EMPLOYMENT TRIBUNALS

Claimant: Miss Lisa Halton

Respondents: (1) Rutland Water Cycling Limited
(2) Ben Yarlett

HEARD AT: Cambridge: 18-20 March 2019; 11 April 2019 (deliberations).

BEFORE: Employment Judge Michell, Mr J Williams; Mr B Smith.

REPRESENTATION: For the Claimant: Mr Ishfaq Ahmed (counsel)
For the Respondent: Ms Jen Coyne (Counsel)

RESERVED JUDGMENT

Each the Claimant's claims against each of the Respondents are dismissed.

REASONS

BACKGROUND

1. The claimant resigned from the first respondent on 31 January 2018. By an ET1 presented to the tribunal on 9 April 2018, and following a period of early conciliation for which Day A was 31 January 2018 and Day B 1 March 2018, she asserted she had been wrongfully and unfairly constructively dismissed. She also made claims of sex and disability discrimination against both respondents under the Equality Act 2010 ("**EA 2010**"). All claims are denied in the ET3.

EVIDENCE

2. We heard oral evidence from the claimant who, to help her deal with the pressure of attending tribunal, was patiently supported in her evidence by

an 'anxiety comfort' chocolate Labrador dog called Ronnie. (He only once unwittingly disturbed proceedings, by dreaming loudly during Ms Coyne's closing submissions.) We consider the claimant did her best to give a truthful account, though on occasion she was visibly upset, a little inconsistent, and sometimes did not focus fully on the questions asked of her.

3. For the respondents, we heard from Mr Ian Roddey, and the second respondent. Both of those men presented as calm, measured, fair and credible witnesses- albeit the second respondent took a little time to acclimatise himself to the questioning process. Mr Roddy struck us as a particularly even-handed and careful individual.

4. We were referred to various pages from a 172 page bundle. We received written closing submissions from both the counsel, which we took into account. In particular, we adopted in large measure Ms Coyne's helpful (and non-contentious) exposition of the material law. We were also provided in accordance with directions we gave at the conclusion of the hearing with further written submissions from (only[1]) Ms Coyne on the issue of (i) whether or not the sex harassment claim in relation to the hook suspension episode (defined below) was -if taken as free standing- out of time; and (ii) if it was out of time, whether or not a just and equitable time extension ought to be permitted.

HOUSEKEEPING AND ISSUES

5. The parties agreed that at this stage we would only deal with liability issues (and any deductions for contributory fault or on **Polkey** bases), leaving remedy for later if necessary. The issues for us to determine were discussed on Day 1, and refined into an agreed List of Issues ("the List") drafted after discussion. For ease of reference, we set them out in full below, in italicised text and using the paragraph numbers (and, on occasion, curious syntax) used in the List:

1. The Claimant complains of:

[1] We invited submissions from both Counsel.

a. *Failure to make reasonable adjustments (against the First Respondent) (section 20-21 EA 2010).*
b. *Direct discrimination (disability) (against the First Respondent) (Section 13 EA 2010).*
c. *Direct discrimination (sex) (against the First Respondent) (section 13 EA 2010).*
d. *Harassment related to disability (against both Respondents) (section 26 EA 2010).*
e. *Harassment related to sex and/or unwanted conduct of a sexual nature (against both Respondents) (section 26 EA 2010).*
f. *Wrongful dismissal (against the First Respondent).*
g. *Unfair Dismissal (against the First Respondent).*

Disability Discrimination Claims

Knowledge (for both disability discrimination claims)

2. *The Respondents accept that the Claimant at the material time of the claim suffered from a disability for the purposes of EA 2010.*

3. *Pursuant to para 20(1) of Schedule 8 to EA 2010, did the First Respondent know or ought to have known that the Claimant was disabled? The Respondents aver that they did not and should not. The Claimant alleges that they did/ought to have from 30 April 2017.*

1) Failure to make reasonable adjustments under section 21(2) EA 2010

4. *Did the First Respondent have either or both of the following PCPs:*
   a. *A practice of not keeping a chair for sales staff to sit on in the store? (**PCP 1**).*
   b. *Alternatively, a practice of not having a chair for sales staff to sit on readily available to staff to sit on whilst on duty? (**PCP 2**)*

*It is accepted that it had a practice that the sales staff in its store should work on Mondays when they were contracted to do so (**PCP 3**). [But not that all staff should work on Mondays].*

5. *If so, did any or all of the PCPs put the Claimant at a [substantial disadvantage in relation to a relevant matter] in comparison with persons who are not disabled, namely, in relation to each PCP:*
    a. *For PCP 1: back pain exacerbated*
    b. *For PCP 2: back pain exacerbated*
    c. *For PCP 3: contracted to work on Sundays, which were busy, and therefore the Claimant's pain was increased and exacerbated on Mondays.*

6. *If so, did the First Respondent know or could it reasonably be expected to know that (1) that the Claimant is disabled (the same answer must apply as above) and (2) that the Claimant was likely to be placed at any such disadvantage?*

7. *If so, were the adjustments below reasonable adjustments at the relevant time (14 January in relation to PCP 1 and 2 and September 2017-31 January 2018 in relation to PCP 3)?*
    a. *The provision of a readily available ergonomic chair to sit on Sunday 14 January 2019 (in relation to PCP 1 and 2)*
    b. *Not requiring the Claimant to work Mondays (in relation to PCP 3).*

2) <u>Direct discrimination (disability) contrary to section 13 EA 2010</u>

8. *Did any of the following acts occur:*
    a. *the Claimant ask George to get a chair down for her, and did he reply that he could not do it as it was a "political hot potato" and she then say not to worry?*
    b. *the Second Respondent exclude the Claimant from a training course (as the Claimant argues)? The Respondents aver that the Second Respondent did not <u>select</u> the Claimant to attend a training course. ["The training allegation".]*

9. *It is accepted that the following acts occurred:*
    a. *The Second Respondent had not been able to provide the chair by the end of the working day of 14 January 2018. [It was alleged*

that the second respondent's failure to provide a chair constituted an act of direct disability discrimination.]

10. *If so, did the First Respondent treat the Claimant less favourably by enacting each act above than they treat or would treat others (the Claimant relies on a hypothetical comparator)?*

11. *If so, was the less favourable treatment because of the protected characteristic of disability?*

3) <u>Harassment related to disability (section 26 EA 2010)</u>

12. *Did the following conduct occur:*
    a. *"The incident": the Claimant walk into the kitchen to fetch a medical letter, the Second Respondent walk after her and say that the Claimant needed to take her top off as it was not uniform (as the Claimant argues)? The Second Respondent slam the door to the office, keep repeating that the Claimant needed to take her top off?*
    b. *the Second Respondent tell the Claimant on the shop floor that her scarf would need to come off?*
    c. *the Second Respondent tell the Claimant to go home on unpaid leave?*

13. *If so, were each or any of the acts listed above unwanted?*

14. *If so, did each conduct relate to disability?*

15. *If so, did each conduct have the purpose (taking into account the Claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have such an effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

<u>Sex Discrimination claims</u>

4) <u>Direct Discrimination (sex) (section 13 EA 2010)</u>

16. *Did any of the following acts occur:*

a. *"The incident": the Claimant walk into the kitchen to fetch a medical letter, the Second Respondent walk after her and say that the Claimant needed to take her top off as it was not uniform (as the Claimant argues)? The Second Respondent slam the door, and repeating that the Claimant needed to take her top off?*
b. *the Second Respondent tell the Claimant on the shop floor that her scarf would need to come off?*
c. *the Second Respondent tell the Claimant to go home on unpaid leave?*
d. *the Second Respondent exclude the Claimant from a training course (as the Claimant argues)? The Respondents aver that the Second Respondent did not <u>select</u> the Claimant to attend a training course on a day she was contracted to work. ["The training allegation".]*

17. *If so, did the First Respondent treat the Claimant less favourably by enacting each act above than they treat or would treat others (the Claimant relies on a hypothetical comparator)?*

18. *If so, was the less favourable treatment because of the protected characteristic of sex?*

5) <u>Harassment related to sex (section 26 EA 2010)</u>

19. *Did the following conduct occur:*
    a. *"The incident": the Claimant walk into the kitchen to fetch a medical letter, the Second Respondent walk after her and say that the Claimant needed to take her top off as it was not uniform (as the Claimant argues)? The Second Respondent slam the door to the office, keep repeating that the Claimant needed to take her top off?*
    b. *the Second Respondent tell the Claimant on the shop floor that her scarf would need to come off?*
    c. *the Second Respondent tell the Claimant to go home on unpaid leave?*

d. *The matters in paragraph 11 ET1. It is accepted that in late November 2017, the Second Respondent told the Claimant and another colleague about hook suspension. She suggested that they should Google search for images. The Second Respondent did so. The group stood around and laughed and grimaced. ["**the hook suspension episode**"]*

20. *If so, were each or any of the acts listed above unwanted?*

21. *If so, did each conduct relate to sex? Alternatively, was it of a sexual nature?*

22. *If so, did each conduct have the purpose (taking into account the Claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have such an effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

Unfair dismissal and Wrongful dismissal

Constructive Dismissal

23. *Did any of the following acts occur as alleged by the Claimant:*
    a. *Was the Claimant's complaint dated 15 January 2018 (actually submitted 24 January 2018) not being taken seriously by the first Respondent by 31 January 2018 in that:*
        i. *The Claimant was suspended without prior questioning;*
        ii. *Whereas the claimant was suspended, the second Respondent was not; and*
        iii. *No action was taken on the Claimant's grievance of 24 January 2018?*
    b. *The incident (paras 9-11 ET1)?*

24. *If so, did each or all of these acts amount to the First Respondent, without reasonable or proper cause conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence in the employment relationship?*

25. *If so, was one of the reasons that the Claimant resigned in response to the same?*

6) <u>Wrongful Dismissal</u>

26. *If so, the Claimant will have been wrongfully dismissed as it is not in dispute that the Claimant has not been paid notice pay.*

27. *The remedy for the same is the notice pay.*

7) <u>Unfair Dismissal</u>

28. *If the Claimant was constructively dismissed by the reason that the First Respondent did not take her complaint dated 15 January (but submitted 24 January) seriously by the first Respondent by 31 January 2018, or the incident, then it is accepted that the dismissal was also unfair under section 98 ERA 1996.*

<u>Finessing the issues</u>

6. It was clarified and agreed between the parties that any of the matters not articulated in the List constituted background only in relation to the above issues. Partway through the claimant's evidence, she also withdrew the Training Allegation as a freestanding head of claim. She realistically accepted that such matters had "nothing to do" with sex or disability, and were instead part of "just me being ostracised".

7. It was also agreed (by the claimant) that if the incident took place essentially as described by the second respondent, it did not amount to a repudiatory breach, and (by the respondents) that if it took place essentially as described by the claimant, it did amount to such a breach.

<u>FACTUAL FINDINGS</u>

8. The first respondent is an independent chain of cycle shops, based in central England. It employs about 250 members of staff. From about March 2011, the claimant worked for a company trading as Pitsford Cycles as a sales assistant at its Pitsford shop. She performed a customer facing role, including meet-and-greet activities. Pitsford Cycles was bought by the first respondent, whereupon the claimant's employment transferred to the first respondent by operation of the TUPE Regulations in about June 2017.

9. Both before and after that TUPE transfer, the claimant worked a 32 hour four day week- on Sundays, Mondays, Wednesdays and Thursdays.

10. In the lead up to the TUPE transfer, Mr Roddy met with the claimant on 30 April 2017. He asked her to explain her background and role in the store. She told him about her four day week, and said she was happy with it. She also said that she had had "a little bit of an accident" in 2012. She explained that she had hurt her back, which meant she was not able to carry bikes. She did not go into further detail, and neither did Mr Roddy press for more information.

11. We accept Mr Roddy's evidence that this was the only information he received, and that neither she nor anyone from Pitsford Cycles gave him more information (whether around the time of the TUPE transfer or otherwise). If they had done so, he would have recorded as much in the April 2017 note or elsewhere.

12. The second respondent was the claimant's manager, from the time of transfer. He was described by the claimant as something of a "new broom", in circumstances where the claimant -perhaps more of a 'free spirit' than most- was not particularly fond of change. Hence, for example, she took offence when the second respondent showed her a "motivational video" setting out guidance for cleanliness standards within the store.

13. Pitsford Cycles had a dress code, It provides that staff had to wear the uniform and other apparel with which the company had provided them "at all times". The first respondent also had a dress code. That code requires that members of staff carrying out customer-facing roles must wear "dark colours only for trousers and shorts", and on the top a Rutland cycling Jersey and jacket. Members of staff are also provided with Rutland Polo shirts, and a neck 'buff' for warmth when needed.

14. We consider that the claimant was well aware of the dress code, which was available in a file by the service desk as well as on the company intranet. In any event, as set out below, she was reminded of its requirements.

15. At some point in late November, the second respondent joined in a conversation with the claimant and a colleague (Matthew) were having. In the context of that conversation, the second respondent brought up the topic of something called “suspension”, which involves participants being willingly suspended by piercings. The three of them googled for images of this strange activity. The claimant was a willing participant in looking at the images. She “laughed nervously”. We reject any suggestion that the conversation was in any way sexual, or that the images were such. Rather, they showed a very peculiar form of meditative exercise– rather like lying on a “bed of nails”. Though somewhat disturbing and unsavoury to look at for many (including the claimant), they were not intended for sexual titillation or sexual purposes. We also accept the second respondent’s evidence that the images depicted men as well as women suspended on hooks.

16. In September 2017, the claimant asked the first respondent if she could stop working on Mondays. She told the second respondent she wanted a day off in order to help a friend who was getting busy with her work. She did not suggest to him that the request was in any way related to her back. On Monday 2 October 2017, the claimant went home early, saying that she was feeling depressed and anxious. Again, she did not mention back issues. The second respondent was somewhat cynical about her absence, noticing that it took take place on Monday. The claimant remained off sick for a few days. Meanwhile, the second respondent considered further her request to no longer work on Mondays. He noted that the claimant had indicated she would not provide cover any other day. He explained to Mr Roddy in his 6 October 2017 email that will be it was “probably not imperative” she that worked on the Monday, but that the loss of one shift that day would affect them elsewhere in the week.

17. On about 12 October 2017 the claimant spoke with Mr Roddy. She told him the reason she had asked not to work on Mondays was because of the strain on her back after working on the Sunday. She told him that, coincidently, someone had offered her another job on the Monday performing administrative duties. Mr Roddy’s advice to the claimant was that he would

need to approach her GP to understand more about her medical condition. He provided her with the consent form and asked her to complete it. He suggested to the second respondent on 14 October that, in the interim, appropriate adjustments might be made to her working arrangements on the Monday.

18. After some delays in obtaining a consent form (for which blame is not attributable to the respondent), Mr Roddy wrote on 23 November 2017 to the claimant's GP asking for further information on her back issues in the light of the Claimant's request not to work Mondays. The GP's 8 December 2017 reply was not very helpful. It merely states: "unfortunately we have insufficient information on Miss Halton's medical condition to complete your request". Mr Roddy accordingly wrote to the claimant's chiropractor on 8 January 2018 (by which time the claimant was on her month-long holiday, described below) asking for a report, which was not received from him until 29 January 2018. That report does not in fact address the issue of whether or not the claimant's request not to work Mondays (or any other day) ought to be accommodated by reason of her back problems.

19. The claimant had for some time used a stool to sit on at work and give her support. She organised for its provision. In mid-November 2017, the claimant's stool broke. She asked the first respondent's Mr Williams for it to be replaced. She explained that she could not stand or work on keyboards due to her back issues, and that she needed to have the support the stool provided. A replacement was promptly arranged.

20. In December 2017, the claimant went away on a once-in-a-lifetime one month holiday. She visited exotic locations such as Costa Rica and the Galapagos Islands. It must have been quite a culture shock and change for her to return to the confines of the shop.

21. In her absence, the stool she generally used was put on a shelf situated above the shower in the office. This was because space is limited, and nobody else needed to use it.

22. The claimant's first day back in the store was Sunday 14 January 2018. On that occasion, she arrived at the store wearing clothes which were not

compliant with the dress code. In particular, she had stonewashed leggings or jeans, a short sleeved store polo shirt, a long sleeved purple base layer and large scarf, but no Jersey (which would have served to cover up the base layer), and a coloured scarf. The second respondent spoke to her about her outfit. He reminded her that she needed to comply with the dress code. He also told her that the area manager was due to visit the store on the Wednesday of that week, and would carry out a store inspection. Hence he told her that when she came to work the following day i.e. on Monday 15 January, she should wear clothes which were compliant with the dress code. The claimant did not complain at this.

23. As far as the second respondent was concerned, there was no need for the claimant to buy any new items of clothing. He had already seen her wearing a pair of black leggings, which complied with the code, and he knew that she had a Rutland cycling softshell top (which could be used to cover up any underlayers). If she was cold around the neck area, she had the company-provided buff.

24. The shop was busy that Sunday. At one point, the claimant asked the second respondent if he could get her stool down from the shelf above the shower (where it had been stored whilst she was on holiday) when he 'had a moment'. The second respondent said he would do so. However, the claimant's request -which she did not repeat to him- slipped his mind. He did not deliberately decline to help the claimant. The claimant also asked a colleague, George, to get the stool for her. He may (for reasons which are not entirely clear to us) have said something about the stool being "a political hot potato". But George did not tell the second respondent what the claimant had asked of him. So, the second respondent was not reminded by him that the claimant wanted the stool.

25. The following day, the claimant attended wearing precisely same clothes she had worn the previous day, albeit with a different coloured scarf. The second respondent once again told her that she was not complying with the dress code. He asked her to ensure that she did so on the Wednesday that

week. At this point, the claimant began to complain to him that she had no money to buy new clothes, and that she had only just returned from holiday. He told her -perhaps a little undiplomatically, but accurately- that her personal finances were not her responsibility, and this was no excuse for not wearing dress code compliant clothing. In any event, as far as he was concerned she already (as explained above) had sufficient clothing.

26. At this point, the claimant started to raise her voice. She started to shout at the second respondent that he was treating her unfairly (which he was not doing), and again told him she had no money. The second respondent told her that if she did not calm down, he would have no choice but to send her home. Regrettably, she continued to shout at him. As a result, he told her to go home. He explained that she would not be paid if she went home.

27. The claimant refused to leave, saying she could not go home unpaid, and repeating that she had no money. She then left the shop floor and marched into the office and kitchenette area nearby. The second respondent followed her in order, to tell her once more that he wanted her to go home. He pulled the door to the office behind him so her shouting was less audible. We accept that he probably did do this a little too hard (albeit not intentionally), and therefore that the door banged. The claimant once again said to him that she had no money to go and buy clothes, and she could not afford to go home unpaid. The second respondent told her that if she was going to stay in the store she would have to comply with the dress code. Specifically, he said that she would have to take off the purple base layer.

28. We certainly do not consider that he meant this as an instruction for the claimant to undress on the spot- nor that it should sensibly have been taken by her to be such.

29. At this point, the claimant was standing near the toilet door where her bag was hanging on a hook. The claimant told us that the reason she went into the kitchenette area was in order to get a doctor's letter from her bag. We are not entirely persuaded this is so–particularly as the content of the doctor's letter was not been discussed at the time. We suspect it is more

likely that she went into the area in order to try and avoid the second respondent and his requests to leave the store.

30. The claimant's evidence was that whilst in the kitchenette area, the second respondent approached her until he was no more than about 2 feet away from her face and (quietly but insistently) said to her "take off your top, take off your top, take off your top".

31. As to this, we accept that the second respondent would not have been particularly far away from the claimant, given that the area is quite small. We do not, however, think he was as close as she says he was i.e. 2ft away, and 'in her face'. Otherwise, we doubt she would have been able to pull off her clothes. Most importantly, we do not consider it is likely that anything the second respondent said or did would, sensibly construed, have caused anyone in the claimant's position to consider she was being ordered to undress in front of the second respondent, and 'then and there'. If the claimant really thought she was been given such an order, we think it is likely she would have refused, or simply used the lockable toilet directly behind her to change her clothing. And in fact, in order to comply with the dress code, all she needed to do was put Jersey over the top of her base layer. (With hindsight, it is a shame neither she nor the second respondent articulated this fact in the 'heat of the moment'.)

32. We think the claimant wholly lost patience with the second respondent, and decided that she would 'show him' by taking her clothes off there and then. We have no doubt she felt upset at the time- probably, because she felt the second respondent was being unduly officious or prescriptive (though we do not think he was being so.) But unfortunately, she responded in a precipitant, intemperate, and wholly unprofessional way.

33. The claimant began to remove her two upper garments, causing the second respondent to back away from her with his hands raised saying 'no, no'. She told him she was going to "tell everyone that you forced me to undress in front of you" (which was not the case). The claimant then walked out of the kitchenette area and onto the shop floor, wearing nothing above her waist

but her bra. The second respondent then followed her, and told her to "put your clothes back on and go home".

34. If there was any conversation about the claimant's scarf at about this time, it would have been in the context of the second respondent telling her that she could not wear scarf, either. The second respondent was entitled to say this, given that (as the claimant surely knew) the scarf did not comply with the dress code.

35. At this, the claimant put her top back on, loudly announced that she was going home, and then left.

36. The second respondent immediately rang Mr Roddy and explained what had happened to him. Mr Roddy decided to suspend the claimant. He wrote the claimant a letter, which she received later that day. Sensibly, in his letter Mr Roddy spelt out that the claimant would continue to be paid her salary whilst suspended, and that suspension was a neutral act. He also invited her to attend an investigation meeting on 17 January 2018.

37. We accepted Mr Roddy's evidence that if the claimant had in fact attended such a meeting, and given him information which indicated it was appropriate to suspend the second respondent and/or end her suspension, he would have done so.

38. Mr Roddy thereafter carried out various investigation meetings on 16 January 2018 with other members of staff. They broadly corroborated the second respondent's account, and (though they were not eye witnesses to every single detail) supported his assertion that the claimant had overreacted and 'lost it' without good reason, had shouted at the second respondent, and had removed her top leaving only her bra above her waist.

39. The claimant let Mr Roddy know she was not well enough to attend the proposed 17 January meeting. Some further correspondence took place between them (though some emails from Mr Roddy and Mr Williams to the claimant were not immediately received because he misspelled her email address), but an investigation meeting with the claimant never took place as the claimant asserted that it would be too stressful for her. Instead, on 24

January 2018 the claimant submitted a lengthy email (dated 15 January) making various allegations about (amongst other things) the second respondent which she had not raised before, such as the hook suspension episode.

40. On 25 January 2018, Mr Roddy advised the claimant that he would treat her letter received on 24 January as a formal grievance. He explained to her the procedure which would be used, and he asked her to inform her trade union representative. On 26 January 2018, the claimant sent Mr Roddy a consent form, so that he could obtain a doctor's report to establish whether or not she was fit to be interviewed. She also sent in a sick note. On 30 January 2018, Mr Roddy advised her that she could appeal against her continuing suspension, but he also pointed out that the suspension had exceeded the desired timeframe because she had not been well enough to meet with him.

41. The next day, he sent the claimant an email suggesting a meeting between herself and Mr Williams on 6 February 2018. (At this point, the claimant's sicknote was due to expire on 4 February.) He suggested a location for the meeting which was away from the store. Less than two hours later, the claimant sent an email giving her resignation, asserting that she had been constructively dismissed by reason of the "cumulative and dreadful treatment by Ben, as intimated in my complaint letter". She also stated that she been discriminated against on grounds of disability and sex.

42. Mr Williams wrote to the claimant on 2 February 2018, asking the claimant to reconsider her resignation. She made clear her in response dated 7 February 2018 that she was not prepared to do so.

43. Mr Williams thereafter duly responded to the claimant's grievance. He rejected her complaints, albeit he made clear that he did so in the absence of face-to-face input from her.

MATERIAL LEGAL PRINCIPLES

(1) Time issues

Conduct "extending over a period'

44. Section 123(3)(a) EA 2010 provides that conduct "extending over a period" is to be treated as done at the end of the period. That subsection applies to

a continuing course of discriminatory conduct, as well as the maintenance of a continuing policy or state of affairs. See e.g. **Hendricks v. MPC**.[2] The correct test is whether the acts complained of are linked, and are evidence of a continuing discriminatory state of affairs -as distinct from "*a succession of unconnected or isolated specific acts*."[3]

Time to bring a s. 20(3) EA 2010 claim

45. A reasonable adjustments claim involves the alleged failure of a respondent to take reasonable steps. Hence omission, rather than action, founds such a claim.

46. Time is therefore generally computed pursuant to s.123(4) of EA 2010 by reference to a notional moment- i.e. the time at which a certain thing ought to have been done, but was not done. This applies to both inadvertent and deliberate omissions. See **Matuszowicz v. Kingston Upon Hull City Council**.[4]

Just and equitable extension

47. As regards any 'just and equitable extension' pursuant to s.123(1)(b) of EA 2010, the onus is always on the claimant to satisfy the ET that they should be treated as a suitable exception to the general rule that claims ought to be brought within their allotted time. See Auld LJ in **Robertson v Bexley Community Care**:[5]

> *"It is… of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

(1) Failure to make reasonable adjustments (sections 20-21 EA 2010)

48. Section 20 EA 2010 provides for the duty to make reasonable adjustments:

[2] [2002] EWCA Civ 1686.
[3] *Per* Mummery LJ, para 52.
[4] [2009] ICR 1170, CA.
[5] [2003] IRLR 434, CA, at para 25.

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A…*
> *(3) The first requirement is a requirement, where a provision, criterion or practice ["**PCP**"] 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."*

49. "*Substantial*" disadvantage is "*more than minor or trivial*" (section 212(1) EA 2010). A "*relevant matter*" is anything concerning employment by the employer (paragraph 5, Schedule 8 to EA 2010). The Claimant must show that the duty arises and the nature of the adjustment that would ameliorate the substantial disadvantage. The burden then shifts to the Respondent to show that there has not been any failure to comply with the duty.

50. The EAT in **Environment Agency v Rowan**[6] set out that the Tribunal must consider: (1) the PCP applied by the Respondent; (2) the identity of the non-disabled comparators; and (1) the nature and extent of the substantial disadvantage.

51. The comparison involves a class (or group) rather than a particular individual (**Fareham College Corporation v Walters**[7]).

52. Paragraph 20(1) of Schedule 8 to EA 2010 provides that an employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know the employee has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

53. The question of constructive knowledge is an issue of fact for the Tribunal (**DWP v Hall**[8]). Employees must be taken on the basis of how they present themselves. Although the employer should make reasonable enquires based on available information, the extent of this duty should not be

[6] [2008] ICR 218 EAT
[7] [2009] IRLR 991, EAT.
[8] EAT 0012/05

overstated, as it goes only so far as what is reasonable (**Ridout v TC Group**[9]; **Peregrine (deceased) v amazon.co.uk Ltd**[10]). If an employee asserts a disability, the employer is entitled to ask for evidence that any impairment does give rise to a disability.

54. A holistic approach should be taken to whether an adjustment is a reasonable one and this can be considered in conjunction with other adjustments made. **Burke v The College of Law and anor**[11].

55. The words 'provision, criteria or practise' are to be construed liberally, given their provenance in EU equality law. However, they may on the facts not be apt to describe a one-off event/omission, or isolated specific acts.

56. Thus, for example, 'the application of the employer's disciplinary process' was rejected by Langstaff J in **Nottingham City Transport Ltd. V. Harvey**[12] as a valid 'PCP'. He held (at paras 18 & 20) that 'practise':

"*... has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering from the disability. ... if that were not the case, it would be difficult to see where the disadvantage comes in, because [it] has to be by reference to a comparator... A one-off application of the Respondent's disciplinary procedure cannot in these circumstances reasonably be regarded as a practise; there would have to be evidence of some more general repetition, in most cases at least*".

(2) Direct discrimination (disability and sex) (Section 13 EA 2010)

57. Section 123 of the A 2010 provides:

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

58. The issues of whether treatment is "because of", and the appropriate comparator, sometimes cannot be resolved without deciding both together (**Shamoon v Chief Constable of the Royal Ulster Constabulary**[13]). The central issue is: why was the Claimant treated as she was? Following **R (on**

[9] [1998] IRLR 628, EAT
[10] EAT 0075/13
[11] [2012] EWCA Civ 87, CA.
[12] UKEAT/0032/12 [2013] EqLR 4.
[13] [2003] ICR 337, HL.

the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors[14], discrimination may be inherently discriminatory or subjectively so. In the latter case, where there is doubt as to the "factual criteria that have caused the discriminator to discriminate", the subjective processes of the alleged discriminator should be explored.

59. If an employer/individual does not know of the protected characteristic then it is not possible for that to be the reason.

60. Pursuant to section 23(1) EA 2010, the comparator must not share the claimant's protected characteristic, but otherwise there must be no material difference between the circumstances relating to each case. In the case of disability, this includes the disabled person's abilities (section 23(2)(a) EA 2010).

61. The discrimination need not be conscious. Sometimes a person may discriminate on these grounds as a result of inbuilt and unrecognised prejudice of which he or she is unaware. **Law Society v. Bahl**[15]. However, as regards 'unconscious discrimination', *per* Elias J:

"*127. ... it is a significant finding for a tribunal to hold that they can read someone's mind better than the person himself, and they are not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it*".

62. As regards 'unreasonableness' of the respondent's conduct and discrimination, the Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably and the employee has a protected characteristic. (**Bahl**. *Per* Elias J at para 94:

" *Employers often act unreasonably... it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is, however, a wholly unacceptable leap to conclude that whenever the victim of such conduct [has a protected characteristic] then it is legitimate to infer that our unreasonable treatment was because [of that characteristic]. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim [has a protected characteristic]. In order to establish unlawful discrimination, it is necessary to show that the particular employer's reason*

[14] [2010] IRLR 136, SC.
[15] [2003] IRLR 640, EAT (para. 82).

for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way".

(3) <u>Harassment on the basis of (1) sex or (2) unwanted conduct of a sexual nature and (3) disability (section 26 EA 2010)</u>

63. Harassment is defined is section 26(1) EA 2010:

"(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.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(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"

64. Harassment under EA 2010 protects claimants against sufficiently serious conduct, not just <u>any</u> unwanted conduct. **<u>Henderson v General Municipal and Boilermakers Union</u>**.[16]

65. Conduct being "related" to sex requires that there is a connection between the conduct and sex, although not necessarily a causative one (**<u>London Borough of Haringey v O'Brien</u>**[17]).

66. One-off acts are not equivalent to an environment, and therefore acts must be sufficiently serious if they are to be said to give rise to an intimidating, hostile, degrading humiliating or offensive environment for the claimant (**<u>Henderson</u>**). Equivalently, in the context of analysing section 26(1)(b)(i) EA 2010, the EAT offered guidance that not every slanted adverse comment or conduct may constitute the violation of a person's dignity (**<u>Richmond Pharmacology v Dhaliwal</u>**[18]). Dignity is not necessarily violated by things

[16] [2015] IRLR 451 EAT.
[17] EAT 0004/16.
[18] [2009] ICR 724 EAT, UKEAT 458/08.

said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. EA 2010 and the conduct which it protects against must not be trivialised.

67. The EAT in **Richmond Pharmacology** explained that when the Tribunal considers 'effect' it must first consider whether the claimant *in fact* perceived the environment was created. Only if the first stage is made out, it must then secondly consider whether that perception was a reasonable one.
68. All the circumstances are relevant to determining both what the claimant's perception was and whether it was reasonable for the conduct to have that effect. A bald assertion that a claimant feels a particular way should not be taken at face value if the facts demonstrate otherwise.

69. A lack of an intention on the part of the employer to create the environment is also material, albeit not determinative. Conduct has a different weight if it was enacted innocently compared to with an intention to hurt the Claimant. The assessment of whether it was reasonable is vital to ensure that the Tribunal does not encourage "a culture of hyper-sensitivity" (**Richmond Pharmacology**).

(4) Wrongful dismissal

70. To show that there was a constructive and (in this case) therefore wrongful dismissal, the Claimant will have to show:
    a. that there was a fundamental breach of contract by the First Respondent (i.e. that the first respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between itself and the claimant); and
    b. that the Claimant resigned in response to that breach.

71. If there is an underlying or ulterior reason why the Claimant has resigned then there is no constructive dismissal. If there are multiple possible causes then the Tribunal must determine whether the dismissal was an effective

cause, but so long as the breach is one of the factors then she may claim constructive dismissal (**Abbycars West Hordon Ltd v Ford**[19]).

(5) Unfair Dismissal

72. There is a dismissal for the purposes of the ERA 1996 when an employee terminates the contract in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct (section 95(1)(c) ERA 1996). The issues set out at para 71 above are material.

APPLICATION TO THE FACTS

73. We find as follows in relation to the sex and disability discrimination claims (and by reference to the above italicised paragraph numbering from the List at para 5 above):
    a. **Para 3**. Though it is clear the respondents both were aware the claimant had a back condition which caused her some discomfort, we suspect it might be going too far to say the first /second respondent knew or ought to have known at all material times that she had a condition which met the definition of disability within the meaning of EA 2010. But any event, whether or not either of the respondents knew or ought to have known that the claimant was disabled had no material bearing on matters, for the reasons set out below.
    b. **Para 4**. We wholly reject the assertion that PCPs 1 or 2 were valid PCPs for s20 EA 2010 purposes, in the sense that both PCP1 and PCP2 are factually misaligned to the claimant's case. At no point did the first respondent have a "practice of not keeping a chair for sales staff to sit on". Moreover, at no point did the first respondent have a "practice of not having a chair for the same staff to sit on whilst on duty 'readily available'". The only material day on which seating was not available for the claimant's use was on 14 January 2018 (when, as explained above, the claimant returned from her month-long holiday and the stool she usually used was still stored out of the way, in what was a very space-restricted work area). Whether or not a

[19] EAT 0472/07.

failure to get the stool down for her that day constituted an act of direct discrimination -as to, which see below- we do not accept that one day without a stool could amount to a 'practise' (or 'criterion' or 'provision').

c. We note that para 7(b) (though not para 4) of the List referred to provision of a "readily available ergonomic chair". However, at no point did the claimant ever ask for anything other than a stool at work (and it was a stool which she herself purchased for her own use). Nor did she in her evidence suggest at any point that an ergonomic chair, rather than a stool, was needed. No claim was advanced before us to the effect that the respondent at any material time ought to have provided the claimant with, or allowed her to use, anything other than that stool.

d. As regards PCP3:

   i. We do not consider PCP3 put the claimant to a substantial disadvantage in comparison with persons who were not disabled. The busiest days of the week on which the claimant worked were Sundays. In contrast, Mondays -particularly at that time of year- were relatively quiet. Working on Monday *per se* did not substantially disadvantage the claimant for s.20 EA 2010 purposes.

   ii. The claimant never asked not to work Sundays. We find this is surprising, if Sundays really did take their toll on the claimant on a regular basis- particularly in the quieter winter months. The claimant sought to say she chose not to ask to take off Sundays because of her sense of loyalty to the first respondent. We were not persuaded by this explanation, given that at least by September 2017, the claimant had become somewhat disillusioned with her work environment - in part because (according to her) felt she was being 'managed out'.

   iii. We consider the reason why the claimant sought in September 2017 no longer to work on Mondays (having worked on both Sundays and Mondays for several years)– rather than asking for Sundays off–was because she had been

offered work with a third party on that day. We are supported in this finding by the fact that the claimant had at no point previously asked to be excused from work on Mondays– even during the busiest times of the year i.e. in the summer.

iv. We also note that when she first raised the possibility of not working on Mondays, she did not make any reference to her back condition.

v. In any event, when the claimant raised the prospect of not working on Mondays, we consider that the first respondent promptly made efforts to establish if there was any medical reason for such an arrangement. Although that process was elongated, this is largely because of matters outside the respondents' control, such as the claimant's own delay in returning paperwork and the GP's slow and sparse response to questions put. We consider that if there was any medical evidence produced to support the claimant's assertion that she needed not to work on Mondays *at all* (rather than being given lighter duties etc that day) because of her back, sensible alternative arrangements would duly have been put in place.

vi. (In fact, even if PCP3 was a valid PCP, and even if the respondents can be said to have failed to make appropriate reasonable adjustments, such failure would -on the claimant's case, at least- for s123 EA 2010 purposes have arguably been in about October 2017, and thus out of time as a free standing head-of claim. This point was not explored in submissions, and is academic anyway.)

e. **Para 8(a)**. We reject the contention that anything George said to her about the stool on 14 January 2017 was in any way on grounds of disability or sex. In fact, in fairness to the claimant, she expressly accepted as much in evidence.

f. **Para 9**. We reject the claim that the second respondent's failure to get the stool down from the shower shelf for the claimant on 14 January 2018 was on grounds of disability or sex. He failed to do so because the matter -raised only once by the claimant, without any great urgency, and not mentioned to him by George- slipped his mind

in circumstances where the shop was busy that day. This may have been remiss (and at worst, unhelpful) of him. But it was not - consciously or otherwise- for reasons proscribed by EA 2010.

g. **Paras 12(a)-(c); 16(a)-(c) & 19(a)-(c)**. We reject the assertion that the incident was on grounds of or in any way related to disability, or to sex (consciously or otherwise). We consider the second respondent would have behaved in precisely the same way to a non-disabled person, and/or to a man. The claimant's disability and sex had nothing to do with what he said or did (and we reject the assertion that the second respondent knew the claimant was disabled, in any event- knowledge being a prerequisite to a direct discrimination claim). His only motivation in acting as he did was to try and get the claimant to understand she needed to conform with the dress code- as he had asked her to do the previous day. It was mistaken of him to say that the claimant would be sent home without pay (and Mr Roddy duly corrected the situation). But this comment had nothing to do with the claimant's sex/disability, and everything to do with her behaviour as set out above.

h. **Para 19(d)**. We reject the assertion that the hook suspension episode amounted to sex-related harassment. We say this for the following reasons:

    i. We accept the claimant voluntarily looked at the images. She "laughed nervously" when she saw them. This, of itself, does not of course mean the conduct at issue could not have had the proscribed *effect* for s.26 EA 2010 purposes. However, we find that she was a willing participant in looking at them, even though she found them unsavoury.

    ii. If she really found the images as shocking as she suggests in her witness statement, we find it very surprising she did not complain about them far earlier, whether to Mr Roddy or higher level management.

    iii. Certainly, as we find, it was no one's *purpose* to violate the claimant's dignity etc for section 26 EA 2010 purposes

iv. In any event, we accept the respondents' evidence that the images were not of a sexual nature, nor related to sex. See above.

i. In any event, if taken as a free-standing head of claim, we agree with Ms Coyne's submissions to the effect that the hook suspension episode is out of time. We were given no satisfactory explanation as to why the claimant, if so upset by the episode, did not bring a claim (or a grievance) about it far earlier or why a 'just and equitable' extension was appropriate.

j. **Paras 23, 24 & 26**. As regards the constructive and wrongful dismissal claim, which is founded on (just) the contention that the matters set out at paragraph 23 of the List amounted to a breach of the implied term of trust and confidence:

i. We do not think it was necessary for the claimant to be questioned before she had been suspended, in the light of the evidence given by the second respondent and the claimants various colleagues as set out above. Such evidence gave the first respondent more than enough information to justify the suspension.

ii. We consider that, had to the claimant attended the investigatory meeting which was proposed soon afterwards, she would have been given ample opportunity to put a version of events forward in order for her suspension (or even suspension of the second respondent) to be reconsidered as appropriate.

iii. We understand why the second respondent was not suspended. In particular, his version of events was broadly corroborated by the other members of staff as set out above. Of course, we accept that those members of staff did not see precisely what took place in the kitchenette. Also, there were some discrepancies between them. However, we accept Mr Roddy considered (and we agree) that such discrepancies pointed away from possible collusion. Moreover, their accounts significantly supported the second respondent's case that the claimant had been at fault rather than him, and

that her conduct -rather than his- was responsible for matters flying out of control that day.

iv. It is quite wrong to assert that no action was taken on the claimant's 24 April grievance. Plainly, it was- and promptly, too. See further above.

v. As regards the 15 January 2017 incident, we do not consider that the second respondent did anything particularly wrong that day. Most importantly, we reject the assertion that he repeatedly urged or demanded that the claimant to take her top off. See further above. Though it was unhelpful for him to tell the claimant to leave on an unpaid basis (in circumstances where he was nevertheless entitled to tell her to "put your clothes back on and leave"), Mr Roddy quickly corrected matters by telling the claimant in his letter received by the claimant later that day that she would receive her full salary during her suspension.

74. Even if we are wrong in our assessment of the dismissal claim, and the claimant was indeed unfairly constructively dismissed, we do not think that any procedural failings on the part of the first respondent made any difference to the outcome. For that reason, a 100% **Polkey** reduction would apply. We would also have made a 100% reduction for the purposes of contributory fault.

75. The claims are therefore all rejected.

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Employment Judge Michell, Cambridge

Date 12 April 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS