EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms Avril Iles	**AND**	**Laura Ashley Limited**

REASONS OF THE TRIBUNAL

Heard at: North Shields **On: 29-31 May 2019**

Before: Employment Judge A M Buchanan
Non Legal Members: Ms E Menton Mr S Eames

Appearances

For the Claimant: In person
For the Respondent: Mr W Lane - Solicitor

JUDGMENT having been sent to the parties on 13 June 2019 and written reasons having been requested in accordance with Rule 62(3) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Preliminary matters

1.1 The claimant instituted proceedings on 12 October 2018 supported by an early conciliation certificate on which Day A was shown as 24 August 2018 and Day B as 12 September 2018.

1.2 A response was filed in which the respondent denied all liability to the claimant.

1.3 A preliminary hearing by telephone took place before Employment Judge Johnson on 8 January 2019. The issues in the various claims were identified and case management orders made. The issues are set out below.

1.4 At the hearing of this matter in May 2018 the Tribunal announced its judgment on liability on 31 May 2019 and then went on to deal with the remedy to which the claimant was entitled and also announced its judgment on that matter. A short judgment confirming the decisions was issued by the Tribunal. Subsequently a timely request was received from the respondent for full written reasons and these reasons are issued in response to that request.

The claims

2. The claimant advances the following claims to the Tribunal:-

2.1 A claim of disability discrimination by an alleged failure to make reasonable adjustments relying on the provisions of sections 6, 20/21, 39 and Schedule 8 of the Equality Act ("the 2010 Act").

2.2 A claim of harassment related to disability discrimination relying on the provisions of sections 6, 26 and 40 of the 2010 Act.

2.3 A claim of discrimination arising from disability relying on the provisions of sections 6, 15 and 39(2)(d) of 2010 Act.

2.4 A claim of ordinary unfair constructive dismissal relying on the provisions of sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act").

3 The Issues

The issues in the various claims advanced to the Tribunal are:

Disability

3.1 It was accepted by the respondent that the claimant was a disabled person at all material times for the purposes of section 6 of the 2010 Act by reason of the impairment of osteoarthritis.

3.2 There was an issue as to whether the respondent had knowledge of that disability at all material times and, in respect of the claim of failure to make reasonable adjustments, whether the respondent had knowledge of the effect of that disability.

Time

3.3 Were any of the claims of disability discrimination out of time? If so, should time be extended by reference to section 123 of the 2010 Act?

Discrimination arising from disability: section 15 of the 2010 Act

3.4 Did the respondent subject the claimant to unfavourable treatment as follows:
3.4.1 refusing to give the claimant her keys back
3.4.2 making the claimant work late shifts
3.4.3 pinning the claimant against the wall

3.4.4 failing to suspend April Robson following the alleged assault
3.4.5 failing to uphold the claimant's grievance
3.4.6 failing to reduce the number of shifts worked
3.4.7 failing to refer the claimant to occupational health when she returned to work after surgery on her knee

3.5 If so, did such treatment occur because of something which arose in consequence of the claimant's disability?

3.6 If so, can the respondent show that it was acting proportionately in so treating the claimant in pursuance of a legitimate aim(s)?

3.7 Does the respondent show that it did not know and could not reasonably have been expected to know that the claimant had a disability?

Failure to make reasonable adjustments

3.8 Did the respondent apply the following PCP:
3.8.1 the requirement for the type of role that the claimant carried out to involve working full-time shifts and late shifts without any reduction to the late shifts?

3.9 Did this PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

3.10 If so, did the respondent fail to take such steps as were reasonable to avoid the disadvantage by failing to amend the claimant's role by reducing the number of evening shifts worked?

Harassment: section 26 of the 2010 Act

3.11 Did the respondent engage in unwanted conduct towards the claimant related to the claimant's disability by:
3.11.1 the remark of "*it's funny you could do an early shift but not a late shift"*
3.11.2 pinning the claimant against the wall

3.12 If so, did such conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant?

Unfair dismissal claim: sections 94/98 of the 1996 Act

3.13 Did the claimant resign as a result act or omission or other series of acts or omissions by the respondent?

3.14 Did that conduct by the respondent amount to a fundamental breach of the claimant's contract of employment?

3.15 The term of the contract relied on by the claimant is the implied term of trust and confidence and specifically she relies on events occurring following her return to work after a knee operation which return occurred on 5 April 2018.

3.16 Did the claimant affirm the contract following the breach?

3.17 Was any such fundamental breach of contract by the respondent (which was not affirmed by the claimant) the reason why the claimant resigned?

4. **Witnesses**

In the course of the hearing, the Tribunal heard from the following witnesses:

Claimant

4.1 The claimant.

4.2 Emma Watson – a former colleague in the Durham store and former assistant manager. This witness has left the employ of the respondent.

Respondent

4.3 For the respondent evidence was heard from:

4.3.1 April Robson ("AR") – the manager of the Durham store

4.3.2 Sarah Bayne ("SB") – the manager of the Edinburgh store who investigated the grievance raised by the claimant

4.3.3 Sharon Brown – the Regional Manager for Scotland and North-East England and the region in which the Durham store is situated. This witness was the line manager of AR.

5. **Documents**

We had an agreed bundle before us running to some 271 pages. Some pages were added during the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

Findings of Fact

6. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 8 January 1958. She began work for the respondent on 1 February 2015 and resigned effective from 30 August 2018. She was employed as a sales leader in the Durham store – a large and so-called flagship store of the respondent. The claimant had a contract of employment signed on behalf of the respondent on 2 February 2015 and by the claimant on 12 February 2015 (pages 62 – 67). The claimant began work in the Middlesbrough store but transferred to the Durham store in 2015. The claimant worked 37.5 hours per week over five days. The claimant had the benefit of a workplace pension and of a life assurance scheme and a dental care plan

6.2 The respondent is a large textile design and international retail company employing over 3000 employees in over 200 stores across the UK.

6.3 The Durham store at which the claimant worked is a store of over 8000 square feet and at the material time between 18 and 20 people worked in that store. AR had been the manager of that store for many years and she was well known both to Sharon Brown and to Sarah Bayne who had supported the store through some difficulties in 2016.

6.4 The respondent company has a handbook which includes at section 6.8 (page 52) reference to a grievance policy which exists "*to ensure that you are treated in a fair and consistent manner and that any grievance is given a proper hearing".* In respect of harassment (page 53) the handbook states that the company will not tolerate harassment bullying or unlawful discrimination of any kind and continues "*all cases of harassment will be fully investigated by the Company and, if justified, disciplinary action will be taken up to and including dismissal*".

6.5 The claimant had an absence from work between 26 September 2016 and 10 October 2016 extending to 10 days and gave the reason for her absence as chest pains and pleurisy (page 71 – 73).

6.6 On 16 May 2016 the claimant received a diagnosis of osteoarthritis and subsequently was told that she needed a total replacement of her right knee. The matter had first been raised as a potential problem by her physiotherapist (page 204) on 13 March 2016.

6.7 The claimant was referred to see a consultant orthopaedic surgeon and in a report dated 16 May 2016 (page 206) it was noted that x-rays showed advanced osteoarthritis in both knees with the right knee significantly worse than the left. A replacement of the right knee was recommended and the claimant decided to proceed with that procedure and she was booked in for it in March 2017. In advance of that proposed procedure the claimant had various hospital appointments including on 27 October 2016 (page 209) and 10 November 2016 (page 210) and we find that she did make AR aware of these appointments and the reasons for them. In the event the planned procedure in March 2017 could not proceed because of the presence of nickel in the knee prothesis to which she was allergic and the procedure was postponed. The claimant had advised AR that she would be absent from work for a significant period but in fact returned shortly after March 2017 pending a further date for the surgery.

6.8 In July 2017 the claimant was away from work for a short period and the reason given on the fit note which she submitted to the respondent (page 124) was "*arthritis".*

6.9 On 8 November 2017 claimant underwent a total right knee replacement and was absent from work until 5 April 2018. A three-month fit note covering the period until 8 February 2018 (page 123) gave the reason for absence as "*R knee replacement"* and the subsequent two-month fit note to 4 April 2018 gave the reason for absence as "*knee replacement painful"* (page 122). The claimant and AR were in the habit of exchanging messages by text. On 5 February 2018 (page 270) the claimant told AR that she had been trying to increase her mobility but her knee

had become swollen and she had been advised to rest it for a week. She had been advised that it would be a few months before she felt the benefit of any exercises. She stated that she would not be returning to work in the near future and asked AR to look into the question of statutory sick pay for her.

6.10 On 19 March 2018 a so-called welfare meeting took place between AR and the claimant (page 153 – 155). The claimant indicated that she felt much better and felt she had "*turned a corner".* She indicated she was using frozen peas to keep the heat down on her knee which was still healing. She was unsure how the knee would keep going when she was standing on it all day. She anticipated returning to work on 5 April 2018. In relation to support required on her return, the claimant replied: "*caution with lifting, try not to lift too much. Caution with the ladders. Trying to be sensible. If feeling pain to be able to take time out in order to rest it. Prefer to take days off in the week rather than doing five days together. Using any residual holidays to help ease in. Being careful when using the stairs. Not lifting while using the stairs".*

6.11 At no time did the respondent consider referring the claimant for an occupational health assessment or taking any advice from the claimant's own GP on the question of adjustments or otherwise. At no stage was a risk assessment carried out in respect of the claimant's return to the workplace. At no stage in the history of this matter did any of them AR, Sharon Brown or Sarah Bayne consider that the claimant was or might be a disabled person under the terms of the 2010 Act. The respondent now accepts that the claimant was a disabled person by reason of osteoarthritis in both knees at all times material to this claim.

6.12 The claimant returned to work on 5 April 2018 after an absence of 78 days. A meeting took place between the claimant and AR (pages 102 – 103). The claimant confirmed she had had a total right knee replacement operation and had been under the care of a consultant. She did not anticipate a recurrence of that problem. Adjustments requested were not to carry out heavy lifting and to take care on ladders and steps. The claimant thanked AR "*for been (sic) so understanding".*

6.13 In common with her colleagues the claimant worked different shifts ranging from 8am – 4:30pm, 9am – 5:30pm, 9:30am – 6pm and the so-called "late shift" from 11:45am – 8:15pm. The claimant continued to work these shifts after her return to work but for the first three weeks used some accrued leave in order not to work a full week. The claimant worked a late shift on 12 April, 16 April and 20 April 2018 and found when she did so that her knee became swollen to such an extent that she took a photograph of it (page 114) and showed the photograph to AR who responded by suggesting the claimant should apply frozen peas to her knee during breaks and that she could keep the peas in the freezer compartment of the staff refrigerator. We find that the claimant was required to work an excessive and disproportionate number of late shifts in the period between 12 and 20 April 2018 which was only a matter of a few days since her return to work. The claimant subsequently raised a grievance in respect of the arrangements made for her return to work and the appeal outcome written by Sharon Brown in respect of this matter reads (page 192): "*April held a "return to work" interview with you regarding you (sic) swollen knee, quite clearly she was aware of it and followed company process in terms of holding the meeting and offering support/reasonable adjustment in terms of returning to work. I can find no proof that you requested a follow up*

meeting or asked specifically for any adjustments to help you.....……I have reviewed the rotas again and found that during a 12-week period you worked one late shift per week with only one week where you worked two late shifts. It was reasonable to assume that as these shifts were the same length as any day time shifts that you would be able to achieve these in the same way as the day time shifts. Furthermore, working in retail, it is custom and practice for staff to work late shifts and flexibly".

6.14 Before her absence for the knee replacement the claimant had kept a set of keys for the Durham store to enable her to open and close the store when required and also to gain access to the office during the working day as and when required. After some days back at work the assistant manager of the store Julie Hopper removed the keys from the claimant in order to give them to a part-time sales leader. This caused the claimant some inconvenience when gaining access to the office during working hours and she perceived the removal of the keys as a disadvantage. She asked AR about the matter on several occasions but received neither an explanation nor a reversal of the decision. We find that after the claimant returned to work in April 2018 that she did apply frozen peas to her knee in the workplace in an attempt to alleviate the swelling caused by excessive standing during her shifts and that this was particularly so during so called late shifts. This matter was known to AR whose only action was to allow the claimant to keep the frozen peas in the staff refrigerator.

6.15 In May 2018 a long meeting took place between the claimant and AR in the training room of the Durham store at which the claimant referred, amongst other things, to her dissatisfaction in relation to the tagging of goods.

6.16 The claimant continued to work late shifts and did so on 5 June 2018. AR was present for most of that shift and the claimant experienced difficulty with her knee which became swollen. This shift coincided with preparations for a sale which was due to begin on the next day and there was a considerable amount of work to carry out.

6.17 On 6 June 2018 the claimant started work at 9am and midway through the shift, at around 12 noon, she found that her knee had swollen again and she was in considerable pain and went to inform AR about it. She indicated that she was going to leave work early and wanted to know if she would be paid. AR contacted Sharon Brown and was told that the claimant would be paid for the hours that she had worked but not for the whole shift. AR advised the claimant of this.

6.18 The claimant went to sign out in the attendance book located in the corridor close to the office of the Durham store and while she was there a conversation took place between herself and AR in which AR said words to the effect "*it's funny you could do an early shift but not a late shift".* AR went on to express the view that it was strange the claimant could do 7½ hours on a late shift but not on that particular day as part of an early shift. The claimant perceived the remark to be sarcastic and became angry: we find that the remark was uttered by AR in a sarcastic and unsupportive manner. AR invited the claimant into the nearby private office to discuss matters.

6.19 The claimant perceived AR not to be in any way supportive of her and said to AR that she was not empathetic. The claimant threw her keys down onto the desk in the office and said that she wanted to speak to the regional manager or to the respondent's personnel department and she asked for the telephone numbers. AR with some reluctance gave the telephone number of Sharon Brown to the claimant and told her that the personnel department would not speak to her. In an attempt to discuss matters further with her, AR took hold of the claimant and for a short time the claimant was pinned by AR against the wall of the office. The claimant pushed AR away from her and left the office in tears in order to leave to go home. No one else was present. There was a stark difference between the accounts of the claimant and AR as to the events at that meeting. We prefer the evidence of the claimant as to the events in the office. Her evidence was given in a clear and credible way and she was certain that she had been assaulted by AR. On the other hand, the evidence of AR was that she had made contact with the claimant but that such contact had amounted to nothing more than lightly brushing the claimant's wrists. We did not find that evidence to be credible. Shortly after the incident AR was seen by Jayne Turnbull (page 111) to be in tears. AR denied this but we accept that she was and we infer that AR was upset because she knew she had overstepped the mark. The claimant's evidence was entirely credible and we assess her as being a witness who would not fabricate such a serious allegation against AR. We conclude the events in the office on that day unfolded as the claimant described them.

6.20 The claimant left the office and was seen by Emma Watson and Jane Turnbull. Emma Watson accompanied the claimant out of the store to her car and spent some 10 minutes with her whilst the claimant tried to speak by telephone to Sharon Bayne. She was unable to contact Sharon Brown and left a message. In the event AR had telephoned Sharon Brown in tears as soon as the claimant had left the office to make her aware of what had occurred (or at least her version of events) and to tell her to expect a call from the claimant. When the claimant did speak to Sharon Brown some hours later, she was told by her to put matters into writing and to send it to her.

6.21 The claimant went to see her GP and was signed off work on 13 June 2018 until 12 July 2018 (page 121) with "*problem with recent total knee replacement"* and from 12 July 2018 to the time of her resignation (pages 119 – 120) with "*work related stress".*

6.22 The claimant raised a grievance dated 6 June 2018 (pages 75 – 78) which she sent to Sharon Brown with further information on 8 June 2018 (page 79) which was also sent to Sharon Brown. The grievance raised several matters:

6.22.1 that AR had not supported her return to work after the total knee replacement appropriately and had shown no interest in her welfare. The claimant referred to having worked a late shift on 5 June 2018 and then working an early shift on 6 June 2018 and being in pain. The claimant referred to remarks made by AR on 6 June 2018 which she stated showed that AR had no comprehension that working later in the day would make leg muscles more tired.

6.22.2 that AR had asked her to go into the office to discuss matters and that she had asked for the telephone numbers of Sharon Brown and the personnel

department. The claimant stated that rotas were not being supplied to staff four weeks in advance as was company policy and continued: "*while I was in the office April physically took hold of my wrists. She completely invaded my personal space and was inches from my face. She said that she was not being unsympathetic and to sit down. I told her to get off me and shook myself free of her. I found this extremely distressing. I was tearful and said I was leaving and that I would be on sick leave for the next few days to sort out my knee."*

6.22.3 that the claimant had been expected to work late shifts following her surgery which had caused her knee to become swollen.

6.22.4 that AR had failed to return to the claimant her keys since they had been taken from her to give to a part-time sales leader.

6.22.5 that the rotas were not being supplied to staff in advance as was company policy.

6.22.6 that the claimant had not had the opportunity to discuss training she attended on 3 May 2018 with AR which she described as "*disheartening".*

6.22.7 that there was a culture of gossip and open discussion and criticism of colleagues on the shop floor in the Durham store which led to a *"very difficult atmosphere in which to work".*

6.22.8 that the claimant's payslips for February and March 2018 had gone missing and had not been safely locked away during her absence.

6.23 On 8 June 2018 the claimant sent further information to Sharon Brown and on that occasion her message ended: *"I feel that my return to work has been a difficult one. I do not believe that my manager has taken seriously the effect working late shifts has had on my knee and that despite her knowing about the difficulties I was having she has done nothing to address them. Her manner on Wednesday towards me was sarcastic – "I'm just saying that it's funny you can manage a 7 ½ hour shift during the day" was her response. I have not been treated with respect over the loss of my payslips: I have not been given a set of keys so that I can perform my job with ease: I've been given more late shifts than my colleagues who are also responsible for closing the store: and the general lack of rotas in the first month back was stressful and inconvenient for all staff as well as myself".*

6.24 Sarah Bayne was appointed to hear the grievance and the claimant attended a meeting with her on 15 June 2018 in the Morpeth store. No one else was present and Sarah Bayne made her own notes (pages 82 – 101 and 128 – 130). The meeting was a lengthy one and the claimant signed the notes. The claimant complained she had had to fight to use outstanding holiday entitlement to ease herself back to work. The claimant complained she had had no opportunity to sit down during shifts. The claimant complained she had worked a disproportionately high number of late shifts. The claimant complained that a late shift was more difficult for her than an early shift and Sarah Bayne questioned why she could not stay in bed longer before a late shift. The claimant made it clear she had not asked to do less late shifts because AR was not empathetic and she felt there could be reprisals if she was difficult. The claimant stated that she was struggling only in

respect of late shifts. The claimant stated she had told AR of her difficulties but had not asked her outright to take her off late shifts. There were not enough staff to enable her to take sit down breaks as had been mentioned. The claimant explained that AR had criticised the work which she and Emma Watson had done to organise the sales floor on 5 June 2018. On Tuesday 6 June 2018 her knee was very painful and she felt she needed to go home. Once AR had checked the question of her payment, the claimant had said to AR that she was going to have to go home and lose money and that she was frustrated and that AR had replied: "*I'm just saying"* shrugging her shoulders and changing her tone of voice *"funny same 7 ½ hours".* The claimant referred to her colleague Tony being nearby and that in the office AR had taken hold of her wrists and AR was "*in her face"* and had put pressure on her arms and pushed them outwards opening them up. The claimant said she felt vulnerable and exposed. She pulled her arms away and was crying and stated *"she probably thought she was being kind but it was so inappropriate. Emma and Jane on the shop floor asked if I was okay. Emma helped me to my car". The* claimant stated since coming back to work she did not feel secure and on May 7 2018 had a long chat with AR in the training room and had discussed things including the fact that she felt she was not being supported by AR. She stated that she could have phoned the police about the conduct of AR which was classified as an assault but had not done so.

6.25 Sarah Bayne interviewed AR on 19 June 2018 (pages 131 – 152). AR stated that additional breaks had been discussed but not documented and she did not see that there was any need for additional breaks once the claimant had returned to work. The claimant had only approached AR recently to say her leg was swollen and she was not aware that the claimant had been in distress on 5 June 2018. The claimant had not asked to go home early that night and AR had not offered it. The claimant had not approached AR to ask not to have to work late shifts. The claimant had complained about her knee on Wednesday 6 June 2018 and asked to go home. There had been a conversation between the claimant and AR witnessed by Emma Watson whilst the claimant was sitting at the piano table at the front of the store. AR had seen the claimant and Emma Watson talking together. AR knew the claimant was not happy and she said she was going home. AR was not angry at her wanting to leave and went through to the back of the store with her while she signed out. She asked if the leg was the same on early and late shifts and did not intend malice by that question. The claimant had shouted that she was not empathetic towards her and was enraged. She had taken the claimant to the office and asked her to sit down and minutely her left hand had touched the claimant's right wrist. AR had not been angry but was shocked and bewildered. The claimant had complained that AR did not care about her and had not contacted her while she was away ill. All matters raised by the claimant were discussed with AR by Sarah Bayne.

6.26 On 25 June 2018 Sarah Bayne sent her decision to the claimant (pages 157 – 158). The grievance was upheld in relation to the delay in issuing rotas, the failure to follow up the training and the missing payslips. The other matters were rejected in summary terms. No other witnesses were interviewed. The conclusion respect of the complaints about the arrangements for the claimant returned to work after surgery read:
"Your manager April held a return to work meeting with you following your surgery,

following that you didn't approach her to say you were struggling so therefore she assumed that you didn't need extra support. There was no evidence of no extra support just a lack of communication in terms of what support you required. Again, you never approached April to say you were struggling with the late shift. The length of the shift is no different to a daytime shift so it is reasonable to assume that you were able to do as (sic) same length shift whatever the time of day. This wasn't raised during your return to work meeting". In respect of the alleged assault the outcome read: "*April denies pinning you against the wall. She put her arms out towards you and her arm brushed yours. As there were no witnesses, it is difficult to decide what took place".* That part of the grievance was not upheld.

6.27 The claimant appealed the outcome in a letter to Sharon Brown dated 28 June 2018 (pages 159-163) with additional notes on 16 July 2018 (pages 167 – 169).

6.28 The claimant stated that she had still not received a copy of her payslip from March 2018. The claimant felt she had been given a disproportionately high number of late shifts and asserted that it was not true to say that AR was unaware of the problems with her knee or that she had not approached her about the problem. AR was as aware as every other member of staff of a problem with the knee. The claimant did not raise late shifts at the return to work meeting because she did not at that time know they would become a problem. The claimant specifically appealed the decision in respect of the alleged assault by AR and made it plain that Emma Watson had seen her, as had another member of staff, after the incident. The claimant raised the question of the suitability of Sarah Bayne conducting the grievance investigation and that it was not possible to have a fair hearing. The claimant raised the absence of a scribe at the grievance meeting. The claimant had not been offered a copy of the minutes from the grievance meeting until she asked for them on 5 July 2018. The claimant asserted that the grievance outcome was curt and that she was accused of being a liar in it. The claimant stated that the allegation of assault had not been taken seriously and she felt she could not return to the workplace in safety.

6.29 Sharon Brown wrote to the claimant on 6 July 2018 to advise that she would deal with the appeal and that she would meet the claimant on 25 July 2018 in the Morpeth store and summarised the matters raised by the claimant (page 164 – 165).

6.30 The meeting on 25 July 2018 between the claimant and Sharon Brown was minuted (pages 172 – 190). After the meeting Sharon Brown interviewed by telephone Tony Rix (pages 104 – 105), Sharon Routledge (pages 106 -107), April Robson (page 108 – 109), Jayne Turnbull (pages 110 – 111), Judith Hooper (page 112) and Maureen Butler (page 113). These notes of interviews with witnesses were not signed or dated or sent to the claimant. In her interview AR stated that after the claimant's return to work there had been no conversation between her and the claimant about support required. She accepted that she had seen the claimant putting frozen peas on her knee to help with the swelling and commented: "*Surely if anything else was required she would have said then".*

6.31 The outcome of the appeal dated 9 August 2018 was sent to the claimant (page 191 – 193). It was concluded that the claimant had not asked for a follow-up meeting with AR and did not produce a fit note detailing any reasonable

adjustments and that the claimant had not worked a disproportionately high number of late shifts. In respect of the assault it was stated: "*as there were no witnesses to the incident and April's version of events is very different to yours I can only conclude that both yourself and April have different perceptions of what was said and what took place. As agreed I have interviewed Judith who admitted that she was joking to Emma about a similar incident involving herself".* The decision of Sarah Bayne was upheld and the letter concluded: "*Bullying and harassment is a very serious allegation, Laura Ashley take any allegations of this magnitude very seriously in this matter has been thoroughly investigated".*

6.32 On 30 August 2018 (pages 197 – 198) the claimant resigned with immediate effect and stated that she felt she had been discriminated against on the grounds of her health and not treated fairly since she returned to work on 5 April 2018. Both the grievance hearing and the appeal hearing were fundamentally flawed and her employers had refused to accept any responsibility for the treatment and she only had one option which was to resign. In the course of her letter of resignation the claimant wrote:
"As my employers you have refused to accept any responsibility for the treatment I have been subjected to resulting in what I consider to be a complete breakdown in the employee - employer relationship. The treatment I have received has left me in no doubt that I cannot return to my working environment as I no longer feel safe. I believe that as employers you have failed in your duty of care to provide me with a safe working environment under the Health and Safety at Work Act".

6.33 The respondent wrote and asked the claimant to reconsider her resignation by letter of 6 September 2018 (page 199). The claimant refused to do so by letter dated 10 September 2018 (page 200) and on 13 September 2018 (page 211) the respondent accepted the resignation.

Submissions

7. We received submissions from the representative of the respondent and from the claimant.

Respondent

7.1 For the respondent Mr Lane produced a short, written submission which was supplemented orally. Reference was made to the decision in **Kaur -v- Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978** and to **Waltham Forest -v- Omilaju 2004 EWCA Civ 1493.**

7.2 It was submitted that the witnesses for the respondent had given evidence consistently with each other and with the documentary evidence in contrast to the evidence from the claimant and her witness.

7.3 The respondent did not know and could not reasonably have been expected to know that the claimant was disabled. The claimant did not suggest to the respondent that she was disabled and the fit notes produced by the claimant did not suggest a substantial adverse effect on the claimant's day to day activities. The total absence from when the surgery took place to the return to work was less than 5 months and on her return the claimant was very positive about her health and indeed at the return

to work meeting on 5 April 2018 was unequivocal in her reply that there would be no recurrence of the health problem (page 103). Nothing that happened after that alerted the respondent to the disabled status. The knowledge exception is in play in this matter. A person has a right not to disclose a disability and an employer has the duty to respect that right of an employee. The claimant had said that her health was good and the respondent must be entitled to place a good deal of respect on that assertion. It would have been disrespectful of the claimant's rights to have referred her to occupational health, as it is now said should have happened, and indeed it may have amounted to an act of harassment to have done so.

7.4 Detailed submissions were made in respect of each act of alleged unfavourable treatment advanced under section 15 of the 2010 Act. The keys to the store were removed from the claimant not because of anything arising from her disability but because another employee of the store needed a set of keys. In any event even if this amounted to unfavourable treatment because of something arising in consequence of the claimant's disability, it was a proportionate means of achieving the legitimate aim of ensuring all staff had access to the keys and avoiding too many keys being in circulation. The claimant was not made to work late shifts. She never asked AR not to have to work late shifts and the allegation is simply not made out. In any event the legitimate aim being pursued was to ensure fairness amongst all staff in covering the opening hours of the Durham store. It was submitted that the claimant had not been pinned against the wall by AR and that that allegation was simply not true. The failure to suspend AR did not and could not amount to unfavourable treatment of the claimant and, in any event, the legitimate aim being pursued was not to suspend unless necessary, which it was not. There was no failure to uphold the claimant's grievance because certain points of it were upheld and those which were not had not been substantiated and that is not unfavourable treatment arising from the claimant's disability. In any event the legitimate aim was to ensure a fair grievance decision. There was no failure on the part of the respondent to reduce the number of shifts worked by the claimant because the respondent allowed the claimant to use some of her accrued annual leave to reduce her working hours in the first weeks of her return to work. The failure to refer the claimant to occupational health was not unfavourable treatment. The meetings held with the claimant had given AR enough material on how to support the claimant in her return to work and no benefit would have arisen from a reference to occupational health. There was no allegation that the claimant's dismissal (if there was one) amounted to unfavourable treatment under section 15 of the 2010 Act.

7.5 In respect of the claim of failure to make reasonable adjustments, it was submitted that the respondent did not have knowledge of the claimant's disability or of the effect of that disability nor could it reasonably have been expected to do so. Between April and June 2018, the claimant did not raise the issues she now asserts and it was only on 6 June 2018 that the claimant made the respondent aware of the issues she was having with pain in her knee. There was nothing from which the respondent could have gained knowledge of the effects of the disability as the claimant had carried out all late shifts assigned to in the period from 6 April 2018 until 6 June 2018. In any event, it cannot be shown that the respondent applied the PCP in the terms asserted by the claimant. In addition, there was nothing to suggest that reducing late shifts would succeed in removing any disadvantage from the claimant – all shifts were of the same length.

7.6 In respect of the claim of harassment, it was submitted that the factual basis of the claim was simply not made out. In respect of all the claims of discrimination advanced, there were time issues and it was not appropriate for time to be extended.

7.7 In respect of the claim of constructive unfair dismissal advanced under the 1996 Act, the way in which the respondent dealt with the claimant's grievance was entirely appropriate and not remotely approaching the high level required to establish a fundamental breach of contract by the respondent entitling the claimant to resign.

Claimant

7.8 In brief oral submissions the claimant asserted that the grievance raised by her had not been investigated properly and the procedure had lacked impartiality and confidentiality.

7.9 The claimant asserted that an employer such as the respondent with over 3000 employees should have shown a greater awareness of her condition on her return to work and done much more to support than it did. The claimant had asked for an approach from respondent which was proactive and compassionate whereas what she saw was a reactive one and an approach lacking in any compassion or empathy. There was a complete reluctance on the part of the respondent to enquire about her condition and then she found herself blamed for not communicating the matter properly. The claimant asserted that the onus should not be on the employer to make adjustments and not on the employee.

7.10 The claimant asserted that she was assaulted at work by AR and that had left her feeling vulnerable, shaken and humiliated and her trust and confidence in the respondent was destroyed. The grievance was not taken seriously in relation to the central allegation of assault by AR and when she received the outcome of the appeal she had had no alternative but to resign her employment. It is not acceptable for the respondent to shelter behind the defence of the lack of knowledge of her disability – a disability which was plain for all to see.

8. The Law

The meaning of Disability within section 6 of the 2010 Act

8.1 The Tribunal reminded itself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

(1) A person (P) has a disability if--
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) --
(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

8.2 We have also referred to Schedule I to the 2010 Act and in particular the following paragraph 2:

2. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

8.3 We have reminded ourselves of the decision in **College of Ripon and York St John -v- Hobbs 2002 185** and note there is no statutory definition of "impairment" and that the 2010 Act contemplates that an impairment can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect. We have noted also the decision in **Urso -v- DWP UKEAT/0045/2016** and the necessity for an employer to consider the symptoms and effect of an employee's disability and that there may be cases where the specific cause of the disability is not known or has not been identified at the material time. What is important is that the employer considers the symptoms and effect of the impairment.

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

8.4 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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 take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2): a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

8.5 The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (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...
(b)….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".

8.6 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

8.7 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

8.8 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away: this will be the case where the position is irretrievable and this may be the position reached during a period of extended ill health. This may be the case also where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v- Weaver 2008 AER 291** made it clear that a Tribunal must take account of the wider implications of any proposed adjustment and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

Discrimination arising from disability – section 15 of the 2010 Act.

8.9 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

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

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

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

(2) Sub-Section (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.

8.10 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability.

8.11 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act:

"From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

8.12 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

8.13 We have referred to the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** to which we were referred by the claimant. We have noted the guidance given in that decision on the question of Justification:

As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. .....Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

Harassment related to disability: section 26 of the 2010 Act

8.14 The relevant provisions of section 26 of the 2010 Act provided:

(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.

(5) The relevant protected characteristics are--. disability;

8.15 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited –v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
(c) being related to the claimant's race.

Burden of Proof and other relevant provisions of the 2010 Act.

8.19 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……."

8.20 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

8.21 We have reminded ourselves of the provisions of section 123 of the 2010 Act in respect of the time limit for the advancement of a claim. We have noted the decision in **Abertawe Bro Morgannwg University Health Board – v – Morgan 2018 EWCA CIV.640** and that section 123(4) of the 2010 Act indicates that the period in which the employer might reasonably have been expected to comply with the duty to make reasonable adjustments should in principle be assessed from the claimant's point of view having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. In addition, we note that section 123 gives Tribunal the widest possible discretion to consider an extension of time but factors which are almost always relevant include the length and reason for the delay and whether the delay has prejudiced the respondent.

Ordinary Unfair Constructive Dismissal Claim – Sections 94/98 Employment Rights Act 1996 (the 1996 Act)

Constructive Dismissal

8.23 The Tribunal has reminded itself of the provisions of Section 95(1)(c) of the Employment Rights Act 1996:

"For the purposes of this part an employee is dismissed by his employer if and only if …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

8.24 The Tribunal has noted the classic definition of constructive dismissal by Lord Denning was in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:**

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by reason of the employers conduct. He is constructively dismissed."

8.25 We have reminded ourselves of the decision in **Malik -v- Bank of Credit of Commerce International SA [1997] IRLR 463** where Lord Steyn states that there is implied into a contract of employment an implied term of trust and confidence which provides that: *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee".* We note that the impact on the employee of the employer's behaviour is what is significant and not its intended effect and that the effect is to be judged objectively.

8.26 We have noted the words of Browne- Wilkinson J in **Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666:**

"To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

8.27 We have reminded ourselves of the decision in **Clements –v- Lloyds Banking plc (above)** and we note the definition of and guidance about constructive dismissal contained in the Judgment of Langstaff J:

*"Where an employer commits a repudiatory breach of contract in respect of his employee, the employee has the option of accepting the breach as terminating his own obligations to continue to perform the contract as he had originally promised to do. Provided he has not acted, by words or conduct, so as to affirm the contract as continuing once he knew of the breach, his acceptance of the repudiation not only puts an end to the contract at common law but is by statute also a dismissal in respect of which he may claim unfair dismissal rights (section 95(1)(c) **Employments Rights Act 1996**). Since the Court of Appeal decision in **Western Excavating v Sharp** [1978] QB761 ordinary contractual principles have applied to such a constructive dismissal. The judgments in **Western Excavating** itself do not expressly state that the employee must resign in response to the breach, though this might be considered implicit; nor does section 95(1)(c) require that the employee resigned in response to a particular breach. However, it has become accepted principle that he must: such that in **Meikle v Nottinghamshire County Council** [2005] ICR 1 Keene LJ said (paragraph 33)*

"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of their repudiation. It follows that, in the present case, it was enough that the employee resigned, in response at least in part, to fundamental breaches of contract by the employer…"

And again at paragraph 39
"Once it is clear that the employer was in fundamental breach… the only question is whether [the employee] resigned in response to the conduct which constituted that breach."

To ask whether the resignation was in response to the breach identified by the claimant is to ask the same question as whether the breach was a cause of the resignation. That the search is for an effective cause rather than for the effective cause and that the test is whether the breach played a part in the resignation is equally now well established (see ***Abby Cars West Horndon Ltd v Ford*** *(unreported) 23rd May 2008;* ***Wright v North Ayrshire Council*** *[2014] ICR 77)……..*

The real question for determination was whether the resignation was because of the discrimination in any real causative sense. The conclusion that it was not was one of fact: a robust approach has to be taken by courts and tribunals to determining whether of not a particular act has caused or materially contributed to a given effect, for the purposes of determining which of two parties should suffer a given loss – here, the damage caused to the claimant by the discrimination for which he could claim compensation. The Tribunal thought carefully about whether, here, for those purposes, the discrimination involved in telling the claimant he was no longer 25 had played any material part in the breach in response to which the claimant resigned. It did so by asking (appropriately) whether it had "tainted" the dismissal. Its conclusion that it did not was one of fact, as to which Mr Leiper is right to say that, in the absence of any error of approach, the high hurdle of perversity would have to be overcome before it could be upset on appeal".

8.28 We have noted the guidance from Underhill LJ in **Kaur –v- Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978**.Paragraph 55:

I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

Conclusions and Discussion

9. We approach our conclusions by dealing with the various claims advanced and issues arising in the following order:

9.1 The question of whether and, if so, when the respondent had knowledge of the disability of the claimant.

9.2 The claim in respect of the alleged failure to make reasonable adjustments.

9.3 The claim in respect of harassment related to disability.

9.4 The claims in respect of discrimination arising from disability.

9.5 The question of whether any act of proven disability discrimination has been advanced out of time and, if so, whether time should be extended.

9.6 The claim in respect of ordinary unfair constructive dismissal.

The question of the knowledge of the respondent as to the disability of the claimant and of the effects of that disability

9.7 The respondent now accepts that the claimant was a disabled person by reason of osteoarthritis in both knees at all times material to these claims but denies knowledge of such disability or knowledge of the effects of the disability.

9.8 We accept that neither AR nor her line manager Sharon Brown or the officer who initially investigated the claimant's grievance Sarah Bayne had knowledge of the claimant's disability and indeed none of them at any time even considered that the claimant could be a disabled person for the purposes of the 2010 Act.

9.9 The claimant received a diagnosis of osteoarthritis in May 2016 and we are satisfied that this was known to her line manager AR and thus to the respondent. The respondent received at least one fit note from the claimant (page 124) on 13 July 2017 which made it aware of that diagnosis. We are satisfied that the claimant made AR aware that she needed a total replacement of her right knee and indeed in March 2017 left work with a view to having that surgery and to being absent from work for a considerable time. That operation was cancelled and the claimant returned to work and all of these matters were known immediately to AR. We are satisfied that both before March 2017 and then particularly in the period from March 2017 until November 2017 when the claimant did have surgery that her

performance in the workplace was affected by the pain in her knees and she patently struggled from time to time at work as was known both to AR and her colleagues. The claimant used a TENS pain relief machine at work from time to time and also took other steps such as applying frozen peas to her knee in an attempt to alleviate pain again as was known to AR. The respondent knew that the claimant was absent from work for the surgery in November 2017 and only returned some five months later in April 2018. At no time during that period did the respondent consider that the claimant might be a disabled person or consider referring the claimant to an occupational health advisor.

9.10 In March 2018 the claimant had a meeting with AR in advance of her return to work and a further meeting on her return to work on 5 April 2018 at which the claimant made it known to AR that she had had a total knee replacement and adjustments of not having to use ladders or to stand for excessive times were discussed on the initiative of the claimant. We find that in the event those so-called adjustments were not actioned in practice. After she returned to work, we find that the claimant made known to AR both orally and by showing her a photograph in April 2018 of the effect on her knees (both the repaired knee and the unrepaired knee) of carrying out her unadjusted duties and the only adjustment suggested by AR was that the claimant should keep the frozen peas she was using to control that swelling in the staff refrigerator. At no time after her return to work and after major surgery did the respondent consider a referral of the claimant to an occupational health advisor and no consideration was given by the respondent to any adjustments to the claimant's duties. After the claimant went away from work on 6 June 2018 and entered the grievance procedure, there was no appreciation of her disabled status by either manager who investigated the grievance or indeed from her own line manager. The approach adopted by the respondent was that it was for the claimant to make the running in suggesting any adjustments she required and there was no appreciation at all of the respondent's duty to consider and to make reasonable adjustments for a disabled employee. The respondent actively shelters behind that approach to say it did not have knowledge of the disability of the claimant which it now accepts existed.

9.11 We conclude that the respondent ought to have had knowledge of the disability from as early as 2016 when the diagnosis was given but certainly by the time the claimant went away from work in November 2017 for her total knee replacement and subsequent five-month absence from work. We conclude that the respondent in this case seeks to hide behind the ignorance of its managers of what was a blatantly obvious disability. We conclude that the respondent could reasonably have been aware of the claimant's disability at all times material to this claim and in seeking to deny that it did have such knowledge, it denies what should have been obvious to anybody.

9.12 In respect of the claim of failure to make reasonable adjustments, it is necessary that the respondent has not only knowledge of the disability but also of the effects of that disability. The one claim of failure to make adjustments relates to the working pattern of the claimant and in particular the effect of having to work late shifts. We conclude that the respondent ought reasonably to have had knowledge that working late shifts caused the claimant to suffer the swelling of her knee by reason of the fact that working late into the night would obviously mean that the

claimant had been using her knee for a long period of time and would obviously be affected by that extended use. We find that AR did know by April 2018 that working the late shift was having an effect on the claimant's knee and that she was struggling as a result of working those shifts and the adverse effect was plain to see. Even if it was not, we find that the claimant showed a photograph to AR in mid-April 2018 of her swollen knee after having worked a late shift. The effects of the disability should reasonably and could reasonably have been known to anyone who cared to put his or her mind to the question. The fact that neither AR nor any other manager chose not to put their mind to the matter does not assist the respondent. The point in this case is that AR and indeed other managers simply never considered the question of disability or the effects of that disability – effects which were all too plain to see. We find that at the material time and for the purposes of the reasonable adjustment claim, the respondent, principally through AR, could reasonably have been expected to know the effects of the disability and that it would place the claimant at substantial disadvantage. The officers of the respondent in this case had had little if any meaningful training as to the meaning of disability and of their duties as managers of disabled members of staff. The lack of training for an employer with 3000 employees was breath-taking and resulted in the respondent's managers committing grave errors in the way this disabled claimant was handled as a result of their startling ignorance of their duties.

The claim of failure to make reasonable adjustments

9.13 We have considered first of all whether the PCP contended for by the respondent was in play in the workplace. The PCP contended for was that those carrying out the claimant's role were required to work full-time shifts and late shifts without any reduction in late shifts. We are satisfied that this PCP was in play in the Durham store. We reach the conclusion from the evidence of the claimant and Emma Watson and also and in particular by reason of what was written by Sharon Brown in the grievance appeal outcome letter dated 9 August 2018 (page 192) which we set out at paragraph 6.13 above. We are satisfied that there was a practice in the Durham store for employees to be rostered to work late shifts as part of their full-time duties and there was no provision for reducing late shifts. It is clear that given the opening hours of the Durham store that the respondent required late shifts to be worked by its employees and that the PCP was applied to the claimant on her return to work in April 2018 without adjustment.

9.14 We have considered whether that PCP placed the claimant at a substantial disadvantage when compared to other non-disabled employees in the workplace. We are satisfied that it did because the claimant by reason of her disability suffered difficulty standing on and using her knee as the day progressed. That difficulty increased over the day and by the time that a late shift concluded the claimant was in considerable pain which was not the case with non-disabled employees. This was a substantial disadvantage – in the terms of something more than minor or trivial – for the claimant in comparison to other non-disabled employees.

9.15 We have considered whether a reasonable adjustment to that PCP would have been to amend the claimant's role by reducing the number of late shifts worked as was contended for by the claimant. We are entirely satisfied that that would have been a reasonable adjustment to make for the claimant on her return to work from surgery in April 2018 and in particular once it became clear, as it did by

20 April 2018, that working those late shifts was causing the claimant substantial disadvantage. There were over 20 employees in the Durham store. The claimant's absence had been managed without difficulty over the previous five months and for a time limited adjustment to have been made to assist the claimant back into work in the reduction of late shifts worked by her would have been entirely reasonable. The fact remains that the respondent never applied its mind to any question of reasonable adjustment because it never applied its mind to the possibility that the claimant may be disabled - as it now accepts she was.

9.16 It was clear by 20 April 2018 that working late shifts was causing the claimant substantial disadvantage. We deal below with the question of whether the claim advanced by the claimant in this regard is in time.

The claims of harassment related to disability

9.17 We have considered whether the claimant has established that AR uttered the remark on 6 June 2018 as alleged at issue paragraph 3.11.1 and whether AR pinned the claimant against the wall in the office on 6 June 2018 as alleged at issue paragraph 3.11.2 above. It is clear from our findings of fact above that we accept that both events occurred in the way the claimant described them. We reject the evidence of AR in relation to those matters. We conclude without difficulty that both matters were unwanted conduct by the claimant at the hands of AR.

9.18 We have considered whether AR intended by her words and actions to violate the claimant's dignity or to create for the claimant an intimidating hostile degrading humiliating or offensive environment. Having considered the evidence of AR, we are not satisfied that it was her intention so to do.

9.19 We have considered whether the effect of what AR did was to violate the claimant's dignity or to create the prohibited environment. In so doing, we must consider the claimant's perception, all the other circumstances of the case and whether it is reasonable for the conduct to have had that effect. We conclude that the actions of AR in pinning the claimant, albeit briefly, against the wall of the office did have the effect of violating the claimant's dignity and of creating for her a hostile environment. The claimant certainly perceived that to be so notwithstanding that she later may have rationalised the event as AR attempting in some perverse way to be kind towards her. The fact remains the claimant was upset by the events of 6 June 2018 and raised a grievance in respect of them and persisted in that grievance. We conclude that it was reasonable for the actions of AR to have violated the claimant's dignity and to have created for her a hostile environment. No employee should be subject of an assault at the hands of her line manager no matter how short lived. We reach the same conclusion in relation to the remark uttered by AR. We accept that the remark was sarcastic and uttered by AR in frustration at the claimant's asserted intention to leave work early at a time when the sale in the store had just begun and every employee was needed. We conclude that the remark was not uttered in in a supportive way and the effect of it was to violate the claimant's dignity and to create for her a hostile environment.

9.20 We have considered whether the actions of AR were related to the claimant's disability. In answering this question context is all important. A conversation had taken place between the claimant and AR in which the claimant had asserted her

intention to return home early because of the pain in her knee. This did not please AR and she responded in a sarcastic manner and invited the claimant into the office to discuss the matter. Once there, the claimant asked for the telephone numbers of AR's own line manager and of the respondent's personnel department. She did this because, as she made plain to AR, she felt she was being given no support by AR in respect of her knee condition which the respondent accepts was a disability. When AR heard that request she became angry and defensive of her own position and in that context the assault, albeit short lived and minor, took place. AR wished to prevent the claimant speaking to either her own line manager or the personnel department of the respondent. Both the sarcastic remark and the assault arose out of a conversation in respect of the claimant's knee condition which was a disability. We conclude that the actions and words of AR on 6 June 2018 were related to the claimant's disability.

9.21 We consider below the question of the time limit in relation to the advancing of this discrete claim of harassment.

The claim of discrimination arising from disability: section 15 of the 2010 Act.

9.22 We consider each allegation of discrimination arising from disability in turn. We first consider whether the claimant has established the factual basis on which each allegation is made.

Refusal to return to the claimant her keys to the Durham store

9.23 We do not accept that the claimant has established the factual basis on which this allegation rests. The keys which were removed from the claimant were not her personal set of keys at all but rather a set of keys used common by several members of staff. The claimant has not established to the required standard of proof the factual basis on which this allegation rests. We refer to our findings of fact at paragraph 6.14 above. Even if that conclusion is wrong, we do not accept that the removal of the keys was because of something arising in consequence of the claimant's osteoarthritis. It is clear that the keys were removed because there was a necessity for another member of staff to have access to the keys and because there were an inadequate number of sets of keys to provide one to each staff member. There was no causal connection between the alleged unfavourable treatment and the claimant's disability. The allegation fails and is dismissed.

Making the claimant work late shifts

9.24 We accept that the claimant was required on her return to work in April 2018 to work certain late shifts. We have considered whether that treatment of the claimant was because of something arising from her disability. We conclude that it was not. The requirement to work late shifts arose as a consequence of the contractual terms under which the claimant was employed and it had nothing to do with her disability as such. In essence, this allegation is a repetition of the allegation of a failure to make reasonable adjustments to the PCP in respect of late shifts which we have found to be in play. The allegation of failure to make a reasonable adjustment in this regard has succeeded. The allegation that the same conduct was also a breach of section 15 of the 2010 Act does not succeed in the absence of any

causal connection between the requirement to work late shifts and the claimant's disability. This allegation fails and is dismissed

Pinning the claimant against the wall

9.25 We refer to our findings of fact and find that the claimant was pinned against the wall by AR on 6 June 2018 albeit for a short time. We have determined that this matter was an act of disability related harassment. This claim is advanced under section 15 of the 2010 Act relying on section 39(2)(d) of the 2010 Act as being an act of detriment. Section 212(1) of the 2010 Act in the definition of "detriment" makes it plain that a detriment does not include conduct which amounts to harassment. In those circumstances it is not appropriate for us to consider this allegation any further and as an allegation under section 15 of the 2010 Act, it fails and is dismissed.

Failing to suspend April Robson

9.26 We accept that the respondent did not suspend AR after the claimant had made an allegation of disability related harassment against her. We do not accept that this is unfavourable treatment of the claimant. The claimant went away from work on the day of the assault and at no time after that did she evince any intention to return to work. In such circumstances there was nothing to be gained in suspending AR and there is no suggestion that, had the respondent done so, the claimant would have returned to work for patently she would not. There is no unfavourable treatment of the claimant in this regard. If anything, this claim could have been advanced as a claim of direct disability discrimination but it was not. The claim fails and is dismissed.

Failing to uphold the claimant's grievance

9.27 This allegation is imprecisely advanced. Three of the points raised by the claimant in her grievance were upheld by the respondent. In any event we are not satisfied that the failure to uphold the remaining parts of the grievance were because of something arising in consequence of the claimant's disability. The claimant has failed to establish any such causal link. This allegation fails and is dismissed.

Failure to reduce the number of shifts worked

9.28 This allegation is imprecisely framed. The only evidence of a failure to reduce late shifts was advanced in the context of the failure to make adjustments claim. We have considered this allegation and dealt with it as one of a failure to make a reasonable adjustment and it is not appropriate to consider this allegation further in the way in which it has been framed under section 15 of the 2010 Act. The claim fails and is dismissed.

Failure to refer the claimant to occupational health

9.29 We accept that the claimant was at no time referred to occupational health by the respondent. We do not accept that the this was because of something arising as a consequence of the claimant's disability. The reason was the ignorance on the

part of the claimant's line manager of any process to refer an employee to occupational health. As advanced the claim is simply not made out and it is dismissed.

Time Issues

9.30 We consider the question of whether the proven acts of disability discrimination have been advanced in time by reference to section 123 of the 2010 Act. The allegations proved are the allegations of harassment on 6 June 2018 and the allegation of failure to make a reasonable adjustment in relation to late shifts from April 2018 onwards.

9.31 We have noted that the claim was filed in this matter on 12 October 2018 relying on an early conciliation certificate on which Day A was shown as 24 August 2018. Accordingly, any act of discrimination occurring three months or less before 24 August 2018 is in time in accordance with section 123 of the 2010 Act as amended by section 140B of the 2010 Act.

9.32 In relation to the claims of disability related harassment, these occurred on 6 June 2018 and so the claims are in time and we need not consider time issues further.

9.33 In respect of the allegation of failure to make reasonable adjustments, we have considered in accordance with **Abertawe** (paragraph 8.21 above) from the claimant's perspective when it would have been reasonable for the respondent to have made the adjustment of reducing the number of late shifts worked by her. The problem in respect of late shifts had clearly become apparent and was known to the respondent by 20 April 2018 when the matter was discussed between the claimant and AR and when the claimant showed AR a photograph of her swollen knee. We conclude that within at most four weeks from that date, namely by 18 May 2018, it would have been reasonable for the respondent to have formally addressed the question of a reduction in late shift working for the claimant. Accordingly, we conclude that time runs from 18 May 2018 in that regard and the claimant's claim should have been secured by approaching ACAS by not later than 18 August 2018. ACAS was in fact approached six days later on 24 August 2018. The claim is out of time and we therefore consider whether it is just and equitable for time to be extended in this regard.

9.34 We have considered the relevant factors. Time limits are meant to be observed. The delay is a short one. The claimant grieved the matter in relation to general lack of support on her return to work in a grievance dated 6/8 June 2018 well before the time limit expired. If time is not extended to enable this claim to be considered for remedy, the prejudice to the claimant will be considerable whereas the prejudice of the respondent is minimal. The respondent was able to deal with this claim and its witnesses were able to give evidence in respect of it without difficulty. The balance of prejudice clearly lies in favour of extending the time in the circumstances of this case. We have considered the reason for the delay and find that the claimant was effectively awaiting the outcome of her grievance appeal before litigating the matter. Having received that appeal outcome, the claimant promptly approached ACAS for early conciliation. Having considered the matter in the round we conclude that in the circumstances of this case that it is just and

equitable for time to be extended to enable this matter to be considered by the Tribunal for remedy.

9.35 In those circumstances, the claims of disability related harassment and disability discrimination by failure to make reasonable adjustment are well-founded and the claimant is entitled to a remedy .

The claim of ordinary unfair dismissal – sections 94/98 of the 1996 Act

9.36 We turn to deal with the claim of ordinary unfair constructive dismissal. We have considered whether the claimant has established on the balance of probabilities that the respondent conducted itself without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of confidence and trust between the claimant and the respondent. By reference to our findings of fact, we find that the respondent did act in that manner and that the claimant resigned her employment because of that breach of contract and that she did not waive any breach by affirmation of the contract.

9.37 The history of this matter demonstrates our conclusion. The claimant made known to the respondent the serious condition from which she was suffering in 2017 and made the respondent aware that she would be having a total knee replacement in March 2017 and then made the respondent aware that that operation had been cancelled. The claimant returned to work and went off again for the operation in November 2017 only returning in April 2008. Throughout that period, and in particular after her return to work in April 2018, no consideration was given at all by the respondent to the question of whether or not the claimant was disabled and in particular to the question of reasonable adjustments which should be made to her duties. Indeed no consideration at all was given by the respondent to the claimant's status as a disabled person at any time during her employment up to the time of her resignation on 30 August 2018.

9.38 The claimant found herself faced with a manager in AR who had no understanding whatever of the concept of a disabled employee or of the duty to make adjustments to accommodate the disability from which the claimant clearly suffered.

9.39 When the claimant returned to work in April 2018 it soon became apparent to the respondent that she was struggling with her duties particularly when working late shifts and yet no adjustment of any kind was considered or implemented. Instead the claimant found herself faced with an environment where she was told to use up her annual leave before returning to work and was only able to persuade the respondent to allow her to use her annual leave so as not to have to work a full week in the first three weeks of her return with considerable difficulty. No consideration was given by the respondent to referring the claimant to occupational health in order to give consideration to its duty to make reasonable adjustments for the claimant as a disabled employee. No phased return to work was offered and no adjustment of any kind to shift pattern was suggested or implemented.

9.40 Whilst away from work the claimant found her payslips for February and March 2018 had not been stored safely for her on her return. The claimant found a difficulty on her return with receiving work rotas in a timely fashion. The claimant

found that a set of keys which she had used were removed from her without explanation causing her difficulty in carrying out her duties and in particular in accessing the administrative office of the respondent at a time when she was patently having difficulty with her mobility. The claimant found herself returning to an environment as a disabled employee where adjustments were not considered and where a risk assessment for her was neither considered let alone implemented.

9.41 Having returned to work, the claimant was faced with a line manager in AR who had no understanding of the claimant's disability and whose only suggestion by way of adjustment to help the claimant was that she should use frozen peas to help the swelling of her knee which was causing her difficulty and was in fact a disability. The claimant worked in an environment where no adjustments to her shifts were permitted and where she found herself in the early weeks of her return working a disproportionately high number of late shifts. The claimant rightly perceived that her difficulties were not taken seriously by the respondent and that there was a patent lack of support and empathy shown towards by her line manager.

9.42 On 6 June 2018 the claimant raised matters with her line manager and asked to speak to her manager's line manager and to the respondent's personnel department. In the face of those requests she found herself the subject of sarcastic and unsupportive comments from her line manager and ultimately an assault on her. The events of 6 June 2018 in themselves were sufficient to amount to a breach of the implied term of trust and confidence and all the more so when taken with all that occurred between 5 April 2018 and 6 June 2018

9.43 As a disabled person the claimant worked in an environment where no consideration was given to her disability either by her line manager or by those who investigated a subsequent grievance which she raised promptly after the events of 6 June 2018. Having raised a grievance the claimant was faced with an outcome in which her central allegations in respect of the assault on her and the failure to support her return were dismissed in summary terms without any interviewing of potentially relevant witnesses and in a short outcome letter which patently evidenced the closing of ranks by managers against the claimant.

9.44 In her appeal against that grievance outcome the claimant found herself faced with another manager with no understanding of her disabled status or the duties of the respondent in relation to it and one who, having spoken to certain witnesses, reached the same unreasonable conclusion in respect of the claimant's grievance about the alleged assault and lack of support. That decision was conveyed in a letter which provided no meaningful analysis for the conclusions reached and provided no detail to the claimant of the evidence provided by the witnesses who had been interviewed at the appeal stage. No explanation was provided as to why the claimant's main witness Emma Watson had not been interviewed. The claimant reasonably perceived that outcome as further evidence of managers closing ranks against her. This outcome finally sealed the claimant's intention to resign and it added something to the catalogue of previous events which together evidenced a breach of the implied term of trust and confidence on the claimant's contract of employment.

9.45 In failing to consider adjusting the number of late shifts worked by the claimant in the light of clear evidence of substantial disadvantage to her, the respondent failed to make reasonable adjustments and committed an act of disability discrimination which was the subject of the claimant's grievance and unreasonably not upheld.

9.46 We conclude that the events of 6 June 2018 and the failure to make reasonable adjustments to late shifts both individually and collectively amounted to a breach of the implied term of trust and confidence entitling the claimant to resign. The claimant grieved those matters promptly after 6 June 2018 and no question of affirmation arises during that grievance process. When those matters are taken together with all other conduct on the part of the respondent to which we have referred above, we conclude that, even if that first conclusion is wrong, then all that which the claimant experienced both before and in particular after her return to work on 5 April 2018 clearly demonstrates that the respondent committed a breach of the implied term of trust and confidence in the claimant's contract of employment which entitled the claimant to resign her employment when she did.

9.47 We conclude that the claimant resigned her employment in the face of a fundamental breach of her contract by the respondent and that, in accordance with section 95(1)(c) of the 1996 Act, the claimant was dismissed.

9.48 The respondent did not seek to advance any reason for that dismissal which is accordingly unfair without any necessity for consideration of the matters arising for consideration under section 98(4) of the 1996 Act.

9.49 In the circumstances the claimant's claim for unfair constructive dismissal is well-founded and the claimant is entitled to a remedy.

Remedy

Submissions on Remedy

10.1 For the respondent, it was accepted that the claimant's gross weekly pay at her dismissal was £283.27 and net weekly pay £249.05. The basic award calculation at £1274.72 was agreed. It was submitted that the claimant had failed to mitigate her loss. The claimant had not acted reasonably in setting up a bed and breakfast business and it was not for the respondent to fund a career change for the claimant unless that was an appropriate step and it was not. The claimant should have tried to obtain direct employment and she did not. The claimant is qualified in a number of areas and she only made two positive applications for work. In respect of future loss, the claimant should by this point have found employment from which she could earn as much as she was receiving from the respondent and there should be no award for future loss.

10.2 In respect of injury to feelings the respondent submitted that it was clear that the injury must flow from any proven act of discrimination and in this case the answers from the claimant indicated that any injury does not flow from any act of proven discrimination.

10.3 For the claimant it was submitted that she had set up in business in the bed and breakfast area because that was a logical thing to do and the source of immediate income.

The Law

11.1 The Tribunal reminded itself of the provisions of section 124 of the 2010 Act and of the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the 1996 Regulations") and in particular Regulation 6(1) in respect of the calculation of interest in respect of awards for injury to feelings.

11.2 The Tribunal reminded itself of the provisions of sections 119 and 123 of the 1996 Act.

11.3 In respect of an award for injury to feelings for acts of discrimination, the Tribunal reminded itself of the decision in **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871** as amended by the decision in **Da'Bell v NSPCC (2009) UKEAT/0227/09, [2010] IRLR 19** together with the Presidential Guidance on Awards for Injury to Feelings issued in September 2017 and the first addendum thereto in respect of claims issued after 6 April 2018 as was the case in this matter. We note the relevant amount for the lower band Vento in respect of a claim issued after 6 April 2018 is £900 to £8600.

Findings of fact in respect of remedy

12 Having considered the oral and documentary evidence placed before us on the question of remedy, the Tribunal makes the following findings of fact on the balance of probabilities:

12.1 The Tribunal find that the claimant was born on 8 January 1958. She began employment with the respondent on 2 February 2015 and that employment ended on 30 August 2018. At dismissal the claimant earned £283.27 per week gross and £249.05 per week net. She had three continuous years' service with the respondent and the appropriate multiplier for the basic award is 4.5.

12.2 The period from dismissal on 30 August 2018 until the date of hearing on 31 May 2019 is 39 weeks 1 day which gives a total of £9747.79 net loss to date taking the agreed sum of £249.05 per week net.

12.3 The employer contributed £36.83 per month to the claimant's pension and 9.03 months from dismissal to hearing gives a total contribution of £332.58.

12.4 The claimant had earned from her bed and breakfast business from October 2018 until the date of the hearing £4361.27 net.

12.5 The claimant was considerably upset by the acts of discrimination and her feelings were affected. The act of harassment related to disability on 6 June 2018 was particularly upsetting for the claimant. The failure to adjust late shifts on her return to work in 2018 also made the claimant feel upset and vulnerable to the extent that she feared reprisals if she sought adjustments for her disability. That

unsupportive and threatening atmosphere was exemplified for the claimant in the actions of AR towards her in the office on 6 June 2018 and then reinforced by the manner in which her grievance in respect of those matters was investigated and then dismissed both initially and on appeal.

12.6 The claimant wished to go back to work for the respondent and was very upset when she found herself forced to resign. She felt very vulnerable after her surgery and she had had to work hard in rehabilitation to get back to work at all. When she returned to work no consideration was given to adjustments. There was no appreciation at all that she was disabled and would require adjustments to ease herself back into work. There was no understanding from the respondent of her condition or any appreciation on the part of her manager or indeed any higher manager that she was disabled and would require adjustments to return easily to her full-time duties. The claimant's line manager AR and the two higher managers who investigated the claimant's grievance had no training in disability awareness and no understanding of the duty of the respondent through them to consider adjustments for an employee of whose disability they ought reasonably to have been aware.

12.7 Since her dismissal the claimant has set up in business offering rooms in her home on a bed and breakfast basis. She has registered as an Air B and B provider. The claimant receives £500 per month on a good month from that source of income and she has received good reviews which should increase her opportunity to earn income through this source. The claimant has not received any state benefits since her dismissal. In addition, in the past the claimant has had teaching roles in adult education. She is able to give training in theatrical make-up and massage. She could earn £150 per day in providing training courses in those subjects and hopes to be able to do so in the near future on an occasional basis.

Conclusions on remedy

Remedy in respect of Unfair Dismissal – compensation calculated in accordance with the 1996 Act

13.1 We have reminded ourselves that there was no allegation before us that the dismissal of the claimant was an act of disability discrimination pursuant to section 15 of the 2010 Act or indeed any of the other provisions of the 2010 Act. We consider it appropriate therefore to compensate the claimant in respect of her dismissal under the provisions of the 1996 Act and applying in particular the provisions of sections 119 and 123 of the 1996 Act.

13.2 In respect of the unfair constructive dismissal the basic award is £1274.72 which calculation was agreed by the respondent.

13.3 In respect of the compensatory award, we calculate the income the claimant has lost to date on a net basis to be £9747.79 together with 9.03 months at £36.83 per month pension contribution from the respondent which totals £332.58. This gives a total of £10080.37 net loss to date. The claimant has earned £4361.27 from her bed and breakfast business to date. This gives a loss to the claimant to date of £5719.10 (£10080.37- £4361.27).

13.4 We have considered the submission that in acting as she has that the claimant has failed to mitigate her loss. The Tribunal rejects that submission. The claimant took steps immediately to mitigate the loss arising from her unfair dismissal by seeking to use her home as a source of income and we are satisfied that that was a reasonable step to take. The claimant has limited formal qualifications and we are satisfied that, by acting as she did, the claimant obtained a valuable and increasing source of income much quicker than she would have done if she had made formal applications in the job market for posts within her level of experience and qualification. The Tribunal concludes that within twelve months from today the claimant will have reached an income position at the same level as that being received at the point of dismissal. However, over that period of time the claimant will earn increasing sums of income as we are satisfied that her income from the business she has created by the use of her home and from other courses she will offer on an ad hoc basis will increase. We must do the best we can with the information before us. We conclude that the earnings of the claimant on a net basis over the coming months will be as follows:

a) in the first three months (June to August 2019) of the future loss period she will earn £545 per month net giving a total income of £1635
b) in the second three months (September to November 2019) she will earn £776 per month net giving a total income of £2328
c) over the third three months (December 2019 - February 2020) she will earn £1007 per month giving a total of £3021 and
d) in the fourth period (March -May 2020) she will earn £1238 per month net giving a total of £3714.

If those four figures are added together the claimant will earn £10698 net over the next twelve months from her bed and breakfast business. Doing the best we can with the information before us, we increase this to £12000 to reflect the income the claimant will receive from the courses she will offer. If the claimant had remained in the employ of the respondent we calculate she would have earned £14865.76 net over that period (inclusive of pension contribution from the respondent) and therefore there is a future loss of £2865.76. We were given no details of the monetary value of the other benefits to which the claimant was entitled and to which we refer at paragraph 6.1 above and accordingly make no award in respect of those matters.

13.5 We consider it appropriate to award £500 for loss of statutory rights.

13.6 The Tribunal considers it would be inappropriate to increase or decrease the award for any alleged failure by the respondent or the claimant to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. The Recoupment Regulations do not apply.

Remedy in respect of unlawful disability discrimination – awarded pursuant to the provisions of the 2010 Act

13.7 We consider it appropriate to make an award for injury to feelings to the claimant in respect of the unlawful disability discrimination claims which have succeeded.

13.8 The act of harassment related to disability which occurred on 6 June 2018 was a serious matter. No matter the motivation of AR, the claimant found herself the subject of a sarcastic unsupportive remark followed by an assault and the incident caused her considerable upset as was witnessed by, amongst others, Emma Watson whose evidence we accept. The claimant left work immediately after the assault on her and never returned. This was a one off and short-lived act of harassment but nonetheless a serious one. We accept the evidence of the claimant that the matter occurred as she described. We accept that she did not want to report the matter to the police particularly with regard to the relationship which she had enjoyed with AR up to the point she went off for the knee replacement in November 2017. We take account of the fact that the claimant on reflection thought that AR may have been trying to be kind towards her but nonetheless, in acting as she did, AR committed an act of disability related harassment which greatly upset the claimant and all the more so when she received no apology for the incident from AR and indeed a denial from AR as to what had happened. We unreservedly reject the anodyne description of the events of 6 June 2018 given by AR during her evidence to the Tribunal. We conclude that any award for injury to feelings arising from this act of harassment must fall in the lower band of the **Vento** guidelines. Having considered the evidence of the claimant on this matter in detail, we place the award for injury to feelings at £4000.

13.9 In relation to the failure to make a reasonable adjustment in respect of the working pattern of the claimant the respondent committed a serious failure. This action was ongoing over a longer period and caused the claimant considerable upset. The claimant was vulnerable after her surgery and the operation was a major milestone for her from which she was keen to recover and return to work and she committed herself to working hard in rehabilitation to achieve a return to work. When she approached the respondent about a return to work, she found herself met with no enquiry as to how the respondent could assist her to return to work and no appreciation from the respondent that she was a disabled employee (as the respondent now accepts she was). We accept that there was universal ignorance on the part of AR and other managers of the respondent who engaged with the claimant as to their duty to consider and make reasonable adjustments but the respondent has a duty to ensure its managers of employees are aware of their duties. The failure to make the reasonable adjustment in this matter was a cause of upset for the claimant, it went on over several weeks even in the face of clear evidence that the claimant was struggling and it caused the claimant to feel vulnerable in the workplace and not to feel able to ask for appropriate adjustments. All this injured the feelings of the claimant. Again, we place the level of injury in the lower **Vento** band. Having considered the matter in detail, we assess the appropriate compensation for injury to feelings in respect of this matter also at £4000.

13.10 Accordingly the award for injury to feelings is placed at £8000 in total. We increase that award by interest pursuant to the 1996 Regulations. We apply the required rate of interest of 8% and do so from the date of the final act of discrimination namely 6 June 2018. That amounts to a period of 360 days to the date of the hearing.

13.11 Accordingly, the Tribunal concludes that the appropriate award for injury to feelings is £8000. The Tribunal increases this sum by the appropriate rate of interest

which totals £631.23 namely 360 days at 8% interest. This give an award for injury to feelings of £8631.23.

14. **Compensation table**

We set out the compensation awarded in tabular form:

Compensation for unfair dismissal – the 1996 Act

Basic award		£1274.72
Compensatory award		
Loss of income to date £9747.79 add pension loss to date £332.58. Total £10080.37 less earnings to date £4361.27 that totals	£5719.10	
Future loss Twelve month period net loss £14865.76 less earnings over that period as set out above £12000 net loss	£2865.76	
Loss of statutory rights	£ 500.00	
Total compensatory award under 1996 Act		£9084.86
Compensation awarded under the 2010 Act		
Injury to feelings and interest		£8631.23
GRAND TOTAL		**£18990.81**

EMPLOYMENT JUDGE A M BUCHANAN
REASONS SIGNED BY EMPLOYMENT JUDGE ON 27 August 2019