr Dowty's authority by challenging his taking of deliveries of cash during store opening hours. We find that this had nothing to do with the claimant's age and was not related to her age. We could find no facts from which we could conclude in the absence of any other explanation that this was because of or related to her age.

344. The offensive comment from Mr Patel, allegation (vii), was not denied. We saw it at page 207 and we found above that Mr Patel intended the claimant

to see it. It is relied upon as sex discrimination or harassment only. We find that it was an act of harassment related to sex. It had the purpose and effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for her.

345. Allegation (viii) was relied upon both as to sex and age. As we have set out above, it was put to the claimant in cross examination that Mr Dowty did not treat her less favourably because of sex or age in relation to Mr Patel. She accepted this. We find that this was not sex or age discrimination whether direct discrimination or harassment.

346. Allegation (ix) was relied on only as to the protected characteristic of sex. We found above that there was nothing untoward about the way in which Mr Patel wrote his name and we could find no facts from which we could conclude in the absence of any other explanation, that there was direct sex discrimination or harassment related to sex. The claimant was also asked whether she thought this was harassment because of her sex. She said thought it was rude, when she treated him cordially. We find that it was not sex discrimination.

347. Allegations (x), (xi), (xii), (xiii) and (xiv) also failed on the facts.

348. The only allegation of discrimination which we found on the facts in the claimant's favour is allegation (vii) - the offensive comment from Mr Patel on 27 January 2017.

Time limit issue

349. The date relied upon for Mr Patel's comment was 27 January 2017. The primary time limit expired on 26 April 2017. The Early Conciliation Rules do not operate to extend time in these circumstances. The ET1 was presented on 12 April 2018. The claim is a year out of time.

350. We have made findings of fact above that the claimant had knowledge of the Equality Act from at least April 2017, before the primary time limit expired. We found this from the content of her letter dated 13 April 2017 appealing against her final written warning. We also found that as she was accompanied by Mr Darby at all relevant meetings that on a balance of probabilities she knew about time limits. The claimant gave us no evidence as to why she did not present her claim at an earlier stage. There is nothing to link to the Patel comment to form any continuing act. We find that this claim is out of time and it is not just and equitable to extend time for a year. We also took account of the fact that by the time the claim was clarified by the claimant, Mr Patel had left the respondent's employment and this was prejudicial to them. We find that this claim fails because it is out of time.

351. We do not condone in any way at all Mr Patel's conduct. The comment was highly offensive and amounted to harassment related to sex. We understand why the claimant was upset about it. The respondent could have done more to reassure the claimant that it had been properly dealt

with. It is only because the claim is out of time that the respondent has escaped liability.

352. The claims for sex, age and religious discrimination or harassment all fail and are dismissed.

_____

Employment Judge Elliott
Date: 4 January 2019

Judgment sent to the parties and entered in the Register on: 7:1:2019 .
_____ for the Tribunals