EMPLOYMENT TRIBUNALS

Claimant: **Ms R. Varvara**

Respondent: **Pret-a-Manger (Europe) Limited**

Heard at: **London Central** **On:** **16, 18-20 February 2019, and 2-3, 7-8 October 2019**

Before: **Employment Judge Goodman**
Ms S. Samek
Mr B Tyson

Representation
Claimant: **in person**
Respondent: **Ms J. Shepherd, counsel**

JUDGMENT

1. The respondent did not discriminate against the claimant because of sex or disability.
2. The claimant did not suffer harassment related to sex.
3. The respondent did not breach the duty to make reasonable adjustment for disability
4. The claimant was not unfairly dismissed.
5. The claims of unpaid holiday pay and failing to provide statutory particulars fail.

REASONS

1. The respondent runs a well-known chain of sandwich shops.

2. The claimant was employed by the respondent as a team member, at four of its shops successively from 2 November 2014 until she resigned on 14 February 2018. She then brought claims of unfair dismissal, failure to pay holiday pay, direct sex discrimination, sex harassment, direct disability discrimination, and failure to make reasonable adjustment for disability.

3. The issues the tribunal must decide in this case were listed at a preliminary hearing, following which the claimant was ordered to give further particulars of the less favourable (or unfavourable) treatment

complained of. Disability was not admitted. The tribunal had also to decide whether there was jurisdiction to decide a claim based on any event before 2 February 2018, that being, on the face of it, out of time.

4. The detailed issues in the unfair dismissal claim, and the protected acts for the victimisation claim, were identified by EJ Isaacson at a preliminary hearing. There was no further agreement of a list of issues after the claimant then served further particulars. We set out in the discussion n ssession the issues as we understood them. The respondent has put together a list of issues from the particulars. We have tried to be alert to the treatment complained of in hearing the evidence. The claimant's absences, especially on the day set aside for submissions, removed the opportunity to clarify this her what treatment was complained of before we came to make a decision. We have done our best.

Live Evidence

5. The tribunal heard evidence from the following:

Roxana Varvara, the claimant
Sanukka Nevala – grievance appeal manager (interposed)
Gierdre Razenskiene – general manager at the Houndsditch shop when the claimant worked from November 2017 until she resigned in February 2018 (interposed)
Jolanta Davreckene – general manager, Westfield shop from September 2016
Jose-Luis Redondo Palacios – assistant general manager, Westfield shop, until October 2016
Aneta Kuzmicka – general manager Cabot Place, where the claimant worked from July to November 2017.
Bruno Daniel Rufina do O Faustino – assistant manager, Houndsditch shop
Jaroslaw Rozwod – operations manager.

Documentary Evidence

6. There was a hearing bundle of over 900 pages. We read those to which we were referred.

7. It was clear to the tribunal during the February hearing days that the claimant seemed unfamiliar with the content of the agreed bundle. In October she brought some new documents in successive days. Most were admitted, subject to giving counsel for the respondent an opportunity to take instructions. On the afternoon of 2 October the claimant suddenly referred to a recording of a disputed telephone call. The fact of recording was not known to the respondent, and neither the recording nor a transcript of it had been disclosed. The claimant said she had not done so because she thought that being covert it was inadmissible. This being the eighth of the listed days for the hearing, and as it would require adjournment to have a transcript made, and then allow the respondent to take instructions on it, the recording was not admitted to evidence, because in the circumstances the further delay, when the case had already had to be adjourned in February for the claimant's non-attendance, was contrary to the interests of justice.

Conduct of the Hearing

8. The case was listed for hearing over six days, on 13-15 and 18-20 February 2019, but the hearing did not proceed as envisaged.

9. On the first day, the Tribunal spent the morning reading witness statements and documents, and from 1 p.m. proceeded to hear evidence. We decided that the clamant was disabled within the meaning of the Equality Act 2010 by reason of back pain. The reasons for that decision were recorded, and the written reasons are set out below. We then started to hear the Claimant's evidence on the main claims. On the second day, however, the Claimant did not attend the hearing at all. She emailed early in the morning to say she had been so upset and anxious that she had not slept all night. The Tribunal replied asking her to state what her intention was – to continue or withdraw.

10. On the third day, Friday, she did attend the Tribunal, and cross examination continued. It was interrupted by calling one of the Respondent's witnesses who was only able to attend that week (Ms Nevala). Despite it having been explained to the claimant on day one, and on the Friday morning, that the witness would be called then, the Claimant had not prepared questions, and we adjourned for thirty minutes to enable her to do so.

11. Cross examination of the Claimant then resumed on Monday, day four, but with a two hour adjournment part way through because the Claimant became too upset to continue. On the afternoon of day four the Claimant spent two hours asking questions of another of the respondent's witnesses, the supervisor in the last shop she worked at (Ms Razanskiene). At the conclusion, she said she was not satisfied that she had been able to put all the necessary points to her, though she was unable to identify what area she had not covered.

12. On the morning of day five there was another email from the Claimant to say that she could not attend. She was asked by the Tribunal by email to state whether she wanted the hearing the following day to be postponed to a future date; if she did she must provide a medical certificate to confirm "whether you are fit to attend a hearing (not fit for work)", and then the prognosis, how long she would be unfit, and when she would be fit for a hearing. She was asked to state by 4:30pm whether she would attend the hearing the next day, and if she did not provide a medical certificate, whether she wished to withdraw the claim. She responded with a medical certificate saying only that she was unfit for work for the next month.

13. On day 6 the tribunal heard an application by the respondent to strike out the claims. We decided to list a further hearing after confirmation from the GP about her fitness for a hearing. Reasons were given in tribunal and then written reasons sent to the parties so that the absent claimant would know the outcome. The GP confirmed that medication could be provided for her anxiety, and that it would be better to provide breaks in listing. The case was eventually relisted for hearing over four further days in October, separated by a break of three days.

14. In October it was possible to conclude the evidence in two days, with a break on the second of these days because the claimant was upset. At the conclusion of the evidence there was discussion about submissions. The respondent was to provide a written submission to the claimant and the tribunal by the end of Friday (the following day), and oral submissions would be considered on Monday. The claimant was at liberty to answer in writing, no later than the Monday, or make an oral submission. In the event the claimant emailed on the Monday morning with a written submission, and did not attend the tribunal. The written submission did not address legal issues, and in effect restated her evidence, with several additions. Judgment was therefore reserved. The tribunal considered both submissions when reaching its decisions.

Disability

15. The Claimant outlined at the outset that she suffered from a degenerative disc disorder, and also from depression. After reading the claim form and the witness statement, we clarified with her that the disability which she considered the reason for discrimination was not depression, but the degenerative disc disorder.

16. The Equality Act 2010 provides at section.6 that a person is under a disability if they are suffering from a mental or physical impairment which has a substantial and long term adverse effect of their ability to carry out normal day to day activities. Schedule 1 Part 1 to the Act explains that 'long term' means that it lasted at least twelve months or likely to so last, and it also identifies that if the impairment ceases, it is to be treated to have that effect if it is likely to recur. We also have to bear in mind s.5 that if measures are being taken to treat or correct it but for that would it be likely to have that effect. We must note that disability means something which goes beyond the normal differences and ability which may exist among people.

17. We also had regard to the 2011 Guidance on matters to be taken in to account relating to the definition of disability and we were taken by counsel for the Respondent to the appendices which list conditions which would or would not be treated as disabling, for example, in conditions which would not be treated as having a substantial adverse effect on day to day activities, the activity would be carrying small objects of moderate weight with one hand and an inability to do that would not be disabling. And at the other extreme it would be disabling not to be able move heavy objects or heavy suitcases without some aid, or discomfort travelling for two hours or more; on the other hand it would normally be a substantial adverse effect to have difficulty waiting or queuing.

18. To decide this we heard evidence from the Claimant, who had prepared a separate witness statement on the impact of disability condition on her; we also have her general practice records. The general practice records show that when the Claimant was 17 she suffered an injury to her back in a gym class at college; she was then laid up for some weeks. Something similar occurred when she aged 22; she is now 37. When she started work with the Respondent in 2014, she was asked in her preemployment questionnaire (1 November 2014) if she had any

musculoskeletal problems that could affect posture or lifting, and she answered no. It is possible that people may not be altogether truthful when trying to get a job. But neither do we know anything about difficulties with her back between age 22 and seeking employment in 2014. We can see that she signed on with her current GP as a new patient in November 2015 and that at that stage she had not mentioned past back problems. In November 2015 she went to see the doctor complaining of an increase in back pain, but said it was the same as a few months ago; it was attributed to moving to a morning shift. In December 2015 she had an MRI scan, which showed multi-level degenerative disc change, particularly in the thoracic spine at T10, T11 and T12 level. She was referred to a physiotherapist for assessment. She had four or five sessions of physiotherapy, the physiotherapy letter of 9 May 2016 states she had thoracic spine spondylosis, and that she was advised to start a general exercise programme, e.g. yoga, for long term management of spondylosis.

19. On the Claimant's account she was told that this was a condition that she would have to live with: exercise and medication could help with the symptoms, but there was no cure.

20. There is no further reference to back pain in the general practice records until February 2018, shortly before the Claimant resigned her employment. The GP noted: "work not really supportive of back problem but needs to work to pay the bills". A fit note for 7 February 2018 recommended that she was fit for work subject to avoidance of heavy loads, and mechanical prolonged standing.

21. The Claimant's witness statement describes that, certainly in the acute stage, she has very interrupted sleep, and it can take her up to half an hour to wake up. In answer to questions she said that even on a good day she would wake up during the night and have to change posture because of back pain. As regards day to day activities, we learn that she has to hoover her shared house once a month and sometimes has difficulties with that; when she goes shopping she goes frequently and takes a small load to avoid carrying a heavy bag. She is now unemployed and is able to rest and avoid activity that might trigger back pain. It is known from her evidence that whilst she tried to avoid shifts where she had to close up the shop, from time to time she was so rostered, and that involved lifting chairs and moving rubbish bins, which did on occasions trigger episodes of back pain. As to other records of how the condition has affected her, we know that she had two days off certified sick in October 2016, a day in March 2017, and four days in April 2017, but it is difficult again to assess the length of time she was affected at these dates, because until autumn 2017 she was mostly working a two day week, Saturday and Sunday only, so there might have been other days of the week when she was affected and that until about autumn 2017 when she seems to have worked more shifts a week. This does indicate that from time to time she was acutely affected, and at other times she was seeking to reduce the risk of a flair up by avoiding shifts when she had to move chairs and rubbish bins. As for treatment, the Claimant said that she takes Naprosyn and Ketoprofen and Co-codamol; according to general practice records she was prescribed Co-codamol and Naprosyn in or around February 2018, (around the time she resigned) but not before, and the Claimant said that was because she got supplies of Co-codamol and

Naprosyn available on prescription from Romania, her home country, so she did not need to ask the GP. It was not clear whether she took pain killers only in an acute episode, some of her answers indicated she took some painkiller every other day to keep going even in ordinary times. Assessing the Claimant's evidence was complicated by the fact we thought that she had also suffered from depression, which has from time to time required treatment; depression can affect perception of symptoms, but also back pain may be a cause of depression.

22. Our conclusion was that at a time when the Claimant was suffering from acute symptoms they were clearly disabling, such that she was unable to do very much except lie down and even when able to keep going did so only by taking pain killers to get through the day; she was otherwise restricting her activity by not carrying heavy shopping. So that when she was affected we consider that the effect was substantial. It is unclear how much we have to discount what she can do by the effect of medication that she was taking to deal with symptoms, because it was not clear how much medication she took throughout the period with which we are concerned. On her evidence (undocumented supplies from Romania) it was reasonably regular. There is also the evidence of some of the effect on her sleep which again seems to have varied. We concluded there was a substantial adverse effect for a number of the periods with which we are concerned. Was this condition was long term, bearing in mind that we have to take in to account whether the impairment was likely to recur? It seemed to us that this was a condition which was likely to recur, in that it was not a fresh problem every time, but that she had a degenerative condition which was long term and which was likely to affect her more than people who did not have this degeneration. It was represented on behalf of the Respondent that back pain is very common in middle age, and so it is, but we would still not regard that as a normal difference in ability which may exist among people, because some people suffer acutely and some not at all. There is also evidence from the physiotherapist was that while older people may develop disc problems, she was unlucky to have developed it so young. We concluded that this is a chronic condition which is likely to recur, that it was stirred up by activity, and is not a normal difference in ability between people; when stirred up, which it was from time to time and certainly during the period of employment with which we are concerned, she did suffer substantial adverse effect on ability to carry out normal day to day activity. We conclude that for the purpose of the Equality Act and for this claim she was a disabled person.

Findings of Relevant Facts on the Remaining Issues

23. From November 2014 to March 2016 the claimant worked at Stratford station branch. When her back pain increased, she says decided to transfer to a branch where she could work a middle shift, that is, one where she did not have to close the shop, which involved cleaning and moving rubbish bins. Despite increasing back pain, the only record of ill health at Stratford is a note she was off work with a sore throat in February 2016.

Work at Westfield

24. She transferred to Westfield in March 2016, cutting her hours from 20 to 16 per week, working Saturdays and Sundays only. She says it was verbally agreed with the manager, Elia Agosti, that she need not work a closing shift. There is nothing in writing to show the respondent was aware of any back condition, but the evidence of Mr Redondo is that it was understood she would only do a closing shift on coffee making, which requires some cleaning, but avoids heavier tasks.

25. Elia Agosti left in September 2016 and was replaced by Jolanta Dvareckiene. At the same time the claimant was accepted onto a radiography training course, and cut her other job, so now she only worked for the respondent, still weekends only.

26. In October 2016 the claimant is recorded as being off sick for 2 days with back pain. Her new manager, Ms Dvarackiene, gave evidence that the claimant then explained she could not do heavy tasks, though the claimant herself denied such a conversation took place. We concluded there must have been some such discussion, because of the reference to back injury in May 2017 (see below) which seems to assume the recipient already knew about it. In November 2016 she was away from work for 2 days with a throat infection. In March 2017 she was off for 2 days with fever and strep throat, and she was warned by the assistant manager that on the third occasion of absence in 3 months she would be issued with a notice of concern, part of the respondent's policy for managing frequent unconnected short-term absence. On 25 April the claimant returned to work after losing 4 working days through stress and anxiety, supported by a GP fit note dated 11 April which was not handed in until some days in to her sickness absence.

27. The claimant said she was treated less favourably than others (without a named comparator) in the operation of sick pay. We can see than in these months two other employees (Indre, Marius) were issued with notices of concern for similar infringements. We did not conclude the claimant had been treated less favourably.

28. The message sequences show some give and take over these months in covering for others' absence, at the request of the local manager, and that the claimant was generally keen to work additional hours, sometimes at other shops if extra hours were not available at Westfield, including, on a temporary basis, closing shifts (message 24/3/17). There was some conflict, it seems, in her booking holiday dates to fit with exams; but the only reported clash on working closing shifts is in May 2017. The claimant was asked then if she could cover a closing shift for an employee who was off sick. She replied: "I'd be glad to help but unfortunately I am unable to due to my back injury, also I will also be spending all day at uni for my occupational health testing and training". This is the first written reference we could find to back pain limiting what she could do.

29. There were further exchanges over the next few weeks about extra hours. The only notable resentment came in July, when the claimant needed to book time off at short notice because she had to retake some exams, and was offered days off rather than holiday. The claimant complained, and received a detailed justification from her manager about the notice requirements for booking holiday. The claimant replied on 3 August taking

issue on this, but without mention of back pain or working closing shifts.

30. Then on 8 August 2017 the claimant complained at length of workload and working conditions, including that she only had 2-3 days' notice of rotas, rather than 2 weeks. Among other things she said that cleaning could damage the spine irreversibly, that she had mentioned before that she could not clean the shop on closing, and that she had been rostered to work a closing shift several weekends in a row. On 29 July the claimant was down to work from 10 till 6 on Saturday (a closing shift at weekends) and was off sick the next day, but other than this, the rotas do not bear out her assertion. The sickness was recorded as flu, although in evidence the claimant said it was because of back pain.

31. In this (8 August) email she complained of "discrimination, bullying and exploitation", after mentioning others leaving the shop, but without reference to disability. In a later discussion of the grievance, she said she was discriminated against because she was part-time. The claimant has also later asserted (but not at this time) that Ms. Dvarackiene deliberately recruited Lithuanians, and spoke Lithuanian at work, with an implied suggestion that she gave preferential treatment to Lithuanians. The claimant is Romanian. In our finding she did not speak Lithuanian at work or deliberately recruit Lithuanians, but it raises the possibility that when the claimant said there was discrimination, she meant race discrimination as well as discrimination against part-time workers.

32. Meanwhile in July, in our finding because of the conflict over holiday bookings, the claimant had told Ms Dvarackiene that she wanted to transfer to another shop. On 1 August she sent her a text: "I've managed to find another shop. It's in Canary Wharf and they already need someone in the weekend. Would you be so kind and let me know when the transfer can be done officially". However next day she added it would not be suitable because they needed someone to work a 12 hour shift and close the shop, which was "way too much for me".

33. Ms Dvarackiene made enquiries about vacancies with other mangers, and secured a position for the claimant at another Canary Wharf shop, Cabot Place. She was then rostered to work there. The claimant complains of this as detrimental treatment, and of short notice. We do not accept it was detrimental, or less favourable treatment. She had asked for a transfer to Canary Wharf and she got one. It is a large shop, so there could be flexibility about her shifts and duties. At worst there was no face to face discussion with Ms Dvarackiene about it, but as the claimant worked weekends and her manager usually did not, this is unsurprising, and they often communicated by text. It is against this background that the claimant made the complaints already mentioned, on 3 August about holiday booking, and on 8 August, about workload, while off sick with stress and headache.

Grievance Procedure

34. The respondent treated her emails of 3 and 8 August as a formal grievance. It was investigated by Jaroslaw Rozwod. There were lengthy meetings to discuss the complaints on 24 August, 31 August and 6 September. On 18 August she lodged a further grievance, adding to the

other matters that the move to Canary Wharf had been imposed on her. The respondent managed to interview 6 members of staff, including Ms Dvarackiene, and tried to interview a seventh who was ill, before sending a letter with an outcome decision on 18 October. It was agreed she did not have 2 weeks' notice of the rotas, did not have a link to the intranet staff policies, and insufficient information, but not that there had been a reduction in the number of staff on a closing shift (which the claimant had said meant there was less help for her with tasks that caused difficulty).

35. The claimant appealed that not enough part time workers had been interviewed about her complaints, and that in April she had been warned not to leave early, and that she had been rebuked for speaking to a team member, not the manager, when calling in sick. There was a one hour hearing about the appeal on 23 November, and the appeal manger then interviewed 6 staff, including the ill team member, about the April incident, and Ms Dvarackiene, about the holiday booking, He also interviewed the notetaker about the August meetings, as the claimant did not agree the content was accurate, and took statements from two others.

36. The appeal outcome was sent on 22 December 2017. It was conceded the investigation could have moved faster, and that part-timers could have been interviewed, although as they could not remember details it would have made no difference. Otherwise the original conclusions were upheld.

Work at Cabot Place

37. While this was going on, from 8 August until 3 November the claimant worked at Cabot Place. There is an complaint that other staff knew that she had lodged a grievance, and thought the issue must be disciplinary. In our finding there is nothing in this - at best it was known she had moved shop and was attending hearings, but there is no evidence it was more than curiosity or that the managers were responsible for any reach of confidence.

38. During the grievance meetings the claimant mentioned she had been asked at Cabot Place to work a 10 closing hour shift on a Sunday at the beginning of September, when she could only manage 8 hours, because of her back. Mr Rozwod, investigating the grievance, said he would speak to the assistant manager, Casia. On 2 September he emailed the claimant confirming they had spoken, and Casia had agreed she need not work 10 hours, though the already published roster could not be altered. The claimant says in evidence she was still asked to work 10 hours, She was unable to explain why, if this was in fact the case, she did not show Casia Mr Rozwod's email saying she need not work 10 hours.

39. There had also been discussion about the respondent wanting to get an occupational health assessment before formally adjusting her duties for the back condition. The assessment was formally offered by Mr Rozwod on 21 September. The claimant was provided with a form to complete but did not return it. She said she had lost it. She was provided with another copy. Some time later, in December, she did complete the form, but she did not agree that the respondent should be permitted to read the assessment report, which meant there was little point in obtaining one, as it was meant to guide managers on what adjustments must be made. She

sent the consent form on 4 December, saying: "if the issues continue I most likely resign as I wouldn't wish to be a burden to anyone". In answer to a question in tribunal, she said she had not given permission for the report to be seen as that would not be "smart". She did not explain further.

Move to Houndsditch

40. Unsettled by the grievance process, the claimant was looking to transfer away from Cabot Place. In October she was interviewed by Geirdre Katalynaite, the manager at Houndsditch, who agreed to take the claimant to give her a fresh start. The claimant was by now no longer a student, having failed the course (Geirdre understood she blamed Jolanta Dvarackiene for this). She now worked 24 hours between Monday and Friday, on a 12.15 to 6.15 shift, so increasing her hours from 20 to 24 per week, and sometimes 30, of which she did not complain. She also asked if she could train as a barista, and training began, and was still continuing when she resigned in February 2018.

Sexual Harassment

41. The claimant alleges she was subject to sexual harassment by Bruno, an assistant manager at Houndsditch. We find facts and discuss this claim here as it is a convenient place to do it within in the overall narrative.

42. The claim form says he once called her ugly, which she believed was because she was not wearing lipstick at the time, and that he told a colleague (who passed it on) that she should not listen to the claimant as she was a witch, and also (without detail) that he made sexually explicit jokes. The witness statement does not mention any of this, but it does say that she spoke to Bruno on 8 December and "made reference to his jokes/comments with sexual connotations and dirty/vulgar talk which others, me included, might not find funny". She did not say she had mentioned any particular jokes or remarks.

43. In tribunal, she added that when team members brushed crumbs from the counter with a brush, he made jokes about Picasso, and pronouncing it "Picazzo", and that this was an allusion to the Italian work "cazzo", meaning a penis. She said she had not mentioned this before the hearing as it was too embarassing. Bruno, who is Portuguese, saids he referred to Picasso because of the brushwork. He denied the "zz" pronunciation, or that he understood, let alone intended, the innuendo. The "dirty/vulgar" talk was an out of shop conversation where Bruno had teased Sara, another team member, about her sexual activity with her girlfriend. Sara and Bruno were old friends, and Sara had engaged in the conversation and supplied details. There was nothing to suggest the remarks were directed at the claimant or others present. Later in evidence to the tribunal the claimant said Bruno would refer to the requirement to serve at least 'six' customers as 'sex' customers, which he denied.

44. When the claimant spoke to Bruno on 8 December she followed up by sending him links to CAB and other general material on sexual harassment. The claimant then messaged him some days later to ask if he was upset with her, to which he replied; "No way…You made me think a lot but nothing else".

45. Over succeeding days are many messages about the claimant's troubles with a colleague, Giorgione, and his practice of wiping the counter down as she worked alongside, and about a colleague, Alisha, who called the claimant bossy after Bruno had asked the claimant to allocate the rest breaks that shift. On 20 December the claimant said she was giving notice because of a hostile work environment. The messages indicate this was not about his hostility, but about the other colleagues.

46. After the Christmas break, and after getting the grievance outcome, the claimant spoke to Gierdre about Bruno making harassing remarks. The detail of what he had said does not seem to have been discussed. Giedre said he was someone who liked to joke around. She did then speak to him. He had just been promoted to kitchen manager. He said he accepted he should become more 'serious' at work. He said he joked with everybody, staff and customers, and was not aware it had offended anyone until the claimant spoke to him.

47. Section 26 of the Equality Act 2010, on harassment, prohibits harassment as defined when related to a protected characteristic:

> (1) A person (A) harasses another (B) if—
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> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

48. What occurred, and did it amount to harassment? The lack of detail from the claimant makes us cautious. The lipstick remark, by itself, is innocuous enough, though it might be different if it were part of a campaign. Calling the claimant a witch once in this context is not in our view harassment related to sex, unless in context with other such remarks, and it was not addressed to her. The discussion of Sara's activity is the only matter objected to which Bruno admitted. This was clearly a consensual conversation, not in the workplace, which the claimant happened to be present at. We assume this caused her approach to Bruno on 8 December, who, once he understood she was embarrassed by talk about

sexual activity, seems not to have offended again, judging by the friendly tone of her subsequent messages. We have no evidence, and do not accept, that anything further of this nature occurred before the claimant's conversation with Gierdre on 2 January; the claimant was referring back to the pre 8 December remarks. The matter was complained of again in the context of the setback of the grievance appeal outcome, We do not accept the "Picazzo" remarks, or serving "sex" customers, as if concerned about them she would surely have mentioned these to Gierdre, or in her claim form, or in the further particulars, or in the witness statement.

49. We accept the claimant's perception was she was not comfortable with sexual banter between Sara and Bruno in her presence. When she mentioned it, it was not persisted in. Bruno did joke. It is possible, but not proved, that there may have been light innuendo generally, but if so it was meant for general enjoyment. Until 8 December he could not reasonably have known the claimant did not enjoy it, that is, that it was unwanted. There is no evidence at all that the conduct the claimant fund offensive continued after 8 December. If she took it up on 2 January with Gierdre, this reflected general dissatisfaction with her colleagues on unrelated matters, not renewed conduct. Whatever had occurred, the claimant made no mention at all of Bruno's behavior either in her threat to resign on 20 December (which was about friction with Giorgione and Ayesha) , or when she came in fact to resign, even though she then sent two detailed resignation letters, the second one after taking more time to consider and elaborate. We conclude that it was not reasonable to hold the conduct to have had the effect of violating her dignity or creating a hostile, offensive, degrading, humiliating or intimidating environment. Had she thought it did, she would surely have mentioned it as a reason for leaving.

Events Leading to Resignation

50. In the week beginning 16 January the claimant and Ayesha had been rostered to work a closing shift, one week each, to cover absence. The claimant brought in some general material on back pain to argue that she should not have to do this. As a result she was (on the claimant's account) told to move slowly. She was also given help moving the rubbish trolleys.

51. On 5 February there is long and slightly tetchy exchange of messages between the claimant and her manager, which continues on 6 February. The claimant said she was ill in bed, and was to see her GP next day. She has since said this was because she had had to spend all day on the tills, rather than making coffee. She also mentioned she was looking to transfer to another shop. The manager reminded her she must call 30 minutes before the shift if she was unable to attend work, and speak to her, not another team member. She added a comment that the new shop may not want her because of record of ill health absence and lateness. Back pain is not mentioned, but seems to have been the cause, as the claimant ended: "So much for work adjustments relating to my health issues that I've been told I'll get after I sign the medical disclosure consent form. Thank you and goodnight to you too." Next day she sent a message that she was to have a hospital appointment in three weeks, had been told to take the rest of the week off, and would have a fit note recommending several work adjustments. She asked if she still had to phone daily as

policy required, "because one must religiously follow this procedure" (we read this as sarcasm). Having seen the certificate, the manager said she must call when self-certified, but not if covered by a doctor's note, and that they would discuss adjustments when she returned to work. After much else, the claimant concluded by asking to be sent all the work rotas from 3 November onward, that is, three months' worth.

52. Some flavour of the relations between the claimant and her colleagues by this point is shown by a message from the manager to HR seeking advice, noting the claimant was now on anti-depressants and: "my team is suffering as she constantly requires special attention, she won't talk to some of the team members if she don't feels like. She won't do cleaning of something if she don't want to". She was closing the coffee area (i.e. a limited task, unlike closing the shop itself). "All team is afraid of her already".

53. On 12 February the claimant returned to work. The GP certificate said: "may benefit from avoidance of heavy loads/mechanical strain and prolonged standing". It was recorded in writing on the return to work interview form that she was not to clean the oven, carry heavy items or stand without moving until 10 March, as the doctor recommended.

54. The claimant now sent in the OH consent form for assessment, as she now wished to have the assessment to justify altered duties longer term, but she had to sign a new one, as it was dated December 2017 and it was thought the doctor would not accept it. Geirdre asked for formal assessment on the basis that otherwise it was not fair to expect colleagues to take tasks from her when her GP recommendation expired.

55. On 13 February the claimant was given a note of concern for being late on shift 4 times in 3 months. It had said 5 times, but was amended after a 45 minute discussion when the claimant pointed out that the first of these five was at Cabot Place, and only four were at Houndsditch; she then left the shop for the rest of the day, and was recorded as absent through stress. The claimant said in tribunal that one of these four was due to miscalibration of the till clock used to record arrival time. Even if true, that leaves three undisputed.

56. On 14 February the claimant did not attend work. That day she sent her first resignation letter. She referred to the two conversations on 12 and 13 February (the return to work interview and the note of concern about being late) having led her to conclude she was being constructively dismissed. She referred to lack of trust and confidence and the "last straw doctrine", and to "previous experiences" without detail. Later she sent a fuller letter, referring to extra workload, caused by staff shortages due to holiday and Bruno's promotion, She had said on transfer she did not want to work long hours because of health problems, and "the handling of this ongoing situation is rather inept".

57. The resignation was accepted.

Duty to Make Adjustments for Disability

58. Section 20 of the Equality Act 2010 imposes a duty to make adjustments

for disability. It imposes: “a requirement, where there is a provision, criterion or practice” of the employer which “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”. Failure to comply with the duty is discrimination.

59. There is a 2011 EHRC Code of Practice on Employment which includes guidance (at 6.28) to employers on reasonable adjustments which describes what factors are relevant to reasonableness. They are whether the steps are effective, or practicable, the costs of disruption, financial resources, and the type and size of the employer.

60. An employer is only in breach of the duty if they knew or ought reasonably to have known that the employee was disabled. This can include making enquiries to find out. (Equality Act, Schedule 8, paragraph 21; EHRC Code 6.19).

61. The claimant says two provisions should have been adjusted. The first was having to close the shop, because of having to move bins and deep clean the ovens. The second is a requirement to spend a whole 7-8 hour shift on the tills. She added to these a requirement to work more than 8 hours.

62. As to the specific matters relied on, we did not accept there was a failure to make adjustments for disability.

    62.1 Mr Rozwod provided in writing she could limit her shift time to 8 hours. It was agreed she should only close the coffee area, not the main shop. On the one occasion at Houndsditch when she was on this shift to close the shop she was given help moving bins by Bruno and in other tasks from Georgiana, and after discussion with Gierdre on 17 January, was allowed to work slowly. At her previous workplaces she had been able to avoid closing shifts, in practice or by agreement.

    62.2 There is no medical indication that having to work on the tills (the apparent cause of the absence on 5 February) was a duty that should have been adjusted. We were puzzled that she was on her feet just as much here as in coffee making, with the opportunity to sit down or move about in slacker periods, and in busy periods was not obliged to stand still, as she maintained, but would move about to give or pick up orders. In any case, the claimant agreed there was only one day when this occurred, as she then went sick for the rest of the week she as assigned to the till, and prolonged standing was not notified as something to be avoided until the GP note of 7 February, such that the employer could not have known this required adjustment.

63. The claimant complains no permanent arrangement was made, there being no occupational health assessment. Any failure to make an assessment of the restrictions on duties necessary because of the back condition does not lie at the respondent’s door: the claimant had failed to sign the form, and deliberately did not cooperate until just before her resignation, although she had been told from September on that this was

what was needed to formalise adjustments. The managers were generally accommodating about shift length, and not being on a shop closing shift, even without formal evidence.

Disabilty Discrimination

64. Section 13 of the Equality Act prohibits an employer from treating a person less favourably than he treats or would treat another because of disability. The comparator may be actual or hypothetical.
65. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

66. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

67. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. A tribunal may consider the employer's explanation first, especially if there if it is not clear of there is a material comparator – **Shamoon v Chief Constable of Ulster Constabulary (2003) IRLR 285**. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Discussion

68.

68.1 The claimant says first there was less favourable treatment in being sent to work at Cabot Place on 3 August 2017. The comparator must be someone in her position who was not disabled by back pain or depression. In our finding, the reason she was assigned to Cabot Place was because she made it clear she wanted a transfer, she thought she had a place at a Canary Wharf shop, when that feel through the respondent placed her at another Canary Wharf shop. We do not accept that was unfavourable treatment, let alone less favourable treatment. The shop manager was facilitating her request.

68.2 Next, she complains about staff questions at Cabot Place about "why are you on disciplinary, what is wrong with you". We do not hold this can be the fault of the respondent. They were dealing with her grievance. There is no evidence they were indiscreet. This was the natural curiosity of colleagues about someone who was leaving the shop to go to meetings with managers. It is not less favourable treatment.

68.3 Thirdly, there is a complaint that a colleague (who may have been Sara or Ayesha, it was not clear) that she was looking at her and commenting on what she did. On the evidence we did not understand how this was connected to disability. It was unexplained friction between colleagues.

68.4 Fourthly is a complaint about being rostered to work a 12 hour shift on 2 or 3 September 2017. On this occasion she had an email saying she was not required to do so. We did not understand on the evidence how she was required to work these hours when she possessed an email from a more senior manager saying she should not. At best this was an error in rostering that would have been sorted had the claimant reminded the manager (Casia)about the restriction of hours or shown her the email.

68.5 Next is an allegation that from mid-December her concerns about workload were not addressed. There do not seem to have been complaints about workload until just before she resigned. In January she was asked to work a closing shift because of staff shortage. We do not understand that this was because of the back condition, it was because another staff member was on leave. It may be better handled as a failure to adjust for disability. There remains some doubt that Gierdre had been told the claimant could not work a closing shift because of back pain, as the claimant arranged to see her to discuss it when she saw the roster.

68.6 Then there is an allegation that she was placed on the tills (rather than making coffee) and not to move from that, on a day in February. We cannot see how it can be said her disability, rather than staff availability, was the reason for that decision. In addition, we do not understand how being allocated to the tills, rather than coffee making, is less favourable treatment.

68.7 The next allegation concerns being given the notes of concern for sickness and absence. We did not understand how following the respondent's own procedure for sickness and arriving late is less favourable treatment. The claimant has not pointed to anyone else with the same record being treated differently. Even if the items she disputed were taken away, she was still in default within the procedure, and the notes of concern were merited.

68.8 The final allegation is that on 13 February Gierdre said she had been "crazy to take you" and that she "didn't want you to send me

those long messages like you did with Jolanta (Ms Dvarackiene, the Westfield manager). Here, Gierdre had taken the claimant because she understood from her there had been a breakdown of relations with Jolanta and she needed a fresh start. Disability did not enter into that decision. We considered what part disability played in these remarks, and Gierdre's change of attitude towards the claimant. The claimant had complained of, and evidently had poor relations with, two colleagues, Giorgione and Ayesha, unconnected with disability. She had also delayed returning a consent form to enable an occupational health assessment form for no good reason. Gierdre was getting long sarcastic messages from the claimant disputing the application of the sickness procedure. We find that Gierdre now concluded she had not appreciated the other side of the story of the claimant's dissatisfaction with Jolanta, and that the claimant was someone who resented being told what to do, and was at odds with her colleagues. It was not about her back.

69. In conclusion we do not uphold the complaint that the claimant was treated less favourably because of disability.

Sex Discrimination

70. We have already discussed the claim of sexual harassment as a discrete episode. There is also a claim of that the respondent treated the claimant less favourably because she was a woman. There are four allegations of less favourable treatment.

    70.1 The first is that Bruno told her on 8 December that she liked to follow rules while he was the opposite and he was scared of her. This conversation is the one where the claimant objected to his language. We did not view this as less favourable treatment than anyone else who raised with him that his language was offending them (whether about sex or something else, such as, say, swearing). It was a reasonable observation in a conversation she had initiated.

    70.2 The second is that he did not reply to her text messages on 8 December 2017. We did not think this was less favourable treatment. He was sobered by the material she sent him about sexual harassment. He might well be cautious about responding and considering the best tone to adopt now. He was polite and pleasant when she prompted him to reply. It is hard to see how he would have responded differently to a man who took him to task with legal or quasi legal material on a work matter affecting their relations.

    70.3 The third allegation is about the discussion with Geirdre about Bruno's behavior. Geirdre doubted it was offensive and apparently said it could not be changed. That is not less favourable treatment because the claimant was a woman. It was a genuine view, but in any case Geirdre did not dismiss the claimant's concern, she went to speak to Bruno about it, and he heeded the advice.

    70.4 The fourth allegation is that Gierdre did not respond to a text on 3 January. We understand this is a text on 2 January saying: "Hello again and sorry to disturb. I was just thinking, maybe we could use some sort of leaflet regarding bullying and harassment at work displayed somewhere in the staff room- in my humble opinion it might help in future". We do not understand how this requires a reply – it

was a suggestion. Either could have referred to it in discussion at work at any time. We know Geirdre did go to speak to Bruno, which suggests she did not ignore the issue. We cannot hold this was less favourable treatment than if a man had sent a text.

Victimisation

71. Section 27 of the Equality Act protects those who complain of a breach of the Equality Act from being subjected to detriment because of the complaint.

72. The claimant says she made four complaints of discrimination. The first is the grievance of 8 August 2017. Although this mentions discrimination, the grievance does not connect it to any protected characteristic. As discussed earlier, the claimant later said it was about being a part-time worker, and there could be an implication of race discrimination. Neither matter is complained of now as a breach of the Equality Act. We do not think the grievance is protected by the legislation. The word is used in its colloquial sense of matters being unfair. She also refers to an "informal grievance" in January 2017. It is not clear from the claim or the witness statement what this is.

73. The others are agreed to be protected. They are: (1) requesting reasonable adjustments for disability in the course of investigation of the grievance, and (2) complaining about Bruno Faustino.

74. The detriment said to result from these protected acts is not listed. We have considered the matters complained of as discrimination. Because of the dates of the protected acts, they must all be about what happened at Cabot Place or Houndsditch.

74.1 At Cabot Place the only detriment is that colleagues wanted to know why she was going to meetings. As stated, there is no evidence the respondent had been indiscreet or was responsible for these remarks. Nor did the claimant explain whether she in fact had to work a 12 hour shift, and if she did, it is hard to find this was because she had lodged a grievance, when the grievance investigator had spoken to the manager and told the claimant by email she did not need to work long hours.

74.2 Moving on to Houndsditch, there is no evidence that Geirdre knew about the need for reasonable adjustments except from the claimant. The claimant was not, until January, asked to work a closing shift at all. At that stage there were no formal adjustments in place because the claimant had not returned the consent form for occupational health. The claimant was given help. When she produced a doctor's note in February 2018, his recommendations were followed for the period stipulated. The notes of concern for sickness and lateness followed the respondent's own procedure, and we have seen this was the same applied to other staff, who were not disabled and had not lodged grievances, the previous year. The claimant does not identify anyone else at Houndsditch being treated differently if they had been absent or late on a similar number of occasions.

75. The claim of victimisation is not made out.

Unfair Dismissal – Relevant Law and Discussion

76. The issues for this tribunal in the unfair dismissal claim had been defined as:

"Was the claimant dismissed? That is, was there a fundamental breach of the implied term of the contract of employment to act with mutual trust and confidence, meaning, did the employer, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? She relies on the following as breaches of the trust and confidence term:

a. failing to make reasonable adjustments
b. failing to refer the claimant to occupational health
c. failing follow the grievance procedure by failing to follow a reasonable investigation
d. failing to follow the grievance procedure by failing to investigate allegations of bullying and harassment
e. failing to address issues of sexual harassment when raised.
f. As a last straw, went off sick due to back pain in early February 2018, being required to call the general manager twice a day despite having a self certificate for the whole week, and then being presented with 2 notes of concern regarding lateness and sickness which were in breach of policy as they related to a period of 6 months

"If the employer did so act, was all or any a reason for the resignation, and had the claimant affirmed the contract (despite breach) before resigning? If the claimant was dismissed, was the employers reason one of the potentially fair reasons in the Employment Rights Act 1996 section 98, and if yes, was it fair to dismiss for that reason, having regard to section 98(4)?"

77. Section 95(c) of the Employment Rights Act 1996, on dismissal, says that this can be where:

"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".

78. From **Western Excavating v Sharp** onwards, it has been made clear that this is not about unreasonable conduct, but about conduct that breaches the employment contract, which can include breach of an implied term of that contract. In **Woods v WM Car Services (Peterborough) Ltd** [1982] ICR 693 this is where the employer acts "without reasonable and proper cause" in such a way as to breach the fundamental implied term of trust and confidence, such that the employee need no longer be bound by the contract.

79. Conduct may be cumulative, and a final action not of itself a significant breach may be taken with other acts of a similar kind to be the last straw.

80. Examining the conduct said to establish breach, we do not accept firstly that the respondent failed to make adjustment for the backache. On every occasion when she raised it, an accommodation had been made. The proximate cause was being rostered on a closing shift. On the evidence, the claimant had not established that she wanted to avoid the closing shift because of disability. Measures to investigate and formalise an arrangement had been blocked by the claimant refusing to sign the consent form for occupational health assessment. Informally, when the claimant explained and asked for help (as on 17 February) she got it, and was told she could work slowly. In a time of staff shortage because of holiday, we cannot view this as an unreasonable or vindictive act on the part of the employer. The next is failing to arrange an occupational health assessment. There was no failing on the part of the respondent. Next is the handling of the grievance. We do not accept that the respondent failed in its grievance procedure. They investigated thoroughly. It was not shown why any other conclusion should have been reached. They made some concessions, indicating they took it seriously. It took some time, but they did it properly. As for not investigating allegations of bullying and harassment in the grievance, we concluded investigations had been made, and the claimant was given a full account. As for failing to address allegations of sexual harassment when raised, Bruno accepted her advice, and Geidre spoke to Bruno when raised with her: they did address these allegations. As for calling in when on uncertificated sick leave, the respondent insisted on the letter of its policy being followed, and made clear she need not call in when there was a doctor's fit note to cover the absence. There is no evidence that it was not followed for any other employee. Nor was there anything untoward about the notices of concern. An employer is entitled to have such a policy so as to control absence and lateness and keep shifts staffed. The policy was applied even handedly. There is no reason shown why the claimant should expect special treatment. If she resented it, there was "reasonable and proper cause" for the employer's conduct.

81. We doubted in any case that the stated reasons were the cause of resignation. The claimant made a threat to resign at the end of December, before the closing shift, the tills episode, or the notes of concern, and two days before she got the grievance outcome, but 2 weeks after the conversation with Bruno, at a time of considerable friction with Giorgione and Ayesha which had nothing to do with the employer. That might suggest she was upset at least in part by delay getting the grievance outcome, but she did then get it, and the employer did then apologise for the delay. Delay was not so serious a breach of the contract as to put it at an end, when thorough, and when delay was acknowledged as a fault. Neither on 20 December nor in February did she mention Bruno's conduct, or any failure to take it seriously, as a reason for resigning, and we took that as an indication that his conduct had not amounted to much, nor was it part of a chain of events causing her to treat the contract as at an end. If the requirement to follow sickness absence policy, and giving a note of concern, were the alst starws, they were not breaches of the contract at all, and not of a similar kind to any earlier event.

82. We did not conclude the respondent's conduct causing the claimant to resign amounted to a fundamental breach entitling the claimant to treat the contract as at an end.

83. If explanation for the resignation was needed, we considered that the claimant's temperament, or possibly her depression, accounted for her reaction to setbacks. Included in our earlier reasons for not striking out these claims in February when she failed to attend the hearing, we noted her upset if challenged successfully in cross examination, and also observed:

> ''Having now heard quite a lot of evidence, we noted from the timeline of this case that sharp words from anyone at work sometimes led the Claimant to leave work early; she also became upset if spoken to by the manager, say about being late for work, or on a return to work interview. She seems to have found interpersonal challenges with colleagues difficult to handle".

84. This was the pattern well before she moved to Houndsditch. We concluded events there were no different. There was friction with colleagues on small matters. The claimant did not like having to phone in to follow a procedure. She did not like being in the wrong when given a note of concern. She had responded to these on earlier occasions by changing her place of work (as with the move to Canary Wharf because of conflict over holiday booking), or from Cabot Place because her colleagues were curious about her absences for meetings. This resignation was of a piece with that.

Holiday Pay

85. The only other claim is of failure to pay for accrued but untaken holiday pay at the conclusion of the employment.

86. There is a right to 5.6 weeks paid holiday a year under the Working Time Regulations. It cannot be carried forward from year to year. Only leave accrued but untaken for the proportion of the final year can be paid in lieu.

87. There is nothing in the claimant's witness statement about when she took holiday in 2017 or 2018. The schedule of loss says she cannot calculate this as the respondent until the respondent sends her payslips for the year, but does not say when she took holiday. The contract of employment states the holiday year runs from 1 April to 31 March. We know she took some holiday after Christmas as in the bundle are the first two payslips in January 2018 showing payments of holiday pay. The respondent asserts all payment due has been made. By the date of termination the claimant had worked 10.5 out of 12 months of the holiday year, so was entitled to 5 weeks, or on a five day week, 20 days holiday. There is no way of knowing if she had taken that entitlement, though experience suggests employees tend to take the bulk of their leave in the summer and at Christmas, so she may had little in hand. In the absence of evidence, we are unable to make any award.

88. The schedule of loss includes a claim for an award for failure to provide statutory particulars of employment. As the contract of employment which includes the required particulars appears in the bundle, and is signed by the claimant, we do not know why this claim was made.

Employment Judge- Goodman

Date: 7th Nov 2019

JUDGMENT SENT TO THE PARTIES ON

08/11/2019

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FOR THE TRIBUNAL OFFICE